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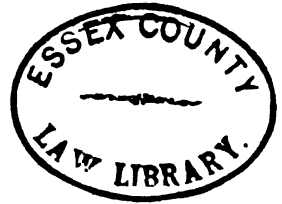
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OF THE

LAW AND THE LAWYERS.

CONDUCTED BY
IRVING BROWNE.



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THE ALBANY LAW JOURNAL:

A WEEKLY RECORD OF THE LAW AND THE LAWYERS.

The Albany Law Journal.

ALBANY, JANUARY 1, 1881.

CURRENT TOPICS.

WE give place in another column of our present number to an article on Escape, from the *Kentucky Law Reporter*. The article is acute and ingenious, and written in a temperate and candid spirit. We shall not undertake at much length to justify our own article on the same subject, which called forth this. It is to be hoped, however, that we are not open to the charge of adducing a "sentimental argument." Our plea was simply for common sense and bare justice. It seems to us that our critic begs the question when he asserts that "if the community has no right to punish a prisoner's desertion, it has no right to prevent such desertion by personal violence." The State has the right to prevent escape; it has no right to punish the prisoner for not lending his aid to the State in the execution of that right, or for defeating its execution. The State, for example, has no right to extort a parole from the prisoner, and to punish him for breaking it. It may keep the prisoner, if it can, but it is absurd to say that the prisoner owes any duty to the State to stay kept. We cannot compel a prisoner to be his own jailor. This is the "sentimental argument," it seems to us, that "where one is actually guilty of a crime, he owes it to the community to submit quietly to the penalty incurred." One might as well argue that one who is being flogged should have an extra dozen of the cat for struggling, and losing his bonds, and troubling his tormentors to tie him up again. Such sentimentality as this can only be supported by precedents drawn from divinity and myth. The "Great Master would not escape" simply because escape would have defeated his beneficent purpose. As for Regulus, his story is now regarded by the best historical authorities as a myth. Granting that we might possibly agree with our critic that "even an innocent man ought not escape," we never can agree that he ought to be punished for escaping. We can heartily join with our critic in laughing at our mistake of Peter for Paul.

A curious point of criminal procedure has been raised in the Supreme Court of New Jersey. Certain indicted persons have challenged the array of the grand jury on the ground that the sheriff was hostile to them and maliciously summoned only such jurors as also were hostile to the defendants. The court have held the challenge valid, although made after indictment, and have directed an issue to be formed and tried thereupon. In the case at least of persons who have not previously been held to answer, there seems to be no good reason for holding that objection to the array must be made before indictment. This is Wharton's opinion. There is, however, a great difference of judicial opinion on this point. In our State, by statute, objection can be raised only before the jury is sworn, and only for the reason that a particular juror is the prosecutor or complainant, or a necessary or recognized witness, on the charge. On the one hand, the practice of challenging the array would cause great delay and obstruction to the cause of justice, and in the case of a prejudiced sheriff, might amount to a prevention of an indictment during his term, and in some cases to a total defeat of justice by the consequent bar of the offense by the running of the statute of limitations. On the other hand, as Wharton says: "It is a serious discredit as well as peril to a man to have a bill found against him; and if this is likely to be done corruptly, or through interested parties, he has a right to apply to arrest the evil at the earliest moment."

Our last London exchanges bring us notes of several singular cases. In *Regina v. Salmon*, Dec. 4, a crown case reserved in the High Court of Justice, A, B and C had been convicted of manslaughter. They were all members of a rifle corps, and had been attending a rifle practice. After practice it was their duty to take the rifles back to the armory. Instead of this they fixed a target in an apple tree in a garden, and fired at it from a distance of 100 yards. One of the shots killed a boy who was in an apple tree in an orchard 400 yards beyond. There was no evidence showing which fired the fatal shot, but the conviction was affirmed on the ground that all joined in a dangerous act without taking proper precautions. They should

first have harvested the boys from all the orchards for a quarter of a mile around. The court did not consider the question whether the boy was not guilty of contributory negligence, nor whether the apples would not have killed him if the rifle had not. Mr. Justice Field however did doubt whether the prisoners owed any duty to a boy up a tree, which amounts to the same thing. The circumstances were strangely like those in *Castles v. Duryea*, 32 Barb. 280. — In *Hooper v. London & N. W. Ry. Co.*, in the same court, Dec. 2, says the *Law Journal*, "the plaintiff had purchased a through ticket issued by the Great Western Railway Company from Stourbridge, on their line to Euston, the terminus of the London & North-Western Railway Company. He travelled from Stourbridge by the Great Western Railway as far as Birmingham, where his portmanteau was transferred to the London & North-Western Railway Company, and where he changed into a London & North-Western Railway Company's train and proceeded to Euston. His portmanteau, however, was not forthcoming for three months, when — *horribile dictu!* — his clothes were ruined by a brace of pheasants which he had stowed inside. He brought this action instead of suing the Great Western Railway Company, and he obtained judgment in his favor. The decision is in conflict with *Mytton v. Midland Ry. Co.*," but is in harmony with the later case of *Foulkes v. Met. Ry. Co.* In this case, again, there seems to have been no question made of the plaintiff's own negligence in putting the birds inside his clothes when he was not wearing the clothes. Again, are pheasants reasonable luggage? — In *Chilcott v. Alexander*, a tradesman sued a father for a great quantity of coats, ties, and gloves, supplied to his son while at an army tutor's. The father paid the bulk of the claim, but disputed £26 16s. on principle. The jury found for the tradesman, and Pollock, B., and Mr. Justice Stephen set aside the verdict. We have nothing to say against this, but it affords an excellent theme for some of our friends to say something more against the jury system.

The recommendations of Attorney-General Devens, in regard to the transaction of business in the Federal Supreme Court, have called forth considerable remark from the legal profession, especially in the columns of *The Nation*. These gentlemen, as well as *The Nation* itself, emphatically express themselves opposed to any pecuniary limitation of appeals, and to making the right of appeal to the ultimate court in any case dependent on the discretion of an intermediate appellate court, especially when divided into ten branches and as many discretions. These arguments seem to us irrefragable. Some propose to overcome the arrears by strengthening the intermediate court; others by strengthening the ultimate court. It seems to us that both should be done. The former plan will doubtless cut off many appeals, but however strong the intermediate court, many suitors will not be satisfied short of the last

resort. The Supreme Court should therefore be doubled, at least, but it should also be divided. The best basis of such division, it seems to us, would be the character of the business. One division might be assigned to constitutional and public law, patent law, and equity law. There should unquestionably be an appeal in criminal cases. Sooner or later this plan must be adopted. The growth of the country will demand it, if it is not already imperative. No plan but the divisional will accomplish the object, for time is not economized by increasing the number of judges to hear the same appeals.

Our own Court of Appeals, after a heroic struggle, have substantially cleared their year's calendar at the end of the year — a feat never before accomplished by this court. They have heard every cause ready for argument, and have decided 583 of the 608 causes on the calendar. They have handed down 560 decisions during the year. This is a great work, and this statement does not include the myriad motions heard and decided. The court sit, in hearing and consultations, seven hours a day, five days in the week, and write their opinions in the evenings, on Saturdays, and in vacation. It is difficult to see where they get any time for reflection. The new calendar will number over 400, with an unusually large proportion of preferred causes. It is a serious question how long men can live under such a burden as the present, not to say how long, with the constantly increasing business, their decisions can continue to deserve the general approbation which they now receive.

In the *Virginia Law Journal* for December, Mr. Henry Hudnall has an article on Construction of the Married Woman's Act, in which he takes the ground that such acts are impolitic and unjust. Herein he follows Mr. John O. Steger, who wrote on the same subject in the same journal last February. Mr. Steger thinks that God meant that man should be the "head" of the woman; that the woman should love the man in any event; that the man by virtue of his headship should grab all the woman's property; and that legislative interference with this divine regulation is apt to breed unpleasantness. Mr. Hudnall's views are quite in keeping with Mr. Maury's on the privilege of the accused to testify, as recently published in the *American Law Review*, remarked upon by ourselves, and copied in this number of the *Virginia Law Journal*. Our esteemed southern contemporary is itself opposed to our Code, as we have before remarked. Altogether it seems that Virginia is not quite abreast of the times in matters of law reform. Change is not necessarily reform, but it seems to us that our brethren have picked out for animadversion three extremely just, beneficial, and necessary enactments. At all events it is quite too late to reverse the course or arrest the momentum of modern thought and legislation on these subjects.

NOTES OF CASES.

IN *Noonan v. City of Albany*, 79 N. Y. 470, it was held that a municipal corporation has no greater right than an individual to collect the surface-water from its lands and streets into an artificial channel and discharge it upon the lands of another; and that the right of a riparian proprietor to drain the surface-water from his lands into a stream flowing through them must be reasonably used, and is not an absolute one under all circumstances, and does not authorize turning surface-water into a small stream, by means of ditches and drains, when by so doing the stream will be constantly swelled beyond its natural capacity, and will overflow the lands of a lower proprietor. In this case the city, by the consent of the proprietors, had substituted for a small water-course, flowing through a ravine, a box drain two or three feet square, into which they turned sewage, and suffered this drain to become obstructed. It did not appear that the city owned any land between the sewers and the original water-course. This would appear, therefore, to be a clear case of negligent interference with a natural stream, and what is above stated as the holding in regard to a private riparian proprietor, may be *obiter*, although it is probably the law. See *O'Brien v. City of St. Paul*, 18 Minn. 176. The court distinguish *Waffle v. N. Y. O. R. R. Co.*, 53 N. Y. 11; S. C., 13 Am. Rep. 467, on the ground that the unnatural increment of the stream by surface-water in that case was not constant, but only at certain seasons. In *Mayor and City Council of Cumberland v. Williams*, 50 Md. 138; S. C., 33 Am. Rep. 304, the defendants, in the execution of powers conferred on them by their charter, for the paving, grading, repairing, draining, sewerage, and re-extending of the streets of the city, but with no want of reasonable care and skill in making the improvements, changed or so directed the natural flow of surface-water, which usually found its way into a mill-race in the city, that a larger flow of such water than formerly was emptied into such mill-race, along a given street, and in times of heavy rains a larger quantity of mud, sand, and debris was thus carried into the race near the mill than before such improvements were made. For the injuries caused by these obstructions to the free flow of the water the owner of the mill brought suit. Held, that there was no ground of recovery. *Crawford v. Village of Delaware*, 7 Ohio St. 459; *Barron v. Mayor, etc., of Baltimore*, 2 Am. Jour. 203, and *Neveins v. City of Peoria*, 41 Ill. 503, disapproved. In *Lynch v. Mayor*, 76 N. Y. 60; S. C., 32 Am. Rep. 271, the city, in raising the grade of an avenue, neglected to provide for carrying off the surface-water or to prevent its draining on adjacent lands, to the injury of an adjoining owner. Held, no cause of action, it not appearing that there was any diversion of any stream on the plaintiff's land, nor the collecting and throwing of surface-water on his land, nor the causing of more water to flow than would have flowed if the grade had not been raised. In the still more recent

case of *O'Brien v. St. Paul*, 25 Minn. 331, it was held that if a city, in improving its streets, accumulates surface-water, and turns it in new and destructive currents upon the lands of adjoining owners, it is liable in damages. To the latter effect are *Pettigrew v. Village of Evansville*, 25 Wis. 233; S. C., 8 Am. Rep. 50, *City of Aurora v. Reel*, 57 Ill. 29; S. C., 11 Am. Rep. 1; *City of Dixon v. Baker*, 65 Ill. 518; S. C., 16 Am. Rep. 591; *Ross v. City of Clinton*, 46 Iowa, 606; S. C., 20 Am. Rep. 160. In *Taylor v. Fickas*, 64 Ind. 167, S. C., 31 Am. Rep. 114, a land-owner, who planted trees on his land, thus obstructing the passage of drift-wood carried on the land of an adjoining proprietor by the overflow of a water-course adjacent to the lands of both, was held not liable. In *Wakefield v. Newell*, 12 R. I. 75, it was held that no action will lie for the results of such usual changes of grade, in respect to surface water, as must be presumed to have been contemplated and paid for at the laying out of the highway.

In *Cole v. City of Newburyport*, Massachusetts Supreme Court, 1880, 4 Mass. Law Rep., the declaration alleged that the city, by its clerk, duly authorized, contracted with the owners of an animal known as the "Sacred Ox," authorizing them to erect a booth on Market square, and to occupy the highway for the use and exhibition of the animal for the consideration of \$2.50 a day; that the mayor and aldermen of the city, by the city ordinances, are authorized to grant permission to maintain tents and booths in public places and upon the public highways for the purpose of exhibition, and are authorized to lease and grant permission to use the same; that the ox emitted an offensive odor, which in its nature is obnoxious to horses and cattle, frightening and causing them to become unmanageable; that the ox was also of an uncouth and strange shape and appearance, and was caparisoned in a gaudy and strange manner, so that he was an object of terror to horses and cattle; that the plaintiff's cart and horse were lawfully travelling along Merrimac street, the horse being well broken and kind and being driven by a safe and experienced driver, who exercised due caution, and near Market square met the ox, which was being led back and forth for his usual and necessary exercise; and that the horse was frightened by the odor and frightful appearance and caparison of the ox, and ran and overturned the cart, damaging it so that it was substantially destroyed, and seriously injuring the horse. The defendant demurred. The demurrer was sustained, on the ground that at the time of the accident the ox was not in the place for the use of which the city received compensation, nor in charge of any agent of the city, and the city was not responsible for the fright while both animals were travelling along the highway. In *Little v. City of Madison*, 42 Wis. 643; S. C., 24 Am. Rep. 435, the city was held liable for licensing "a bear show," under authority of which two cinnamon-colored bears were exhibited in the street, and by means thereof the plaintiff's horse was frightened and in-

jured. In the same case, on a later hearing, it was held that the city was not thus liable, where it had not licensed such an exhibition in the streets, but simply licensed the exhibition of bears, and the police negligently suffered it to take place in the street. The latter case seems to overrule the former. See *Rivers v. City Council of Augusta*, post.

In *Kennedy v. Railroad Co.*, U. S. Circuit Court, Southern District of Ohio, July, 1880, Int. Rev. Rec., Dec. 6, 1880, it was held that an action against the receiver of a railroad company, for damages for personal injury, cannot be sustained without leave of the court by which he is appointed, but that on application he will be permitted to go before a master or sue in a court of law, and that he has no absolute right to a jury trial if the Court of Chancery choose to retain jurisdiction. Baxter, J., says: "Such has been the uniform holding of the courts until recently, since which modifications of the rule have been attempted by a few exceptional adjudications, and by legislative enactments in some of the States. A statute of the kind exists in Ohio. But this statute cannot control the action of this court. Jones on Railroad Securities § 503; 7 Cent. L. J. 146; and *Thompson v. Scott*, 4 Dill. 508. Nor can we yield to the modification of the rule adopted by some of the State courts. These decisions have been ably reviewed by Love, J., in the case of *Thompson v. Scott*, and his refutation of them maintained by a cogency of reasons that ought, we think, to forever foreclose all further discussion of the question. Mr. High, who advocates (in an article published in the *Southern Law Review*) the new doctrine, admits that 'the weight of authority is adverse to the exercise of any right of action against a receiver by any court other than that from which he derives his appointment, and to which he is amenable.'" A similar decision was made by the New Jersey Court of Errors and Appeals, in *Pulys v. Jewett*, 32 N. J. Eq. 302, where the power of the Chancery Court to ascertain damages is learnedly examined. Mr. Stewart, the reporter, adds a valuable note to this case.

SEVENTY-NINTH NEW YORK REPORTS.

THIS volume does not contain many cases of general interest. The following are the principal:

Green v. Diabrow, p. 1. — Upon a store account the defendant had delivered to the plaintiff small quantities of merchandise at different times; held, a case of "mutual accounts" or "reciprocal demands," to which the statute of limitations did not apply.

Bruce v. Fulton National Bank, p. 154. — In a lease formally and technically drawn, with an evident attention to details, and containing various covenants, some mutual, and others binding only the one party or the other, there was a covenant on the part of the lessor for a new lease at the expiration of the term, but no corresponding covenant on the part of

the lessee to accept it. Held, that the lessee was not bound to accept it.

Stephens v. Board of Education, p. 183. — A member of a municipal board received moneys belonging to it, as its attorney, and appropriated them to his own use. Subsequently he procured moneys from the plaintiff on a forged mortgage, and with them paid his debt to the board, which received the same in good faith and in ignorance of the fraud upon the plaintiff. Held, that the plaintiff could not recover the same from the board.

Scattergood v. Wood, p. 263. — In an action involving a breach of warranty that a cotton-gin was "equal in all respects to the best saw-gin then in use," the opinions of competent and experienced men are admissible on the question whether the cotton-gin was as warranted.

Bennett v. Garlock, p. 302. — Lands were conveyed to trustees, their heirs and assigns, to sell sufficient to pay certain debts, and then to lease and support a certain beneficiary for life; the residuum to be held for the benefit of the grantors' heirs at the expiration of the life estate; reserving to the grantors power by appointment or will to direct where the residue should go; the trustees in their discretion, upon request of the grantors, to sell and convey any portion. Held, that the trustees took the whole estate, and the beneficiaries only an equitable interest; and that if by the acts or negligence of the trustees the estate of the trustees had been defeated by adverse possession, the interest of remaindermen was also defeated. This decision reversed the ruling of the General Term, and *Rapallo, J.*, dissented. We are inclined to think that a good many will fall in with the dissent.

Pierson v. People, p. 424. — On a trial for murder by poison, a physician is not prohibited from testifying to the results of his examination of the deceased, while attending him in his last illness. On such trial, the prisoner, having challenged the array, may withdraw the challenge, and thus waive the irregularity.

Pratt v. Short, p. 437. — A corporation which has discounted commercial paper without any statutory power to do so may recover the money thus loaned, although the securities are void.

Union Hotel Company v. Hersee, p. 454. — A subscription was made on condition that a certain sum be subscribed by the citizens of B. One of the subscribers was domiciled in A., but boarded, did business, and spent nearly all his time in B. Held, that he was a citizen of B. within the meaning of the subscription paper.

Noonan v. City of Albany, p. 470. — A municipal corporation has no right so to drain surface-water into a small natural stream that the stream is swelled beyond its natural capacity, and owing to an obstruction thus made in the stream, overflows and injures the land of an adjoining proprietor.

Morgan v. Schuyler, p. 490. — On the dissolution of the firm of M. & S., S. bought M.'s interest in certain of the firm property, and assumed the rent of the old stand, where he continued the business, while M. opened an office for the same business in

another part of the city. M. removed his name from the old firm sign, but S. replaced it, placing over it, "S. successor to," in small and almost imperceptible letters. *Held*, that S. should be restrained from such use of M.'s name.

Power v. Cassidy, p. 602. — A testamentary trust of property to be divided by the executors "among such Roman Catholic charities, institutions, schools or churches in the city of New York" as the majority should select, and in such proportions as they should think proper, is valid.

This volume contains several interesting and important *obiter dicta*. In *National Bank of Gloversville v. Wells*, p. 498, the court said, by Andrews, J.: "The counsel have elaborately argued another question, viz.: whether a National bank can loan its credit, and become an accommodation indorser of a promissory note. If material to the decision of this case I should have no hesitation in denying this proposition. Such a transaction as is here disclosed on the part of the plaintiff is clearly outside of its corporate powers. If a bank may charge a compensation for loaning its credit, and procuring another bank to discount the paper of its customers, it would practically abrogate all restraints imposed by the usury clauses, in the National Bank Act. It will be easy, if the practice can be sustained, for banks, by a course of friendly and reciprocal dealings, to obtain from needy borrowers under the guise of commissions for indorsing, any rate of interest which they may see fit to exact. But it is unnecessary to decide whether this matter constitutes a defense." This agrees with the dissenting opinion of Talcott, J., at General Term, and with *Seligman v. Charlottesville Nat. Bank*, Browne's Nat. Bk. Cas. 195, and *Johnston v. Same*, id. 199.

So, in *Mutual Life Ins. Co. v. Hunt*, p. 541, the court, by Danforth, J., said that an obligation entered into by an insane person to repay a loan of which he had the benefit, is valid where the lender acted fairly and in good faith, and without knowledge of the insanity, or notice or information demanding inquiry, and the parties could not be put in *statu quo*.

Again, in *Ryan v. People*, p. 598, Church, C. J., reiterated the doctrine of *People v. Crapo*, 76 N. Y. 288; 8 C., 32 Am. Rep. 303, that it is improper, for the purpose of impeachment, to ask a witness on cross-examination whether he has been indicted. Folger and Earl, JJ., dissented from this, citing the manuscript opinion of Johnson, J., concurred in by the whole court, in *Southworth v. Bennett*, 58 N. Y. 659, to the contrary, and holding that the allowance of such questions is discretionary.

This volume also contains the important local cases of *People ex rel. Dailey v. Livingston*, p. 279, and *People ex rel. Mayor v. Nichols*, p. 582; the former concerning the disputed election of surrogate in Kings county, and the latter concerning the removal of the police commissioner by the mayor of New York. Both these cases, which were what is generally known as political cases, were unanimously decided, the opinion being written by the

late chief judge in the former, and in the latter by Danforth, J.

The volume contains very few dissents — only six upon decided points, so far as we have observed. It includes decisions of January 27, 1880. Why do not the court begin now to publish the current decisions, and bring up the arrears at leisure? They will never catch up in this way. This course has been adopted in several States.

PUNISHMENT FOR ESCAPING.

THIS subject has of late awakened considerable interest. Our esteemed contemporary, the ALBANY LAW JOURNAL, started the discussion — apparently in the very exuberance of its humanity; which, indeed, does great credit to the heart of the editor; and we are very glad to accept the indication that he is no selfish, unfeeling, cruel expounder of the law; but on the contrary, a gentleman of refined moral instincts; one who has a deep sympathy even with those erring ones who have too generally, perhaps, been regarded as mere outcasts, having no rights that law-abiding citizens are bound to respect.

Compassion should not be excluded from the necessary punishment of the violators of law. But yet it is not to be the paramount consideration. It should temper the infliction of penalties, but should not subvert the rigid sternness thereof. It is the very nature of sympathy to be blindly impulsive. And accordingly, our Creator has constituted the intellect cold and impassive, in order to serve as a check and a balance to the rushing emotions which are intended to warm our whole being but not to exert supreme control over it. A mere thinker without a heart is almost a nuisance; and on the other hand a man of impulsive generosity unchecked by reflection is as unserviceable as a runaway horse. If we allow intellect and sentiment to co-exist and co-operate, the true harmony of our nature and of our private and public relations will be promoted; but not otherwise.

We are not expounding mental philosophy. But so far we have thought it necessary to notice its principles briefly, as a preface to our response to the sentimental argument — and we can call it nothing else — of the ALBANY LAW JOURNAL, on the topic before us; in which it seems to have been followed by all the leading periodicals which have noticed the matter. We do not censure; but we think it well to utter a hint of caution.

We cannot but think the argument is radically unsound. The doctrine advanced is substantially this: A prisoner ought not to be punished for trying to escape, and for breaking prison bounds, because *it is natural that he should seek to regain his liberty*.

In the first place, the impractical character of this theory is, we think, a fair logical objection to it. If the community has no right to punish a prisoner's desertion, it has no right to prevent such desertion by personal violence. And so, when an escaping convict has once succeeded in getting outside the wall, the officers who may discover him are confined to the ridiculous necessity of coaxing him back; or else the majesty of the law will depend upon the comparative speed of the convict and his pursuers, or upon their ability to outwit or circumvent him! And all the while he is animated by the knowledge that his experiment is to cost him nothing even if it is foiled; *because it is natural for him to run away!* And no matter what trouble and expense the recapture involves.

Again, the theory is as much opposed to the exercise of discipline in the prison as outside of it. Because

all prison restraints are directed against personal liberty, and the rules are framed, not merely with the view of preventing a prisoner from interfering with the rights of his fellows, but directly with the view of contravening his freedom so as to subject him to the galling condition of absolute servitude and submission to the will of those whom the law has placed over him, without his consent, in order to punish him for previous crimes. *It is natural for a man to desire to do as he pleases*; and in a community every citizen has a right to do as he pleases, so long as he does not intrude upon the rights of others. And it is natural for a man to want to have his own way, in prison even; and it logically follows from the natural argument of the ALBANY LAW JOURNAL that he ought not to be punished for obeying the promptings of his nature by "peaceably and unresistingly" declining to yield full submission to the enslaving prison rules, any more than he ought to be punished for "peaceably and unresistingly" abandoning the place where such rules prevail.

Moreover, it is natural, likewise, for a man who has no control of his passions to do violent deeds. Is an uncontrollable force of temper an immunity against the claims of the law? Certainly it is, if we are to accept the natural impulses as the standard of the right of community to punish.

But it may be said there is this distinction to be observed; that it is natural for all men—even the incorrupt and conscientious—to desire liberty from bondage. But will our friend of the ALBANY LAW JOURNAL maintain that a pure, conscientious man will wish to evade, by illegal means, even the penal requirements of a statute? We have instances recorded of men who, by reason of their lofty integrity, voluntarily submitted themselves to punishments which they might have avoided—punishments, too, wholly undeserved, unjust and arbitrary. The case of Regulus affords an eminent example of this kind; and he stands before us in history, by the common consent of mankind, not as a reckless, headstrong, foolhardy man, but as an illustration of the most heroic virtue and honor.

It is certainly a hardship that if an innocent man is convicted—as innocent men may sometimes be convicted, through the infirmity of human judgment—he should not be allowed quietly to escape without incurring additional punishment by his act. But we hold that when an innocent man is placed in a position of condemnation, it is still his duty to submit to the requirements of the law, until some legal method of relief is available. In fact, the mistaken punishment of an innocent man does him no civil wrong. One may be falsely accused, and may be imprisoned for many weary months to await his trial; but it will not be contended that even when his innocence is clearly revealed on the trial, and he is acquitted, the community is under obligation to compensate him for his loss and suffering. Such a principle, if established, would inevitably bring in a train of abuses which would soon set aside all law.

We are now speaking of the obligations of citizenship. Where one is the victim of willful injustice on the part of the sovereignty itself, or where the right to imprison is derived merely from the capture alone, as is the case in war, and not from allegiance, perhaps something different may be said. And yet our Great Master would not escape from even an iniquitous legal proceeding, although he declared that he could, at once, have called twelve legions of angels to the assistance of his humanity then in peril.

At all events, every citizen is entitled to every legal method of redress; while no one is entitled to illegal devices. It has even passed into a maxim of law that one must not accomplish lawful ends by unlawful means. And to this the Scripture responds by denouncing the maxim, "Let us do evil that good may

come," or in other words, "The end justifies the means."

But where one is actually guilty of a crime, does he not owe it to community to submit quietly to the penalty incurred? Has he any right whatever to evade or throw off his liability to make the due reparation? Will a man truly penitent of an evil deed ever seek to escape this liability? Have we not heard of men, moved by conscience to genuine repentance, voluntarily disclosing their guilt, and subjecting themselves to the penalty? Does not the very attempt to escape show a continued disobedience to the law? And is not obligation a far better standard than mere nature? Is it not every man's business to bring nature into harmony with obligation, instead of trying to break away from the latter by virtue of a natural impulse? The usual purpose of a convict escaping is that he may perpetrate his crimes anew. Has society no right to prevent this by punishing attempts to throw off the present requirements of the penal law?

It will be seen, then, that we justify the decision in *State v. Lewis*, 19 Kans. 260, to the effect that even an innocent man ought not to escape.

However, we regard the following cases as involving an absurd and unwarrantable application of the true doctrine—a travesty of justice, indeed: *Riley v. State*, 16 Conn. 47; *State v. Davis*, 14 Nev. 439; *McLellan v. Dalton*, 10 Mass. 191; *Steele v. Field*, 2 id. 486; and perhaps *Stuart v. Supervisors*, 86 Ill. 341.

It is an excellent token to find the ALBANY LAW JOURNAL resorting to the Scriptures in opposition to what it regards as iniquitous decisions. This does it great credit. But we would recommend a closer perusal thereof before venturing very far. We regret to see that, in condemning *Steele v. Field*, *supra*, the JOURNAL should be guilty of so gross an inaccuracy as in the following sentence: "Under this doctrine, St. Peter would have been indictable for escape, although he did not offer to go, and assured the jailer 'we are all here.'" Now we must gently inform the JOURNAL that it was St. Paul, with his companion, Silas, and not St. Peter, who was in the Phillippian prison on the occasion referred to.—*Kentucky Law Reporter*.

STATUTE OF FRAUDS—ORAL CONTRACT RELATING TO LAND PERFORMED BY ONE PARTY.

ENGLISH HIGH COURT OF JUSTICE, EXCHEQUER DIVISION, JUNE 2, 1880.

ALDERSON V. MADDISON, 43 L. T. Rep. (N. S.) 349.

A. desiring to retain in his service the defendant who had been acting as his housekeeper for many years, and to whom he was indebted in arrears of wages for such service, represented to her that if she would forbear to press him for the arrears of wages due to her, and giving up other prospects in life, would continue to serve him for the rest of his life without wages, he would make a will leaving her a life estate in certain property of which he became owner in fee. A. made a will which was void, not having been properly attested, by which he left the defendant a life estate in the property in question, and the defendant, relying on the representations so made by A., was induced to continue in his service till his death, when she took possession of the title deeds of the property. In an action brought by the plaintiff, as the heir-at-law of A., to recover possession of the title deeds, the defendant counter-claimed for a declaration that she was entitled to a life estate in the said property, and to retain the title deeds for her life. Held, (1), that the representations made by A. to the defendant were terms in a contract which was binding on A. and his heirs, and that the defendant was entitled to a life estate in the said property, and to retain the title deeds for her life. (2), That the contract related to land within section 4 of the statute of frauds, but that the statute did not apply by reason of the contract hav-

ing been completely performed on the part of the defendant.
Bannerman v. De Biel, 13 Cl. & F. 45; and *Loftus v. Mau*, 6 L. T. Rep (N. S.), 346; 3 Glf 502, commented on and explained.

THIS action was tried at the Durham Summer Assizes in 1879, before Stephen, J., by whom it was reserved for further consideration.

The statement of claim alleged that the plaintiff was brother and heir-at-law of Thomas Alderson, deceased, who died intestate on the 15th of December, 1877, and in whose service the defendant, Elizabeth Maddison, had lived as housekeeper for many years before his death. Thomas Alderson, at the time of his death, was owner in fee of an estate called Manor House Farm, and on his death his property descended to the plaintiff as his heir-at-law. The defendant took possession on Thomas Alderson's death of the title deeds of the property. The plaintiff claimed the restitution of the title deeds and damages for their detention.

The statement of defense admitted in substance the allegations of the statement of claim, but stated in detail that Thomas Alderson, becoming indebted to the defendant for wages, and wishing her to remain in his service, made an agreement with her to the effect that if she would forbear to press him for the arrears of wages due to her, and would serve him for the rest of his life without wages, he would at his death leave her a life interest in the Manor House Farm. It also stated that Thomas Alderson, meaning to carry out his promises, made a will by which he left the property in question (subject to a small annuity) to the defendant for her life.

By way of counter-claim the defendant repeated the statements above mentioned, and added that the will referred to, though signed by Thomas Alderson, was not properly attested, whereby he had failed to fulfill his engagements to her. She claimed a declaration that she was entitled to a life estate in the Manor House Farm, or to such life estate as the draft will purported to devise to her, and that she was entitled to retain the deeds for her life. In the alternative she claimed to be entitled to retain the deeds till she had been paid all wages due to her, or fair remuneration for her services. The only questions before the court were whether the defendant was entitled to a life estate in the property, and whether she was entitled to a lien on the deeds.

At the trial it was proved that Thomas Alderson had made the will referred to, and that it had not been properly attested, so that as a will it was void.

At the suggestion of the counsel on both sides, the following question was put to the jury, viz: whether the defendant was induced to serve Thomas Alderson as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by a promise made by him to her to make a will leaving her a life estate in Manor House Farm, if and when it became his property? The jury replied, "Yes," and the judge thereupon reserved for further consideration the effect of this finding and the evidence.

STEPHEN, J., after stating the facts as given above, continued—The substantial question appears to me to arise upon the defendant's counter-claim. Has she a right to the declaration for which she asks that she is entitled to a life estate in possession in the property, and to the custody of the deeds for life? If not, I do not see how she can be entitled to a lien upon the deeds for any amount of wages which may be due to her. Indeed, it was hardly contended in argument that she was so entitled. The defendant's case is put in two ways. First, it is said that Thomas Alderson made representations to her which influenced her conduct, and which his heir is bound to make good. Next, it is said that what took place between them amounted to

a contract, that in consideration of her serving him for his life he would leave her by his will a life interest in the farm, if it became his property during his life and if she survived him. I think that if this was so she is entitled to what is equivalent to specific performance of the contract. The law upon the subject is, I think, clear and consistent when all the decisions are considered, but I am led to believe that an impression exists that there may be such a thing as a representation which, though neither a contract nor part of a contract, may have the effect of binding the person who makes it as if it were a contract. I do not agree with this view, and I think it desirable to state fully the way in which the matter presents itself to me. It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable, or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation; secondly, it may operate as an estoppel preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it; thirdly, it may amount to a criminal offense. The common case of a warranty is an instance of a representation forming part of a contract. *Pickard v. Sears*, 6 Ad. & E. 409, and many other well-known cases are instances of representations amounting to an estoppel. A false pretense by which money is obtained is an instance of a representation amounting to a crime. Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences, unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, fulfil it. It will, I think, be found that all the difficulties of the subject may be solved by keeping in mind this classification of the different classes of false representations. Nothing need be said here of criminal false representations, nor need I, on the present occasion, say more of false representations amounting to estoppels than that it does not appear to me that the law upon that subject has anything to do with this case. Thomas Alderson neither did nor said any thing that could estop either him or his heir from denying any state of facts whatever. He promised to leave his housekeeper a life estate in the Manor Farm. He intended to do so, and had a will prepared which purported to do so. He signed that will in the presence of two witnesses, but unfortunately they were not both present at once, and accordingly the will was void. What relation can estoppels by consent or by statements have to such a case as this? To say that Alderson's heir-at-law is estopped by Alderson's conduct from denying the validity of the irregularly attested will would be to repeal the Statute of Wills; but I do not see what other estoppel would affect the case. Who is to be estopped? What assertion is he estopped from? The question, therefore, comes to be this: Were the representations made to the defendant terms in a contract, or were they merely voluntary revocable promises which were not in fact carried out? In other words, did Thomas Alderson contract with his housekeeper that he would leave her a life interest in the Manor Farm if she would serve him for his life, and if the farm became his property and if she survived him;

or did he induce her so to serve him by making promises not intended to be legally binding? Did she make a bargain, or did she take her chance of his keeping his word? Before examining the facts of this particular case it will, I think, be well to refer to the decisions which have led me to state the question in this form. I do so because some of the language used in them may seem to countenance the notion that there may be a binding representation which is neither a contract nor an estoppel. I think, however, that when the matter is considered it will be found that whenever representations have been held to be binding, the circumstances were such as to show that all the conditions of a valid contract had been fulfilled, and that in all the cases in which representations have been held not to be binding, one or more of those conditions were absent. I understand by a contract an agreement which the law will enforce, and I apprehend, that speaking generally, the law will enforce all agreements made upon good consideration or with certain solemnities which dispense with consideration. Agreement and consideration are thus the elements which constitute a contract not under seal. It may seem trivial to mention such obvious matters, but attention to them appears to me to clear up many decisions which are not otherwise very readily explained. I now proceed to examine the cases referred to, taking first those in which representations were held to be binding, and next those in which they were held not to be binding. The first case is *Hammersley v. De Biel*, 12 Cl. & F. 45. The facts were that the brothers of a lady engaged to be married wrote, by her father's authority, a memorandum, part of which was as follows: "Mr. Thomson proposes for the present to allow his daughter 200*l.* per annum for her private use, subject to a possibility of a reduction in that sum in case political or other circumstances should diminish his income; and also intends to leave a further sum of 10,000*l.* in his will to Miss Thomson, to be settled on her and her children, the disposition of which, supposing she had no children, will be prescribed by the will of her father. These are the bases of the arrangements proposed, subject of course to revision; but they will be sufficient for Baron de Biel to act upon." The paper also contained a condition that Baron de Biel was to settle 500*l.* a year on his wife for life. The marriage took place. Baron de Biel made the settlement which he had engaged to make, but the sum referred to was not left in the will, and it was held that it must be settled for the benefit of a child of the daughter. Lord Cottenham, in delivering judgment as Lord Chancellor on appeal from the Master of the Rolls, said (12 Cl. & F. at p. 61, n.): "I propose first to consider whether there was any such agreement previous to the marriage as * * * was binding on the late Mr. Thomson to give an additional 10,000*l.* as the portion of his daughter. If it be supposed to be necessary for this purpose to find a contract such as usually accompanies transactions of importance in the pecuniary affairs of mankind, there may not be found in the memorandum or in the other evidence in the cause proof of any such contract, and this may have led to the defense set up by the defendants; but when the authorities on this subject are attended to, it will be found that no such formal contract is required. A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him will in general be sufficient to entitle him to the assistance of this court for the purpose of realizing such representation." This language was adopted by Lord Campbell in delivering judgment in the House of Lords, and by Stuart, V. C., in the case of *Loffus v. Maw*, 6 L. T. Rep. (N. S.) 346; 3 Giff. 592; 32 L. J. 49, Ch. I am inclined to think that it has been misunderstood, and has been supposed to lay down the rule that in cases of this kind, a representation not amounting

to a contract may be binding on the person who makes it. I do not understand Lord Cottenham to have said any thing of the sort. His words appear to me to mean only that contracts of this nature may be made, like other contracts, by informal documents, or partly by documents and partly by conduct. That this is so is clear from other cases. In *Luders v. Anstey*, 4 Ves. 501, it was held that a letter, making a suggestion as to a settlement, followed by marriage under such circumstances as to imply the acceptance of the suggestion, may be a contract for a settlement. *Hammersley v. De Biel*, 12 Cl. & F. 45, has been followed by several other cases. *Prole v. Soady*, 1 L. T. Rep. (N. S.) 309; 2 Giff. 1, was in principle similar to *Hammersley v. De Biel* (*sup.*), and Stuart, V. C., decided it on the authority of that case, of which he said: "There was no more than the expression of an intention to leave this sum" (10,000*l.*) "by a revocable instrument. But inasmuch as the expression of that intention on such an occasion had an influence on the conduct of the contracting parties, and was an inducement to the contract, the House of Lords * * * compelled the executors of him who had made the representation to pay the money, and to fulfill that which was expressed as a mere intention. This doctrine, which gives all the force of a binding contract to the mere expression of an intention to do something by an instrument revocable in its nature, is too firmly established to be shaken." This appears to me to be equivalent to saying that the cases establish that an agreement to make a will in a particular way may be a binding contract, that it need not be made in any particular form, and that if binding it may be enforced against the representatives of the party making the agreement. *Loffus v. Maw*, 6 L. T. Rep. (N. S.) 346; 3 Giff. 592; 32 L. J. 49, Ch., is the next case. Its facts are almost precisely the same as those of the case now before me. Gunnell, being old and infirm, promised Loffus that if she would continue in his service till his death, he would leave her the rents of two houses for her life. He showed her a codicil to his will which he made for this purpose, but he afterward revoked it by a further codicil. It was held by Stuart, V. C., that the trusts in favor of the plaintiff in the codicil which had been revoked should be performed. The judgment quotes part of the passage already quoted from Lord Cottenham's judgment in *Hammersley v. De Biel* (*sup.*), and also refers to the well-known case of *Pickard v. Sears*, 6 Ad. & E. 469, as an authority to show that a man may be bound by a representation made to another person for the purpose of influencing his conduct. For the reasons already given, it seems to me to be simpler and more distinct to say that the case was one of a contract by mutual promises—"If you will serve me, I will leave you the rents of two houses." If it is objected that a will is in its nature revocable, the answer is that the cases of *Hammersley v. De Biel* (*sup.*) and *Prole v. Soady* (*sup.*) show that that is no reason why a promise for valuable consideration to make a will should not be a binding contract. This language is, I think, simpler than that which turns upon representation. If the promise had been, "If you will serve me for a year, I will pay you 20*l.*" the promise to pay the 20*l.* would hardly have been described as a representation which the promisor was bound to make good. I do not know why such terms should be applied to a promise to make a will. *Loffus v. Maw* is approved of in *Coles v. Pilkington*, 31 L. T. Rep. (N. S.) 423; L. R., 19 Eq. 174, which, however, relates to a different subject. *Coverdale v. Eastwood*, 27 L. T. Rep. (N. S.) 646; L. Rep., 15 Eq. 121, is a case similar in principle to *Loffus v. Maw* (*sup.*). The father of a woman about to be married wrote letters to the mother of the intended husband in which he said, "V., being my only child, of course she will come into possession of what belongs to me at my decease." "It has been my intention, in the event of

the marriage taking place, to make a similar will in accordance with the facts of the case, and of course I should settle my property on my daughter absolutely." These and similar expressions, followed by marriage, were held by Bacon, V. C., to constitute a contract. His words are "that representations of this kind will constitute a contract is shown beyond the possibility of question by every case which has been referred to, as well by those in which the contract has been enforced, as by those in which the court has found it impossible to establish the contract." The result of all these cases appears to me to be that a contract to make a particular disposition of property by will is not invalid merely because a will is revocable, that such a contract need not be made in any particular form (though the provisions of the Statute of Frauds may apply to it), and that the validity of such a contract must be tested by the rules which govern the validity of other contracts. I now pass to the cases in which representations of intention, whether as to wills or other dispositions of property, have been held not to be binding. All of these are cases in which the language used was considered to amount to nothing more than a declaration of what the parties influenced by it knew or ought to have known to be no more than a present revocable intention. Such declarations, no doubt, in many cases raised natural expectations, which induced the parties to whom they were made to take irrevocable steps; but in each case the decision turned on the question whether the declaration made was intended to form part of a contract, or only to announce a present revocable intention, or (which is the same thing) to make a promise for which there was no consideration. The first of these cases is *Jorden v. Money*, 5 H. of L. Cas. 185; 23 L. J. 865, Ch. This was a case in which the facts were hard to be ascertained, and were open to various constructions, Lord Cranworth and Lord Brougham differing from Lord St. Leonards in their view of them. When Mr. Money was about to be married, a question arose as to his means, and in particular as to 1200*l.* which he owed to Mrs. Jorden, as joint obligor on a bond, which, in Mrs. Jorden's opinion, had been obtained from him unfairly by a brother of hers, whose personal representative she was. She used language on various occasions which, to say the least, expressed a strong intention not to sue upon the bond, which she said she had abandoned, and Mr. Money was induced to marry by what she said. Afterward a decree was made by the Master of the Rolls, and affirmed by the Lords Justices, that Mr. Money should be released from the bond. It was argued that she had made a representation leading Mr. Money to marry, which she was bound to make good. On appeal to the House of Lords, Lord Cranworth and Lord Brougham were both of opinion that her language amounted at most to a promise not to sue on the bond. Such a promise, made in consideration of Mr. Money's marriage, would have been good as a contract if the statute of frauds had been complied with. The statute of frauds not having been complied with, the promise was not binding as a contract, and if regarded as a mere representation, it could not even be said to be false, for it truly represented the state of her mind when she made it. Each judgment, in short, appears to me to proceed upon the principle already stated that a representation must operate either as a contract or as an estoppel. Lord St. Leonards took a different view both of the facts and of the law of the case, and part of the language used by him may seem at first sight to imply that a representation not amounting to a contract may have the effect of a contract. According to the view which he took of the facts, Mr. Money's father had certain claims against Mrs. Jorden, which he forbore to urge in consideration of her giving up her claim on his son. This, he said (5 H. of L. C. at p. 240), their lordships were not "driven to

treat as a contract in the proper sense of the word. It is, however, a representation by one party of an intention" (the word "not" appears to be here omitted) "to do an act which he refrains from doing in consideration of another party giving up a right to something else, and refraining from doing another act; and I will show your lordships that that is perfectly good in law, and can be enforced without any legal contract at all." He afterward says: "He (Mr. Money, the father) says, 'I will not enforce the right against you, which I know I have, if you will not enforce your right against my son.' That is a representation which your lordships will presently see the effect of in point of law, but it is a representation that does not depend upon contract. It is not buying and selling, but dealing in representation between parties, a part of the *res gestæ* of the case up to the time of the marriage." This language does not, I think, mean more than that the agreement in question was not one of those contracts which have well-known legal names and incidents, like the contract of bargain and sale; but as Lord St. Leonards states the matter, it was an agreement made upon good consideration, and enforceable by law. Such an agreement I should regard as a contract. I know, indeed, of no definition of a contract which would exclude it. In a later part of his judgment, Lord St. Leonards states that he differs from his colleagues as to the sort of representation which may operate as an estoppel. He supposes them to lay down (5 H. L. C. at p. 248) that "it must be a misrepresentation of the facts, and not a declaration of what you intend to do, or intend to omit to do." The principle, he observes, is that a person is not to be induced to act by deception, whence he infers that "it is utterly immaterial whether it is a misrepresentation of facts as it actually existed, or a misrepresentation of an intention to do or to abstain from doing." If this view were adopted in its entirety, every promise on which a person acted, even if there were no consideration, would be binding by way of estoppel, and such a doctrine would alter the present law by giving legal force to that class of representations which at present are only morally binding. The difference between the classes of misrepresentation which do and do not bind seems to me to be plain. To say, "I have cancelled this bond," when you have not, is to tell an untruth. To say, "I intend to cancel this bond," is to make a statement as to a present revocable intention. If a person chooses to act on such a representation, without having it reduced to the form of a binding contract, he knows, or ought to know, that he takes his chance of the promisor changing his mind, and therefore he is in no worse position if the statement is false when it is made — *i. e.*, if that intention is not really entertained — than if it is true when it is made; *i. e.*, if the intention exists, and the person making the statement intends to revoke it if he pleases. I have examined this case at length, because I think that the language I have referred to has contributed to the confusion which has been introduced into the subject, but that when the whole case is fully considered, it is an authority for the view which I have expressed. There are several other cases which support the same view. In *Maunsell v. Hedges*, 4 H. of L. C. 1030, Mr. Eyre, the uncle of Mr. Maunsell, who was engaged to be married, wrote Mr. Maunsell a letter, in which he said: "I have made my will, and left you my property in the county of Tipperary, which is considerable." He repeated the statement in another letter, and added: "My county of Tipperary estate will come to you at my death, unless some unforeseen occurrence should take place." He refused, however, to make any settlement. In a settlement made by Mr. Maunsell it was recited that he had expectations from Mr. Eyre, and he consented to settle any property which he might receive under his will. The property was afterward

devised to others. It was held in this case, that as there was no contract by Mr. Eyre to settle the property, the trustees of the will could not be compelled to convey it to Mr. Maunsell. Lord Cranworth, in his judgment, says (4 H. of L. C., p. 1055): "Where a man engages to do a particular thing he must do it—that is a contract; but where there are no direct words of contract, the question must be, what has he done? He has made a contract, or he has not. In the former case he must fulfill his contract; in the latter there is nothing that he is bound to fulfill. * * * * Where a person makes a representation of what he says he has done, or of some independent fact, and makes that representation under circumstances which he must know will be laid before other persons who are to act on the faith of his representation being true, and who do act on it, equity will bind him by such representation, treating it as a contract." He says elsewhere (4 H. of L. Cas., at p. 1056): "There is no middle term, no *tertium quid*, between a representation so made as to be effective for such a purpose, and being effective for it and a contract, they are identical." He adds, in reference to *Hammersley v. De Biel* (*sup.*), "though you see the word 'representation' used as it is in the speech of Lord Cottenham, I cannot think that it was meant to bear the construction now attributed to it and to raise any such distinction as is now relied on. That word is no part of the judgment. I must say that I do not think it is a word very happily employed. The only distinction I understand is this, that some words which would not amount to a contract in one transaction may possibly be held to do so in another." He adds: "The circumstances there" (in *Hammersley v. De Biel*) "gave to the words used the character of a contract which equity was bound to enforce." The judgment of Lord St. Leonards is to the same effect. He is reported to have said expressly in the course of the argument (4 H. of L. Cas., at pp. 1051, 1060) that *Hammersley v. De Biel* (*sup.*) was a case of contract. Both Lord Cranworth and Lord St. Leonards point out that in *Maunsell v. Hedges* (*sup.*) there was no contract at all, and they decide the case on that basis. The cases of *Caton v. Caton*, 12 L. T. Rep. (N. S.) 532; L. Rep., 2 H. of L. 127, and *Dashwood v. Jermyn*, 12 Ch. Div. 776, are illustrations of the same principle. Each is a case in which a promise to make a will, not amounting to a contract, was held to confer no rights upon the promisee after the death of the promisor. Such being my view of the law, I now come to the question whether in this case there was a contract between the parties. The answer to that question put to the jury certainly does not in plain and direct words affirm such a contract, and it is no doubt to be regretted that the question was not so framed as to give them an opportunity to do so. This is to be attributed to the view taken by the counsel, who were no doubt guided by the case of *Loffus v. Maw* (*sup.*), and were desirous of bringing this case within the terms of the principle laid down in that case by Stuart, V. C. In substance, however, I think the finding of the jury, especially when it is taken in connection with the evidence of the defendant, is equivalent to a finding that there was a contract. It must be taken that the defendant was induced by a positive promise, or series of promises, to forego the wages to which she would otherwise have been entitled, and to give up a prospect of being married. It is to me inconceivable that she should have done this had she not understood the promises so made to be legally binding. The making of the will to her satisfaction, and the fact that Alderson showed it to her to see if she was satisfied, are to my mind the strongest possible evidence that such was the character of the transaction. If it had been intended that she was to have been at his mercy he would not have shown her the will. It was urged that there was no mutuality, that she might have left his

service at any moment, and that he would have had no remedy, and that as every contract implies mutuality, there was thus no contract. Upon full consideration I do not agree with this view. Whether he would have had any remedy against her if she had left his service may be a question, but there are many cases in which the consideration on one side must be wholly executed before any obligation arises on the other, and in which the party who gives the first consideration is never under any obligation to give it. In such cases it is impossible that more than one party to the contract should ever sue upon it. Cases in which a reward is offered for information are an illustration. The person who promises the reward can never sue any one for not giving the information, but when the information has been given the promisee can sue for the reward. The doctrine that the solemnity of sealing dispenses with consideration is connected with such obligations as these. A bond is usually given in respect of an executed consideration, which, if there were no bond, would often impose an obligation on the obligor, though he may never have had any right of action against the obligee. Upon the whole, I am of opinion that there was a contract between Thomas Alderson and the defendant to the effect already stated. As it was a contract relating to land, it falls within the 4th section of the statute of frauds, but as it was completely performed on the part of the defendant, according to the well-known doctrine of equity, the application of the statute is barred. There will be a declaration as prayed in the counter-claim, but as the case is certainly one of difficulty, and one in which the heir could hardly be expected to concede at once the claim made by the defendant, I think that the costs ought to come out of the estate.

Judgment for the defendant.

UNREASONABLE REGULATION BY CARRIER OF PASSENGERS.

ENGLISH HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, JULY 5, 1890.

SAUNDERS V. SOUTH-EASTERN RAILWAY CO.

An English statute provides that a railway company may make regulations for certain express purposes, and generally for regulating the travelling upon or using and working of the railway. A by-law of a railway company provided that "no passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company, whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." A passenger, without fraud, refused to show his season ticket on passing over a station platform of the company to which his ticket applied; and was convicted by a magistrate under this by-law in the amount of the fare from the starting place of the train by which he had just travelled. *Held*, that this by-law was void for unreasonableness in the amount fixed for the penalty; and that the conviction must be quashed. *Held*, also, by Cockburn, C. J., that the by-law, in terms, applied only to persons in the company's carriages; and that in any case, for other reasons, it was not within the authority of the statute.

CASE stated by a metropolitan police magistrate, by whom the appellant, Harris C. L. Saunders, was convicted for a violation of the by-laws of the respondent railway company, in refusing to show his

ticket while travelling as a passenger on respondent's railway. The opinion states the case.

COCKBURN, C. J. This is an appeal against the conviction of the appellant by a metropolitan police magistrate for breach of a by-law of the respondent company, which by-law is in these terms: "No passenger will be allowed to enter any carriage used on the railway, or to travel therein upon the railway, unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket (whether a contract or season ticket or otherwise) to any duly authorized servant of the company, whenever required to do so for any purpose. Any passenger travelling without a ticket, or failing or refusing to show or deliver up his ticket as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." The facts were as follows: The defendant is in the habit of travelling to and fro between London and Windsor. The journey is accomplished by means of two lines of railway, by that of the respondent company, from Cannon street or Charing cross as far as the Waterloo station of the South-Western Railway Company, and from thence to Windsor on the line of the latter company. Joint tickets are issued by arrangement between the two companies, which enable the traveller to travel the whole distance without taking a second ticket. The defendant has been for some time the holder of a season ticket enabling him thus to travel over both lines. The carriages of the South-Eastern Company do not run on to the line of the South-Western. On arriving at the junction the passenger has to alight on and pass along a platform belonging to the South-Eastern Company, and in doing so has to pass a barrier at which the company have ticket collectors. The defendant had travelled from London by a train of the South-Eastern Company which had started from Blackheath. On arriving at the barrier for the purpose of passing into the South-Western Company's station, he was called upon by the respondent's ticket collector to show his ticket, but he refused to do so. Thereupon the collector said he must charge him the fare from Blackheath. The collector did not, however, demand or mention any specific sum. The appellant refused to pay. The appellant has been convicted by the magistrate in the amount of the fare from Blackheath, and against the conviction he now appeals. In my opinion, the conviction was wrong, and the appeal must prevail. In the first place, it was held by this court, in *Brown v. Great-Eastern Railway Co.*, 2 Q. B. Div. 406, that under such a by-law as the present, assuming such by-law to be otherwise good, there must be a demand of the specific amount payable in respect of the penalty imposed by the by-law, which condition was not satisfied in the present instance. I have, however, considerable doubt whether that decision governs this case, as I gather from the facts stated, that upon the ticket collector informing the appellant that he should charge him the fare from Blackheath, the appellant at once stated that he should not pay it. This fact, which did not exist in the case of *Brown v. Great-Eastern Ry. Co.*, is, I am disposed to think, sufficient to dispense with the necessity of a demand of the specific amount, which under the circumstances would have been useless. But passing by this point, I am of opinion, first, that the by-law is bad; secondly, that it was inapplicable under the circumstances to the case of the appellant. As regards the validity of the by-law I am strongly disposed to think that such a by-law was *ultra vires*. The power to make by-laws is given by the 108th section of the Railway Clauses Consolidation Act. This section empowers a railway company to make regulations for regulating the use of the rail-

way in certain specified instances; that is to say, for regulating the speed of trains, the times of arrival and departure, the loading and unloading of carriages, the receipt and delivery of goods, and as regards passengers and others, "for preventing the smoking of tobacco, and the commission of any other nuisance in or upon such carriages, or in any of the stations or premises occupied by the company;" after which follows this more general term, "and generally for regulating the travelling upon or using or working of the railway." I am greatly disposed to think that this enactment has reference to what at the time the act was passed was, as will be remembered, generally contemplated, namely, the use of the railway by other locomotives and carriages than those of the company constructing the line. I say so because the first four specified purposes in respect of which power to make regulations and by-laws is given by the section in question, are obviously purposes for which, when a railway company was working its own line, with its own carriages and servants, such power would be wholly unnecessary. A company would need no by-laws to enforce its own orders as to the rate of speed at which its carriages should travel, or the time of their departure and arrival, or as to their loading and unloading, or as to the receipt and delivery of goods conveyed by them. But they might well need such by-laws when their line was worked by persons not under their immediate order and control. The next purpose might no doubt apply either to persons travelling in the carriages of the company, or in others. But the last purpose must, as it seems to me, again have reference to the use of other carriages than those of the company. For not only had the case of any fraudulent travelling on the line been provided for by the 103d and 104th sections, and assuming section 109 to be applicable to the case of persons travelling in the company's carriages, any misconduct on the part of such persons had been made capable of being dealt with under a by-law of the company by this very section, but the proviso which immediately follows shows that the words in question had reference to the use of the railway by others than the company, the proviso being as follows: "But no such regulation shall authorize the closing of the railway, or prevent the passage of engines or carriages on the railway at any reasonable time"—a proviso manifestly applicable to other locomotives or carriages, but inapplicable to persons travelling by the company's own trains. And that this is so becomes more apparent from what follows after the enactment enabling the company to make by-laws to enforce its regulations by a penalty to the amount of 5*l.*, viz., that "if the infraction or non-observance of any such by-law or regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, annoyance or hindrance, without prejudice to any penalty incurred by the infraction of such by-law;" all which, as it seems to me, clearly points to the use of the railway by others. I am therefore led to think that the power given has no reference to the case of persons travelling by the company's own carriages. Assuming, however, that the power given to make by-laws would enable the company to make a by-law applicable to passengers travelling in the company's carriages otherwise than as expressly mentioned in the 108th section, it again occurs to me to doubt whether the power must not be taken to apply only to cases *ejusdem generis* with those mentioned specifically in the section. I entertain considerable doubt whether it can involve a power to modify in so essential a degree the contract between the company and a person whom they undertake to carry. The company have a perfect right to say that they will not undertake to

carry, and therefore will not admit into their carriages, any one who does not pay his fare beforehand and take a ticket, and having made this the condition of the contract they have the right to remove any one from their carriages who has not provided himself with a ticket. And I am not prepared to say that a by-law making it compulsory on a party so circumstanced—that is to say, who has no ticket, or who having a ticket refuses to show it, from which it may be reasonably presumed that he has none—to leave a company's carriage under a penalty if he refuses to leave, would not be a reasonable by-law, and within the power given by the act. But it seems to me a very different thing to say, that where a ticket has actually been taken and the fare paid, and so a contract has been entered into by a company, the company can by a by-law superadd to the contract the important modification that the traveller shall be subject to a penalty if he fails to produce the ticket whenever called upon. If it had been intended to give the company the power of thus modifying the contract in so essential a particular, I should have expected to find it expressly given either as an appendage to the 103d section or as part of the 109th. But there are far more urgent grounds for holding this by-law to be bad. It is found expressly in the case that "the appellant in refusing to show his ticket had no intention to defraud, and did not in any way defraud the South-Eastern Railway Company." In *Dearden v. Townsend*, L. R., 1 Q. B. 10, this court intimated a very clear opinion that such a by-law as the present could not apply to the case of a person travelling on a railway beyond a distance for which he had taken his ticket and paid the fare where there was no intention to defraud, and the point was expressly decided to that effect in *London & Brighton Ry. Co. v. Watson*, 3 C. P. Div. 429. I am perfectly satisfied of the soundness of this construction of the statute. The principle of these decisions, namely, that the by-law would be bad if in excess of the 103d section of the 8 Vict., ch. 20, which makes a fraudulent intention the gist of the offense of travelling without having paid the fare, appears to me to apply *a fortiori* to the case of a person who has paid his proper fare and is travelling with his ticket in his pocket. If the man who is travelling without having paid his fare, and who consequently has no ticket, is not within the by-law where the element of fraud required by the statute is wanting, the man who has paid his fare and got his ticket can surely be in no worse position. It may no doubt be said that it is not for travelling without having paid his fare that the appellant has been convicted under the by-law, but for having refused to show his ticket when properly called upon to do so. But when the by-law is looked at, as I think it should be looked at, as a whole, it seems plain that its main and primary purpose is to prevent persons from travelling on the railway in fraud of the company without having paid the necessary fare, and that the obligation to show the ticket when required is subsidiary only to such primary purpose. Indeed, if this were otherwise, and the exhibition of the ticket were not subsidiary to the prevention of the fraudulent purpose of travelling without paying the fare, this remarkable consequence would follow in the case of such attempted fraud, namely, that in addition to the penalty fixed by the statute, a penalty of 40s., and which must have been intended to be the maximum of punishment the offender might be subjected to the penalty established by the by-law, and this to the extent of an additional 5s., that being the amount to which the penalty can be carried by the by-law under section 104—a result which cannot have been contemplated by the statute. It seems to me to follow, that with reference to the exhibition of the ticket as well as the travelling without one, the by-law must not be carried beyond the scope of the 103d section. Even

when confined within these limits such a by-law, if otherwise within the power to make by-laws given by the statute, will not be without its use. The want of a ticket affords *prima facie* evidence of fraud, and entitles the company to put the traveller to the proof of the absence of fraudulent intention. The refusal to produce a ticket leads in like manner *prima facie* to the inference that the party has none, and consequently to the inference of fraud. To this extent a by-law, if not otherwise open to objection, would be reasonable as subsidiary to the 103d section of the act, by affording the company *prima facie* evidence of a fraud, and so enabling them to proceed against the offender for the penalty under the statute independently of any civil proceeding to recover the amount of fare. But otherwise than as subsidiary to the 103d section the by-law would appear to me to be beyond the power of making by-laws conferred on the company. It was not necessary in *Dearden v. Townsend*, L. R., 1 Q. B. 10, to decide on the validity of the by-law in this respect, nor did the decision involve it. It was sufficient to hold that the case did not come within the by-law, as the by-law imposed a penalty on a party refusing to produce a ticket; it was enough to say that a person not having a ticket, and therefore being unable to produce one, could not be said to refuse to do so. Let us assume, however, that to make a by-law imposing a penalty on a traveller for not showing his ticket when he has one would be within the competency of the company; we have still to consider whether this by-law is in itself reasonable. Now, it is settled law, not only that it is essential to the validity of a by-law that it be reasonable (Com. Dig., "By-law," ch. 6), but also that "a by-law, being entire, if it be unreasonable in any particular, it shall be void for the whole," (id. ch. 7), of which Comyns gives as an instance "as if the penalty be unreasonable." Here the penalty, that of paying the fare from the station from which the train originally started, cannot, under certain circumstances, be otherwise than unreasonable. For where crimes are the same and the criminality equal, equality of punishment is of the essence of penal legislation and justice. Here the offense being the same and the criminality equal, whether the offense occurs at one end of the line or the other, the degree of punishment is made to depend on whether the offense has been committed at the one end or the other, its severity increasing as we advance toward the *terminus ad quem*. To illustrate the position, let us suppose a line of sixty miles in length with stations at every ten miles. The man who, having travelled to the station next to that from which the train started, refuses to produce his ticket will have to pay the precise fare for the distance he has travelled; in other words, will not have to pay any penalty at all. The man who does the corresponding thing at the further end of the line—that is to say, who travels the last ten miles of the distance, and then fails to produce his ticket—has to pay, in addition to the proper fare for the distance he has travelled, the fare due for the fifty miles over which he has not travelled as a penalty, while, as we have just seen, the offender at the other end of the line pays no penalty at all. And the same thing occurs, though of course the disproportion is not so striking, in all other instances which may happen according to whether the offense occurred near to or farther from the *terminus a quo*. The injustice arising from a law operating thus unequally, so much more heavily when the offense has been committed at the one end of the line than when it occurs at the other, is too manifest to admit of such a by-law being held to be reasonable. It is not a sufficient answer to say that it is "reasonable that facility should be thus afforded to the company to protect themselves against persons travelling without having taken tickets, it being in most instances

impossible for the company or their officers to know how far a person may have travelled." Facility is not to be afforded to a prosecutor, or his convenience consulted, at the expense of injustice committed in the inequality of punishment. Besides which the company may to a great extent protect itself by greater care in seeing that no person is admitted into their carriages without showing a ticket. But even if we were to hold the by-law to be valid, it does not appear to me to be applicable to the case of the appellant. The power given to the company by the 109th section of the act is to make by-laws to be enforced by penalties for regulating (*inter alia*) the "travelling upon the railway," and it is under this power that the by-law in question is made. But not only must such a power, being in derogation of common right, be construed strictly, but the whole enactment appears to me to point to travelling upon the railway in the actual meaning of the term. Now, here the appellant, when he refused to show his ticket, cannot be said to have been "travelling on the railway" in point of fact, nor do I think he can be said to have been even constructively travelling upon it. He had entirely left the carriages of the South-Eastern Company. He was quitting their station. That the stations of the two companies happen to be more or less contiguous is an accident. They might be some distance apart. As it is, it takes some minutes to pass through the passages which extend from the one platform to the other. It seems to me impossible to say that a person traversing this distance in order to pass on to a different line of railway is still travelling upon the South-Eastern line. The by-law, the effect of which must be construed by the light of the statutory power under and by authority of which it has been made, and beyond which it cannot be carried, is therefore, in my opinion, inapplicable to the case. On these grounds I am of opinion that the conviction cannot be upheld.

LUSH, J. The question left open at the close of the argument, and upon which we took time to consider our judgment, was the validity of the by-law upon which the magistrate proceeded. It is in these terms: [Reads it.] It appears to me that the penal clause of this by-law is *ultra vires* and void, on the ground that the penalty it imposes for refusing to show the ticket is variable, and dependent on the accident of the ticket being demanded at an early or a late stage of the train's journey. A passenger who has travelled only the last ten miles in a train which has travelled a hundred miles is fined ten times as much as another who started at the station *a quo*, and whose ticket was demanded at the end of ten miles, although the offense of refusing to show the ticket is precisely the same in the one case as in the other. A by-law which has this effect cannot be deemed a reasonable by-law. The clause which precedes the penal clause seems to me equally objectionable; the passenger is not only required to show his ticket when demanded—a requisition which is perfectly reasonable, and which may be enforced by a reasonable penalty—but he is required to deliver it up, whatever the purpose may be for which it is demanded, and without any limitation as to the time at which the demand is made. A season ticket is a contract by which the company engages to carry the holder free of any further charge for a specified period between certain specified stations. Until that period has expired the holder is entitled to retain the ticket as his own property. He is bound to show it when required, in order that the company's servants may see that it is still in force, and that it entitles the owner to be where he is. The by-law would in terms justify the company in demanding it back on the first journey which the holder makes under it, though it be on the very day the ticket was purchased. The same objection applies to a journey ticket. The holder of such a

ticket is entitled to keep it till he has arrived at the station where the tickets for such a journey are collected. I do not intend, and am far from wishing to impute to the company that the by-law was framed with a view to its being so applied, or that they would sanction any arbitrary or capricious use of the power which it proposes to give. No instance has ever come to my knowledge in which any company, or any official, has shown a disposition so to act. Our duty, however, is to test it by established principles of law, and to regard what the by-law authorizes, and not how it is applied in practice, and so regarding it, I feel bound to hold that on this ground also the penal clauses of it are wholly void. I do not discuss the validity of that part of the by-law which imposes as a penalty for travelling without a ticket the whole fare from the starting station of the train. That point has been already decided by the Common Pleas Division. I am of opinion, for the reasons given, that the appellant is entitled to our judgment.

Judgment for appellant.

PROVISION FOR ATTORNEY'S FEE ON PROMISSORY NOTE.

PENNSYLVANIA SUPREME COURT, JANUARY 5, 1880.

JOHNSTON V. SPEER.

A promissory note negotiable in form but containing this: "With —, attorney's commission, if collected by legal process," held not a negotiable instrument.

ACTION by Levi Johnston upon two promissory notes indorsed to plaintiff by the defendant, Speer. The notes each read as follows:

\$583.48. BELLE VERNON, PENN., August 22, 1877.

Ninety days after date we promise to pay to the order of N. Q. Speer five hundred and eighty-three 48-100 dollars, with interest from date, at the banking-house of S. F. Jones & Co., without defalcation or stay of execution, value received, and without any benefit whatever from any valuation, appraisal or relief laws, and with — per cent attorney's commission if collected by legal process.

L. M. & W. F. SPEER.

The trial court held the notes to be not negotiable by reason of the provision as to attorney's commission. Plaintiff took a writ of error from a judgment for defendant.

D. Kaine, for plaintiff.

W. H. Playford, for defendant.

GORDON, J. If there is any thing positively settled with reference to an agreement in a bond, mortgage or note, for the payment of a fixed sum as attorney's commissions, it is that the sum so fixed belongs to the payee or mortgagee as a compensation for the expenses and trouble he may incur in the collection of the claim. It does not belong to the attorney who collects such claim, and it is not part of the costs of the case. *Faulkner v. Wilson*, 3 W. N. C. 339.

In *Robinson v. Loomis*, 1 P. F. S. 78, it was held that such an agreement could not be regarded as a penalty, but as an agreed compensation for expenses incurred by the mortgagee in consequence of the default of the mortgagor. According to this doctrine the stipulation for attorney's commissions would amount to an agreement for stipulated damages over which the courts would have no control as, in such case, the agreement of the parties would be the law of the case. *Westerman v. Means*, 2 id. 97. Following this rule the agreement in this case for blank attorney's commissions amounts to nothing, for the blank could be filled only by the subsequent agreement of the parties, and until so filled it would have no force whatever. But in

Daily v. Matland, 7 W. N. C. 103, a somewhat different doctrine is held; for Mr. Justice Sharswood, in delivering the opinion in that case, says: "This principle of liquidated damages is not applicable, however, to a contract for a loan of money; at least such stipulation is subject to the control of courts of equity." The effect of this decision is to give the agreement for commissions the character of a penalty, or of a stipulation that damages shall not exceed a certain amount. If we adopt this rule, then a stipulation to pay—attorney's commissions would be equivalent to contract to pay—damages; reasonable damages, or such damages as a court, at its discretion, might fix.

However this may be, there is one thing about which we feel little doubt; that is, that uncertain stipulations of this kind ought to have no place in negotiable paper. As was said in *Woods v. North*, 3 Nor. 407: "It is a necessary quality of negotiable paper that it should be simple, certain, unconditional, not subject to any contingency." It is certain that the note in suit does not meet the conditions above prescribed, for in any event the question what the parties meant by the blank is an open one, and may have to be settled by oral testimony.

Judgment affirmed.

COUNTIES NOT LIABLE FOR NEGLIGENCE.

NEBRASKA SUPREME COURT, NOV. 10, 1880.

WOODS V. COLFAX COUNTY.

A county is not, at common law, liable for injuries to persons travelling over a public bridge within its boundaries, caused by a defect in such bridge, existing by reason of the negligence of the county officials.

ACTION to recover damages for personal injury. The opinion states the facts. From a judgment for defendant upon demurrer, plaintiff took a writ of error.

Hoxie, Russell & Chambers, for plaintiff.

C. J. Phelps, for defendant.

MAXWELL, C. J. In the year 1876 the plaintiff was injured by the breaking down of a public bridge in Colfax county, and brought an action in the District Court of that county to recover damages therefor. The defendant demurred to the petition on the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained and the cause dismissed. The plaintiff brings the cause into this court by petition in error. The question presented is whether the county is liable for the neglect of the county commissioners in failing to keep a public bridge in safe condition. If the negligence complained of in the petition and subsequent injury to the plaintiff had been occasioned by a natural person or a municipal corporation proper, the right to recover would be unquestioned. But are counties municipal corporations? Municipal corporations may be defined to be bodies politic and corporate created by law for the purpose, primarily, of regulating and administering the local and internal affairs of towns, cities and villages. *Dillon on Mun. Corp.*, § 9. Such corporations are created principally for the benefit and convenience of the inhabitants composing the corporation, although they are important auxiliaries of the State in the administration of the law. The charters conferring powers, prescribing duties, and imposing burdens must in some way receive the assent of those to be governed by their provisions, and they thus accept the benefits and agree to perform the duties imposed upon them. These corporations have existed from the earliest period of the Roman republic. 2 *Kent's Com.* 268. But a county is not, in the proper sense of the word, a municipal corporation.

In *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, Chief Justice Parsons says: "We distinguish between proper aggregate corporations and the inhabitants of any district who are by statute invested with particular powers without their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds in England, and counties, towns, etc., in this State. Although *quasi* corporations are liable to information or indictment for a neglect of public duty imposed on them by law, yet it is settled in the case of *Russell v. Inhabitants of Devon* that no private action can be maintained against them for a breach of their corporate duty unless such action be given by the statute." To the same effect see, also, *Mower v. Inhabitants of Lancaster*, 9 Mass. 247; *Angell & Ames on Corp.*, § 629 and note; *White v. City Council*, 2 Hill, 571; *Ward v. County of Hartford*, 12 Conn. 404; *Freeholders of Sussex v. Strader*, 3 Harrison, 158; *Hedges v. County*, 1 Gillm. 567. A county is a mere local subdivision of the State, created by it without the request or consent of the people residing therein. As was said in the case of *Commissioners v. Mighels*, 7 Ohio St.: "A county organization is created almost exclusively with a view to the policy of the State at large, for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State, and are in fact but a branch of the general administration of that policy." Counties were not liable at common law for injuries caused in the manner set forth in the petition in this case, and our statute in force at the time of the alleged injury did not change the common-law rule. The Legislature undoubtedly possesses the power to make counties liable in cases of this kind, and some of the States have passed laws imposing such liability, but without such legislation we must adhere to the rule laid down in *Wehn v. Commissioners of Gage*, 5 Neb. 494. The judgment of the District Court is therefore affirmed. The costs taxed in the court below at \$32.50 appear to be exorbitant, but no objection is made on that ground, and in any event the proper remedy is a motion to retax. 4 *Kans.* 536.

Judgment affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

AGENCY—IN PURCHASE OF BONDS—EVIDENCE OF—ESTOPPEL—DECLARATIONS BY AGENT BEFORE EMPLOYMENT AS SUCH.—In an action to recover the amount paid by plaintiff for bonds, purchased by him and which it was claimed that defendant sold, which proved to be forged, it appeared that plaintiff obtained the bonds from K. & Co., a firm of brokers. This firm, he claimed, acted as his agents in the purchase, and there was evidence tending to show this fact. It appeared that they purchased the bonds for 74 and charged plaintiff 76 for them. *Held* (distinguishing the case from *Survey v. Womersley*, 4 El. & B. —), that the charge by the firm of an advanced rate to the purchaser was not conclusive proof that the firm sold as principals and upon their own account, but evidence pointing to that result for the jury. It was proved that before the firm became agents of plaintiff, defendant produced these bonds to the manager of the firm and asked if they were genuine, and the manager assured him that they were, the manager claiming to know the handwriting. Thereafter and on the faith of this assurance, defendant made a loan upon the bonds and they came into his possession. *Held*, that while the firm might have been estopped by the state-

ment, plaintiff could not be, while, as between the agent who does not disclose his principal, and the person dealing with him, such agent may be treated as the principal, and the equities of the other party enforced. As against the principal himself no estoppel can be sustained which does not rest upon his act or admission, or that for which he is responsible through an agency which he has created. In this case, *held*, that plaintiff could not recover from defendant the larger price paid K. & Co. instead of that paid defendant. If plaintiff was wronged by his own agent it furnishes no ground for recovering the excess from the defendant. Judgment reversed and new trial granted. *Greenwood v. Schumacker*, appellant. Opinion by Finch, J.

[Decided Oct. 5, 1880.]

EVIDENCE—PRESUMPTION—POSSESSION OF BILL OF LADING—ACCEPTANCE—WHEN COLLATERAL FACT MAY BE PROVED BY PAROL.—Plaintiff, to prove the ownership of a cause of action in relation to personal property of which defendants were consignors and one V. was consignee, put in evidence a bill of lading of such property. This bill of lading had been made more than six years previously, and it showed that plaintiff had not a personal right to it unless he had performed a condition precedent, namely, the acceptance of a draft that went with it. Defendants were not parties to the draft nor privies. Plaintiffs offered to prove the acceptance of the draft by parol. The trial court declined proof by parol and required the production of the draft. *Held* error. *Prima facie* defendants or V. had right to possession and control of the property, subject to the conditions of the bill of lading. *Lawrence v. Minturn*, 17 How. (U. S.) 100. But it is to be presumed that the bill came into plaintiff's hands honestly and in pursuance of the conditions endorsed upon it. When a party to a forensic proceeding tenders in support of his case a document, a court will presume that he did not come by it in a tortious way. *Littleton*, Bk. 3, ch. 5, §§ 375-377; *Roberts v. Bethel*, 12 C. B. 778. And as plaintiff could not rightfully claim to own the bill without having performed a condition precedent, it will be presumed, unless the contrary is shown, that the condition has been performed. *Defreest v. Bloomingdale*, 5 Denio, 304; *Boyd v. Foot*, 5 Bosw. 110; *Garlock v. Goertner*, 7 Wend. 198; *Alford v. Baker*, 9 id. 323; *Braman v. Bingham*, 26 N. Y. 493. As the ordinary and natural way to meet the condition of the bill of lading was to accept the draft, the presumption was that the draft was accepted, otherwise the party interested to have it accepted would have pursued the bill if it had been got from him wrongfully. And although the statute requires an acceptance to be in writing (1 R. S. 768, § 8) to charge the acceptor, it may be proved by parol where it is a collateral fact. A stranger to a written instrument may dispute the truth of its contents by oral proof, and so far as a controversy is with a stranger to it, a party to it may do the same. *McMaster v. Insurance Co.*, 55 N. Y. 222. *A fortiori* may a party to it in such a controversy prove by parol that it had existence? Thus, the fact of a tenancy may be proved by parol, though there be a written lease. *Rex v. Kingston upon Hull*, 7 B. & C. 611, recognized in *Augustine v. Challa*, 1 Exch. 279, though it is there held that the lease must be produced if it is sought to show that rent is due. See, also, *Whitfield v. Brand*, 16 M. & W. 282. The principle seems to be that the contents of a written instrument cannot be given in evidence by parol when the contract contained in it is the subject of the suit (*Strother v. Barr*, 5 Bing. 136), but as is the inference, the existence of the relation under the instrument and the fact of the existence of it may be. See *Davis v. Reynolds*, 1 Starke (N. P.) 115; *Spiers v. Willison*, 4 Crauch, 308; *Dennett v. Crooker*, 8 Greenl.

239. Judgment reversed and new trial ordered. *Sprague et al., appellants, v. Hosmer et al.* (Opinion by Folger, C. J.)

[Decided Dec. 9, 1880.]

RIPIARIAN RIGHTS—RIGHT OF OWNER TO ERECT BRIDGE ON FRESH WATER STREAM—CONSTITUTIONAL LAW—EXCLUSIVE RIGHT TO MAINTAIN BRIDGE—IMPAIRING CONTRACT.—Plaintiff, a bridge company, was incorporated by the Legislature in 1808 (chap. 113) to build and maintain a bridge over the Chenango river, and by its charter it was provided that it should not be lawful for any person to erect any other bridge over the same river within two miles either above or below the bridge to be erected by plaintiff. In pursuance of this charter, plaintiff erected a bridge over the river named. In 1855 (chap. 164), the Legislature incorporated the Binghamton Bridge Company, and authorized it to erect a bridge over the same river within not less than eighty rods above plaintiff's bridge, and to take tolls for the use of the same. In 1856, the last-named company built a bridge within one hundred rods of plaintiff and above it, and maintained it as a toll-bridge, until it and plaintiff's bridge were swept away by a flood. Defendant's testator was one of the principal promoters of the last erected bridge. He was one of the largest stockholders in the company, was a director at its organization, and its president from 1858 to 1863, when he died. He erected the bridge by contract and kept it in repair. Plaintiff, claiming that its charter was a contract that the Legislature would not authorize a bridge within two miles of its own, in 1856 commenced an action to enjoin the last-formed company from constructing and maintaining, as a toll-bridge or for public travel, the bridge it was building, and for damages. Plaintiff was defeated in this action in the State Courts (27 N. Y. 87). Upon appeal, the United States Supreme Court held that plaintiff's charter constituted an inviolable contract, and that so far as the charter of the Binghamton Bridge Company authorized it to maintain its bridge for public travel, it was null and void. In 1865, two years after testator's death, an unprecedented flood in the Chenango river swept away the bridge of the Binghamton Company, and carrying it against the plaintiff's bridge, that was swept away. In 1869, this action was commenced by plaintiff against defendant as executor of testator, for the loss of the bridge, and for the loss of tolls diverted by the last erected bridge, on the ground that that bridge was an unlawful structure, a nuisance; and as testator built and aided in maintaining it in his lifetime, he was liable for the injury caused thereby. It was not claimed that the bridge was negligently or improperly built. *Held*, that the action would not lie for the destruction of the bridge, but might be maintained for the diversion of the tolls. The Chenango river is subject to the right of navigation, the private property of the riparian owners (*Ex parte Jennings*, 6 Cow.); and such an owner has a right to erect a bridge for his own use so long as he does not interfere with the easement of the public, and such a bridge is not a nuisance. The Legislature, except upon making compensation, has authority in reference to such a stream only to protect the public easement. *Canal Com'r v. People*, 5 Wend. 423; *Wheeling Bridge case*, 18 How. 421; *Morgan v. King*, 36 N. Y. 454. It may give a license for a public ferry or bridge which is exclusive, but not for a private one. That which is authorized by law cannot be a public nuisance. *Crittenden v. Wilson*, 5 Cow. 105; *People v. Kelly*, 70 N. Y. 475. By authorizing the construction of the second bridge, the Legislature did not violate its contract with plaintiff, but only by authorizing its use as a public toll bridge. The fact, that the bridge was built designedly as a toll bridge, would not make defendants liable for the injury done by sweeping the plaintiff's

bridge away. The motive with which a lawful structure is erected does not render the owner liable for injury done by it without his fault. *Barclay v. Commonwealth*, 25 Penn. 503; *Moody v. Supervisors*, 48 Barb. 659; *Ely v. Supervisors*, 38 N. Y. 297; *Babcock v. City of Buffalo*, 1 Sheld. 317; S. C., 56 N. Y. 208; *Phelps v. Nowlen*, 72 id. 39. But the damages for diversion of toll stand on different ground. Testator was liable for the illegal act in which he took part. The statute giving the authority to do these acts was no protection, as it was void, neither were the decisions of the State courts under 2 R. S. 602. The amount of toll received by the Binghamton Company was *prima facie* the amount of tolls diverted. Judgment reversed unless plaintiff will stipulate to deduct amount allowed for loss of bridge. *Chenango Bridge Co. v. Paige et al., appellants*. Opinion by Earl, J. [Decided Dec. 14, 1880.]

SHERIFF—LEVY BY—WHAT CONSTITUTES—ATTACHMENT OF MONIES IN SHERIFF'S HANDS—CONSPIRACY TO DO LAWFUL ACT.—(1) A sheriff holding an execution against defendants entered their store, announced to them that he levied upon the stock of goods there present, indorsed a memorandum of the levy upon his execution, and left the goods in charge of one of the defendants. *Held*, a levy there was enough to make the sheriff liable as a trespasser if not protected by his process, and also to make him responsible to the parties interested for the value of the levy. *Camp v. Chamberlain*, 5 Den. 196; *Barker v. Binninger*, 14 N. Y. 270. (2) The rule, that money actually collected and in the sheriff's hands is not liable to attachment, being *custodia legis* (*Wilder v. Bailey*, 3 Mass. 389; *Pollard v. Ross*, 5 id. 319) has not been adopted in this State, was questioned in *Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 145, and the right to attach a fund in the custody of an officer of the court sustained. The rule would, if adopted, graft upon the code an exception the Legislature has not made (§ 231). Until an attorney's lien upon a judgment is asserted by the party entitled to it, the judgment is the property of the judgment creditor. A sheriff or the court cannot treat it otherwise. Without notice of the claim, the lien cannot be enforced. *Martin v. Hawks*, 15 Johns. 406; *Ackerman v. Ackerman*, 14 Abb. 284; *Crocker on Sheriffs*, § 283. (3) It cannot be shown in an action against the sheriff for not returning an execution within sixty days, in which a defense was that the judgments of plaintiff had been attached in other suits, that there was a conspiracy between the attachment creditors, the debtor in the judgment and the sheriff, to prevent the collection of plaintiff's debt, the purpose for which the attachments were issued being perfectly lawful. *McIntyre v. Mancius*, 18 Johns. 600; *Place v. Munster*, 85 N. Y. 95; 2 *Addison on Torts*, 740. Judgment affirmed. *Wehle, appellant v. Connor*. Opinion by Finch, J. See same case in former appeals. 63 N. Y. 258, and 69 id. 548. [Decided Dec. 21, 1880.]

UNITED STATES SUPREME COURT ABSTRACT.

APPEAL—FROM SUPREME COURT DISTRICT OF COLUMBIA—AMOUNT IN DISPUTE MUST EXCEED \$2,500.—This case is governed by *Railroad Company v. Grant*, 98 U. S. 398. In that case it was held that the act of February 25, 1879 (20 Stats. 321, chap. 99, §§ 4, 5), took away the right of this court to hear and determine cases from the Supreme Court of the District of Columbia where the matter in dispute did not exceed \$2,500, and that it operated on pending cases which had been brought here under the provisions of section 847 of the Revised Statutes of the District. This case

came here under section 848, which provided for the allowance of appeals and writs of error by the justices of this court under certain circumstances, when the matter in dispute was less than \$1,000, the then general jurisdictional amount, but exceeded \$100. There is no reservation in the repealing act as to this class of pending cases any more than the other. Both sections have reference to the same general subject-matter, that is to say, the review by this court of the judgments and decrees of the Supreme Court of the District in cases where jurisdiction has been made to depend on the value of the matter in dispute. Under the act of 1879 the court can no longer hear any of that class of cases, unless the amount exceeds \$2,500. Appeal from the Supreme Court, District of Columbia, dismissed. *Dennison et al., appellants, v. Alexander*. Opinion by Waite, C. J. [Decided Dec. 13, 1880.]

ATTORNEY—KNOWLEDGE OF, KNOWLEDGE OF CLIENT—BANKRUPTCY.—On the question whether the plaintiff in a judgment on which goods were taken in execution knew of the defendant's insolvency and of the intent to evade the bankrupt law, the knowledge of plaintiff's attorney is the knowledge of plaintiff. Where the debtor was son of the plaintiff and actively contributed to having judgment rendered before it could have been done without such aid, this was procuring his goods to be taken on execution within the meaning of the 35th section of the bankrupt law as modified by the act of 1874. The case of *Hoover v. West*, 81 U. S. 308, was one in which a creditor had procured a confession of judgment and a levy on property of a debtor, who was declared a bankrupt within four months thereafter. The creditor had sent his note to a collection agency in Philadelphia, which had sent it to their corresponding attorney in Nebraska, where the judgment was taken. The creditor knew nothing of what was done until the money was made by sale of the goods, and had given no direction as to the mode of proceeding, and held no communication with his attorney. This court held that the attorney was the agent in the transaction of the collecting agency and not of the creditor, and that he could not be held to know what the attorney knew in regard to the insolvency of the debtor, and other matters in the case. Three of the judges dissented from this view. But an examination of the opinion will show that all were agreed that if the creditor had sent the note directly to the attorney, the latter would then have been the agent of the creditor, whose acts and whose knowledge, obtained in the course of the employment, would have been the acts and the knowledge of his principal. And such is the true rule of law. See, also, *Wilson v. City Bank*, 17 Wall. 487; *Little v. Alexander*, 21 id. 501. Decree of U. S. Circuit Court, Minnesota, reversed. *Rogers, appellant, v. Palmer*. Opinion by Mellor, J. [Decided Dec. 6, 1880.]

FEDERAL QUESTION—WHEN THIS COURT CAN LOOK BEYOND.—Upon an appeal from a State court on the ground that a Federal question is involved, this court can only look beyond the Federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the State court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the Federal question. *Murdock v. Memphis*, 20 Wall. 591. Judgment of California Supreme Court affirmed. *McLaughlin, plaintiff in error, v. Fowler*. Opinion by Waite, C. J. [Decided Dec. 13, 1880.]

MUNICIPAL BONDS—FRAUDULENT ISSUE OF—ANTICIPATING SO AS TO GIVE APPARENT VALIDITY—RECOVERY FROM CITY OF MONEY PAID AS A MISTAKE.—By

a statute of Missouri, passed in 1872, any bond issued by a city, to become valid, must be registered in the books of the State auditor. Before that time this was not necessary. In 1867 the city of Louisiana, in that State, which had authority to borrow money, by ordinance authorized its city fund commissioner to sell its bonds, and in 1871 provided for an issue of certain bonds, to be used in funding the city indebtedness, then maturing. In July, 1872, after the statute mentioned had gone into effect, the proper officers of the city, for the purpose of paying its debts and to meet current expenses, issued a number of bonds payable to bearer and with the corporate seal attached. In order to evade the operation of the statute the bonds were antedated to January 1, 1872, and contained recitals that they were issued under the authority of the city charter and the ordinance of 1867. The bonds also stated that they were signed and sealed on the 1st of January, 1872. The bonds thus executed were, without being registered, placed by the fund commissioner in the hands of a respectable stock and bond broker in St. Louis, to sell for the account of the city. On the 25th August, 1873, the broker and agent sold and delivered these bonds to the plaintiff below and others, who purchased for value in good faith, believing that the recitals in the bonds were true and that they were what they purported to be, obligatory upon the city. The city received from the broker the price paid by plaintiff (which was 90 per cent of the full value), less five per cent on such value as commission to the broker for the sale. *Held*, that although the bonds were invalid (*Anthony v. Jasper Co.*, 101 U. S. 897), the city was liable for the money paid by plaintiff therefor as money paid the city by plaintiff by mistake. The city, by putting the bonds out with a false date, represented that they were valid without registry. The bonds were bought and the price paid under the belief, brought about by the conduct of the city, that they had been put out and had become valid commercial securities before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. The city could lawfully borrow. As the purchasers were kept in ignorance of the facts which made the bonds invalid, they did not knowingly make themselves parties to any illegal transaction. They bought the bonds in open market, where they had been put by the city in the possession of one clothed with apparent authority to sell. The only party that has done any wrong is the city. In *Moses v. Macferlan*, 2 Barr. 1012, it is stated as a rule of the common law, that an action "lies for money paid by mistake, or upon a consideration which happens to fail, or for money got through imposition." The present action can be sustained on either of these grounds. The money was paid for bonds apparently well executed, when in fact they were not, because of the false date they bore. This was clearly money paid by mistake. The consideration on which the payment was made has failed, because the bonds were not in fact valid obligations of the city. And the money was got through imposition, because the city, with intent to deceive, pretended that the false date the bonds bore was the true one. While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back. As was said in *Marsh v. Fulton Co.*, 10 Wall. 684, "the obligation to do justice rests upon all persons, natural or artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation." U. S. S. Ct. Judgment of U. S. Circuit Court, E. D. Missouri, affirmed. *City of Louisiana, plaintiff in error, v. Wood*. Opinion by Waite, C. J. [Decided Nov. 29, 1880.]

GEORGIA SUPREME COURT ABSTRACT.

CONFLICT OF LAW — PLEA OF DISCHARGE IN BANKRUPTCY TO SUIT ON JUDGMENT SINCE DISCHARGE IN ANOTHER STATE.—Where a suit brought in Georgia on a judgment rendered in the State of Tennessee, the defendant pleaded his discharge in bankruptcy, and it appeared that he was adjudged a voluntary bankrupt pending the suit in Tennessee, but failed to plead that fact to ask a stay of the proceedings on that account, and the judgment was subsequently rendered, and he thereafter obtained his discharge, *held*, that the plea was a valid bar to a recovery. The Tennessee judgment did not constitute a new debt, but simply a new security for the old debt, and of itself had no force or effect in Georgia. *Anderson v. Anderson*. [Decided Nov. 16, 1880.]

CORPORATION — SUBSCRIPTION TO STOCK PROCURED THROUGH FRAUD.—Though a subscription to the stock of an insurance company may have been induced by fraudulent representations, yet the subscriber cannot recover the amount paid, if there are creditors to an equal or larger amount on debts contracted after his subscription. As to such debts, the funds of the corporation, including his subscription, are held in trust for their payment. *Turner v. Granger's Life and Health Insurance Co.* [Decided Nov. 23, 1880.]

MUNICIPAL CORPORATION — NOT LIABLE FOR INJURY BY COW PERMITTED TO RUN IN STREETS.—A municipal corporation is not liable for damages resulting from a failure on the part of its council to perform, or an improper performance of those powers and duties which are legislative or judicial in their character. For damages resulting from their neglecting to perform or negligence in the performance of those duties which are purely ministerial, it would be liable. There is no sound distinction as to such liability between a failure to pass an ordinance in the first instance and its repeal or suspension after being passed. Therefore, where a city council passed an ordinance forbidding the running at large of cattle in its streets, but subsequently suspends its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health and good appearance, one who was gored by a cow running at large in the streets would not have cause of action against the city. Nor would the principle be altered by the fact that the owner paid a municipal tax on the cow. *Rivers v. City Council of Augusta*. [Decided Nov. 23, 1880.]

NEW JERSEY COURT OF CHANCERY ABSTRACT.

MAY TERM, 1880.*

DIVORCE — ACQUIESCENCE BY WIFE IN ADULTERY BY HUSBAND PRECLUDES.—In May, 1870, a husband was divorced from his wife by the decree of a court of competent jurisdiction of the State of Illinois. The certificate of that decree states that the wife was duly served with process. The wife, in a suit for divorce commenced in 1878, denies (in her testimony) that she received the notice of the suit, which was sent to her address, but she does not attack the *bona fides* or validity of the decree. In December, 1871, the husband married again, and has now living two children, the issue of the last marriage. Before his divorce he gave to the first wife a house in this State, and ever since then has voluntarily provided for her and her children. In January, 1878, he dismissed two of her sons from his employ, and she admits that, apprehending that he was about to cease supporting her and her children, she filed a bill for divorce, alleging adultery

* Appearing in 5 Stewart (33 N. J. Eq.) Reports.

with his second wife. *Held*, that the divorce must be denied, on the ground of acquiescence and connivance. *Ross v. Ross*, L. R., 7 P. & D. 734; *Thomas v. Thomas*, 2 Sw. & Tr. 113; *Nichols v. Nichols*, 10 C. E. Gr. 80; *Singer v. Singer*, 41 Barb. 139. *Yorston v. Yorston*. Opinion by Runyon, Chancellor.

EASEMENT—RIGHT OF WAY BY PRESCRIPTION—WHEN EQUITY WILL PROTECT.—A right of way acquired by prescription is commensurate with and measured by the use, and the owner of the land has no right to do any thing which will hinder or obstruct such use. An owner of the land erected a gate in a lane that had been used without such gate for more than twenty years. *Held*, that equity would relieve and protect the owner of the easement in his use of the lane unobstructed by such gate. *Shifers v. Shifers*. Opinion by Runyon, Chancellor.

WILL—CONSTRUCTION OF—LEGATEE OF PERPETUAL ANNUITY TAKES FUND.—Where an intention to give a perpetual annuity is apparent in the will, the legatee will be held entitled to the fund itself. Testator gave, after other bequests, to his nieces and to their heirs and descendants an annuity of \$200 each. *Held*, that the residue of testator's estate, his nieces being dead, some of them leaving children, went to such children. The rule is, that when the interest or produce of a legacy is given to, or in trust for, a legatee, or for the separate use of such legatee, without limitation as to continuance, the principal will be considered as bequeathed also. 2 Roper on Leg. 1478; *Craft v. Snook*, 3 Beas. 121; *Gulick v. Gulick*, 10 C. E. Gr. 324; S. C., 12 Id. 498. And where the intention to give a perpetual annuity is apparent in the will, the intention will prevail, and the legatee will be held to be entitled to the fund. 2 Roper on Leg. 1482; *Stoker v. Heron*, 12 Cl. & Fin. 181; *Crough v. Wyun*, 2 Madd. 168; *Phillips v. Chamberlaine*, 4 Ves. 81; *Parsons v. Parsons*, L. R., 8 Eq. 200. The words, "or their descendants," or "their heirs and descendants," are merely words of substitution. *Jones v. Torin*, 8 Sim. 65. A gift to A. "or to his heirs," "or to his representatives," is an absolute gift to A. on condition that he is alive at the death of the testator, but if he dies in the life-time of the testator, the gift takes effect in favor of the other persons described as substitutes of the primary legatee. *Gittings v. McDermott*, 2 Myl. & K. 73; 2 Wms. on Ex'rs, 656, et seq.; *Brokaw v. Hudson*, 12 C. E. Gr. 135; *Yates v. Madden*, 16 Sim. 613; *Potter v. Baker*, 15 Beav. 489; *Taylor v. Martindale*, 12 Sim. 188. *Huston v. Reed*. Opinion by Runyon, Chancellor.

WILL—TRUSTS NOT EXHAUSTING ESTATE, TRUST IN SURPLUS RESULTS TO NEXT OF KIN—EQUITABLE ESTATES—PARTIAL INTENTAC—WHO ENTITLED TO SHARE IN ESTATE—WIDOW.—It is a settled doctrine of equity jurisprudence that where personal estate is given by will to a trustee, upon certain trusts, and the purposes of the trust do not exhaust the whole estate, or the trusts fail, the trustee shall not take the surplus for his own benefit, unless such appears to have been the intention of the testator, but a trust will result in favor of those who are entitled under the statute of distribution as the next of kin of the testator. Equitable estates are treated in equity as legal estates, and are held to be subject to the same incidents, properties and consequences that similar legal estates are at law. In cases of partial intestacy, both the next of kin and the widow take under the statute of distribution, and one cannot acquire a right to distribution unless the other does also. In cases of partial intestacy, the persons entitled to distribution take, not in pursuance of the intention of the testator, but by force of law, and regardless of what his intentions may have been. The widow is entitled to participate in the distribution of that part of a testator's estate as to which he dies intestate. 2 Williams on Ex'rs, 1475; 1 Perry on Trusts,

§§ 152, 155, 158; *Story's Eq. Jur.*, § 1206; *Hill on Trusts*, 112; *Nickerson v. Bowley*, 8 Meta. 430; *Cushing v. Blake*, 3 Stew. Eq. 605; *Handy v. Maroy*, 1 Id. 80; *Davies v. Dewes*, 3 P. Wms. 40; *Dicks v. Lambert*, 4 Ves. 725; *Oldham v. Carleton*, 2 Cox, 389; *Ex parte Kempton*, 23 Pick. 163; *Dale v. Johnson*, 3 Allen, 384. *Stillinger's Executor v. Stillinger's Executor*. Opinion by Flood, Vice-Chancellor.

FINANCIAL LAW.

AGENCY—AUTHORITY TO MAKE TIME AND SIGHT DRAFTS NOT AUTHORITY TO MAKE POST-DATED ONES.—A general agent had authority to draw drafts in the name of his principal on sight or time. *Held*, that this did not give him authority to draw post-dated drafts, and that where he obtained the discount of a draft post-dated, accompanied by a draft of the date of the day of the discount, as collateral, to be used only in case the agent should die before the date of the discounted draft, the post-dating of the draft was sufficient to put the bank discounting it upon inquiry as to the agent's authority. To charge the transferee of negotiable paper with the equities, he must have had actual notice of them, or at least, he must have had knowledge of such facts and circumstances as would have made his taking the paper with the intention of enforcing it an act of bad faith. *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. 100; *Phelan v. Moss*, 67 Penn. St. 62; *Hamilton v. Vought*, 84 N. J. 157; *Magee v. Badger*, 84 N. Y. 247; *Crosby v. Grant*, 35 N. H. 273; *Farrell v. Lovett*, 65 Me. 326; *Commercial Bank v. First Nat. Bank*, 30 Md. 11; *Spooner v. Holmes*, 102 Mass. 568; *Mathews v. Poytheers*, 4 Ga. 287; *Bottomley v. Goldsmith*, 35 Mich. 27. But no banker, to whom paper should be presented for discount by a third party before the time of its date, would look upon the offer as so far an ordinary occurrence that he would take it with the same promptitude as he would any other paper of equal apparent responsibility, and on the supposition that he had as little occasion to inquire into the circumstances of its issue. But in this case the paper was not only post-dated, but it was issued under a claim of agency, and the question of power was involved. It was the plain duty of a party proposing to take it to take notice of whatever was unusual, either in the form of the paper, or in the accompanying circumstances, which might tend to raise doubts in his own mind whether the authority which was asserted had in fact an existence; and among the most important of these circumstances would be those which indicated that the paper afforded special opportunities for fraud upon the alleged principal. He would not be at liberty to look exclusively at the facts which lead to one conclusion, and to disregard merely suspicious circumstances because in themselves they were inconclusive; for the fact of authority or apparent authority is one to be deduced from all the circumstances, and he must at his peril take them all into consideration. It is no doubt the fact that a post-dated draft, purporting to be payable at sight, is for all the legal purposes of presentment, demand, protest and payment, a draft payable a certain time after date. But in order that authority to make time paper shall be held to cover post-dated paper, their legal effect must not only be the same but all their incidents so far identical that we may fairly suppose both were in mind when the authority was given; for the authority is not to be construed on technical reasoning but by intent. Is this the case? Unfortunately judicial decisions throw but little light upon the subject. In *Foster v. Mackreath*, L. R., 3 Exch. 163, it was decided that authority to draw a check did not authorize drawing a post-dated check, because, "so far as regards its practical effect, a post-dated check is the same thing

as a bill of exchange at so many days' date as intervene between the day of delivering the check and the date marked upon it." And see *rs Brown*, 2 Story, 502; *Andrew v. Blackley*, 11 Ohio St. 88. But while a bill of exchange is usually allowed days of grace, a post-dated check is not. *Mohawk Bank v. Broderick*, 10 Wend. 204; 8 C., 10 id. 133; *Salter v. Burt*, 30 id. 205; *Taylor v. Lip*, 30 N. J. 284. The proposition, therefore, that authority to draw bills include authority to draw post-dated checks is one which could not be supported. The two classes of instruments are similar, but they are not in legal effect identical. But a post-dated bill differs also from a bill payable a corresponding number of days after it is drawn. It is true that the question of the right to days of grace might be settled by the terms of the bill itself, but there would be an important difference in this, that the time bill would be subject to be sent forward for acceptance while the post-dated bill would not. The latter must stand upon the responsibility of the drawer until the time of date arrives. It could not be dishonored by refusal to accept it before its date, because the drawer does not undertake to have funds in the drawer's hands to meet it before that day arrives; and the drawee, if he were in funds to meet it, could not retain them for the purpose as against other bills drawn and payable before the date arrived. *Godin v. Bank of Commonwealth*, 8 Duer, 76; *Champion v. Gordon*, 70 Penn. St. 474, 478. Michigan Supreme Court, October 13, 1880. *New York Iron Mine Co. v. Citizens' Bank*. Opinion by Cooley, J.

PARTNERSHIP—ACCEPTANCE OF DRAFT BY AGENT OF FIRM—WHEN PARTNERSHIP ENDS—POWER OF PARTNERS AFTER DISSOLUTION—ACCEPTANCE OF DRAFT AFTER DISSOLUTION.—(1) Where one firm was indebted to another firm, and after dissolution of the first it employed a member of the latter firm to close and wind up its business and pay its debts, and such agent, acting in behalf of his own firm, drew drafts in the name of his firm, payable to themselves, and procured a person who had before been the manager of the first firm to accept the same in his own name as lessee, supposing he had such authority, but not giving or attempting to give such manager any authority to accept for his principals, it was held, that the first named firm was not liable on the acceptances, it appearing that such manager at the time had no authority to accept the drafts on behalf of his principals. (2) If a partnership is formed for a single purpose or transaction, it ceases as soon as the business is completed, or whenever there is an end put to the business; and although a partnership is entered into for one year, it may be terminated by mutual consent at any time the partners may choose. Where partners, by resolution, determine to leave the business and wind up the same, and appoint one of their number or a third party to take charge of the property and accounts and to dispose of their property and collect their accounts, this will amount to a dissolution of the partnership and the revocation of the powers of any other agent before that time acting for the firm. In the absence of stipulation to the contrary, in case of dissolution, every partner is left in the possession of the full power to pay and collect debts due the firm, to apply the partnership funds and effects to the discharge of their own debts, to adjust and settle the unliquidated debts of the partnership, to receive any property belonging to the partnership, and to make due acquittances, discharges, receipts and acknowledgments of their acts in the premises. While the dissolution does not revoke the authority to liquidate, settle and pay debts already created, it operates as a revocation of all authority for making new contracts, and since the giving of a promissory note or the acceptance of a bill or draft, is the making of a new contract, although it may be for a firm debt, a partner after dissolution

cannot thus bind the firm, or authorize another to do so. (3) Although a partnership may exist in the name of one as lessee, who is merely the agent of the firm, to transact a particular business, as the manufacture of brick, and not a member of the firm, it will not be bound by such agent, making or acceptance of commercial paper, without direct and specific authority from the firm, or some member thereof before dissolution, or unless the firm or some member during the existence of the partnership, ratified the act of such agent. To hold the members of a partnership liable for commercial paper, executed or accepted by direction of one member after the dissolution, on the ground that the person taking and discounting such paper in the late firm name and style was ignorant of the dissolution, it must be shown that the members constituting the partnership were known to the person so discounting such paper previous to the time of taking and discounting the same, especially where the acceptance fails to show who composed the firm. Illinois Supreme Court, November 11, 1880. *Bank of Montreal v. Page*. Opinion by Scholfield, J.

INDORSEMENT—WHEN HOLDER OF NEGOTIABLE INSTRUMENT CANNOT RECOVER FROM ACCOMMODATION INDORSER.—Weller & Son made a negotiable note payable to Callahan. Callahan indorsed his name on the back of the note and returned it to them, and they presented it at a bank and had it discounted for their own benefit. Held, that the bank could not recover against Callahan. The law will not presume that he indorsed it for accommodation, but will presume that it was paid. *Long v. Bank*, 1 Litt. 290; *Beane v. Real Estate Bank*, 4 Ark. 546; *Bank v. Hammett*, 50 N. Y. 188. The cases holding the indorser liable were so held upon facts being established, distinctly showing the indorsement was made for the accommodation of the person by whom it was delivered to the holder. *Woolfork v. Bank*, 10 Bush, 504; *Young v. Harris*, 14 R. Mont. 556; *Rogers v. Paston*, 1 Metc. 643. Kentucky Court of Appeals, October 12, 1880. *Callahan v. First National Bank of Louisville*. Opinion by Cofer, C. J.

WHEN INDORSER AFTER MATURITY NOT LIABLE.—The indorsement of a note after maturity is in effect the drawing of a new bill, payable on demand; and to hold the indorser, demand and notice of non-payment are essential. *Stuart v. Redfield*, 13 Kans. 550. After the indorsement of a note after maturity, J., the indorser, held the note in his care and custody for B., the indorsee, and at her instance, from March 1, 1874, to January 11, 1875, for safe-keeping in a bank of which J. was the president and cashier. The indorsee took actual possession of the note on January 11, 1875, and brought an action thereon against the maker. Failing to collect all the judgment from the maker, or the mortgaged property, on May 11, 1875, an action was brought against J., as indorser. No other demand was made than the institution of the suit on January 11, 1875, no notice of non-payment was given, and such notice was not waived. Held, that the indorser was not liable. *Braine v. Spaulding*, 53 Penn. St. 247 distinguished. Kansas Supreme Court, July term, 1880. *Shelby v. Judd*. Opinion by Horton, C. J.

NEW BOOKS AND NEW EDITIONS.

ABBOTT'S YEAR BOOK OF JURISPRUDENCE.

The Year Book of Jurisprudence for 1880. By Benjamin Vaughan Abbott. A compend of the most recent Statutes, Leading Cases and General Information upon the Progress of the Law. Boston: Little, Brown & Co. 1880. Pp. vi, 643.

THIS volume is a combination of a succinct digest and a legal journal. It is a convenient magazine of reference to ascertain what has been decided, enacted, written, and published during the year from July, 1879, to July, 1880. The matter is arranged in

double columns, under headings after the manner of a digest, and there is a table of cases. It is an interesting and useful compilation.

CURTIS' FEDERAL JURISPRUDENCE.

Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States. By Benjamin Robbins Curtis, LL.D. Edited, with Notes, by George Ticknor Curtis and Benjamin R. Curtis. Boston: Little, Brown & Co. 1890. Pp. xviii, 898.

This is a volume of lectures delivered at the Harvard Law School in 1872-3, by the late Judge Curtis. The lectures were extemporaneous, but were taken down in short hand, and have been published without any change of text. References to statutes and decisions and some notes have been added by the editors. No man was better qualified to treat of this subject than the distinguished lecturer, and the lectures give a remarkably concise and comprehensible view of the subject. The style however is naturally somewhat familiar and diffuse, and might well have been occasionally pruned, by the editors, of matters appropriate in an oral lecture, but superfluous in a treatise. The volume constitutes a valuable member of the excellent "Students' Series."

CORRESPONDENCE.

DISAGREEMENT OF JURIES.

Editor of the Albany Law Journal:

In commenting on the proposal of the *Kentucky Law Reporter*, you remark that a jury of one man might be better than twelve, because he could never disagree. This reminds me of the anecdote of a case of the kind in a justice's court. A jury had been demanded, but there was difficulty about getting a jury together. One jurymen had appeared and it was finally agreed by the court that they would try the case by a jury of one. Accordingly the case was tried and the jury (of one) retired to consult of their verdict, under the charge of an officer. After waiting an hour or two the jury were called into court to see if they had agreed on their verdict, and the foreman informed the court that they had not agreed and that there was no prospect of their agreeing. And the court sent the jury out again, and waited two or three hours longer for the result, when they were again called into court, and they informed his honor that they had not agreed and there was no prospect of any agreement. The hour being late the jury was then discharged without a verdict. This may have been a farce, but if it was, it was no more so than are one-half of our jury trials.

DETROIT.

[See Albert Mathews' "Bundle of Papers"—*"The Divided Jury,"* noticed 19 Alb. L. J. 523.—ED. ALB. L. J.]

NOTES.

THE current number of the *Southern Law Review* is a very strong one. It contains the following leading articles: Modern legislation touching marital property rights, by Henry Hitchcock; Power of municipal corporations to borrow money, by Judge Dillon; Late works on private international law, by Dr. Wharton; Expert evidence, what it is, by F. J. Van Vorhis; a Study in the law pertaining to covenants of warranty, by James O. Pierce, the Panama Canal and the Monroe doctrine, by Charles R. Grant. Mr. Hitchcock's article is an excellent history of the status of married persons at common law as to property, and a review of the modern legislation in favor of the wife, with a pretty strong intimation that the wife has got more than her rights. Dr. Wharton, speaking of the recent works of M. Laurent, Mr. Westlake and Mr. Lawrence, says: "The chief characteristic of M. Lan-

rent's book is eloquent dissertation; that of Mr. Westlake is curt decision; that of Mr. Lawrence is accumulation of precious material. M. Laurent works as the orator in the lecture room; Mr. Westlake as the judge on the bench; Mr. Lawrence as the investigator in the library. M. Laurent kindles enthusiasm; Mr. Westlake gives direction; Mr. Lawrence imparts education." Judge Dillon's article is based on his remarks on the same subject in his forthcoming edition of his work on Municipal Corporations. Mr. Van Vorhis' article is an examination of the question whether an expert witness can be compelled to give his opinion in evidence without receiving a satisfactory compensation. He cites the conflicting cases of *Buchanan v. State*, 59 Ind. 1; S. C., 25 Am. Rep. 619, note, and *Ex parte Dement*, 53 Ala. 389; S. C., 25 Am. Rep. 611; but he omits any reference to *Summers v. State*, 5 Tex. Ct. App. 365; S. C., 32 Am. Rep. 573, agreeing with the latter.—St. Louis is growing as conceited as Boston. In a book notice in the *Southern Law Review* we find this: "It is needless to add that the law-printing of the 'Riverside Press' almost rivals in excellence that done in St. Louis, but some superiority must yet be accorded to their western competitors." It would be hard to find handsomer law books than St. Louis produces, but their publishers learned their business in Boston.

In the Federal Supreme Court the attorney-general of the United States presented a series of Resolutions of the bar on the retirement of Mr. Justice Strong, accompanying them with appropriate remarks, to which the chief-justice responded as follows: "We are glad to receive from the bar this expression of their regard for Judge Strong. It is but simple justice to say that during the ten or more years he held a seat on this bench, he never for a moment forgot what was due to the place he so ably filled. His judgment was always the result of his honest convictions of what was right, and we, who have known him in the intimacy of long personal and official intercourse, shall ever bear witness to his purity of character as a man and of his eminent ability as a judge. We part with him on the bench with sincere regret. The resolutions of the bar, with the remarks of the attorney-general, in presenting them, will be entered on the records of the court, and we shall take pleasure in sending a copy to Judge Strong, as requested."

The author of the "Rye and Rock" brief is Mr. A. H. H. Dawson, of New York city. A number of trade-mark lawyers think his argument was sound, and that "Rye and Rock" would indicate rock candy dissolved in rye whisky only to those who happened to know it.—We regret to learn that the Hon. Wm. Beach Lawrence is seriously ill from excessive mental exertion. His labors for many years have been very great, and their results extremely beneficial to the public. Our readers will join us in the hope that he may speedily find relief from the enforced repose which he is taking, and that we shall not be deprived of further results from his exceptional experience, learning, and devotion in the field of international law.—It is said that Chief Justice Cockburn's researches upon the authorship of Junius will be published.—The Chief Justice of Austria, Dr. Anton von Schmerling, Knight, celebrated, on Nov. 17th, the fiftieth anniversary of the day on which he received the degree of "Doctor Juris" from the University of Vienna. Deputations from the Imperial Supreme Court, from the Department of Justice, from the Academy of Sciences, the University, the College of Doctors, the Bar Associations, the Notaries' Association and others, offered their congratulations. The University renewed the diploma, referring in the renewal to the eminent services of the Chief Justice to the State, particularly as Minister of Justice, which position he occupied some time ago.

The Albany Law Journal.

ALBANY, JANUARY 8, 1881.

CURRENT TOPICS.

MR. RICHARD GRANT WHITE ought to read Mr. Redfield's recent book on "Homicide, North and South." In respect to this particular offense it could not fail to convince him that education is not a promoter of crime. Mr. Redfield makes the following startling assertions (we copy from *The Nation*): "More men have fallen in personal combat at the South since 1840 than were killed in battle on both sides in the rebellion (p. 120); in the same section there have been more homicides since the war than there have been deaths from yellow fever (p. 126) — this number is at least 40,000 (p. 10). In Texas there were more assassinations in 1878 than homicides of all kinds in Massachusetts in 1877-78 (p. 64), and always there are more manslaughterers at large than in confinement (p. 77). In South Carolina there were three duels in 1878, against none among the more than thirty millions of the Northern population (p. 90); and of a single affray in Edgefield, which 'leads us into accounts of seven different homicides,' all the survivors were acquitted on trial (p. 91). The number of homicides along the route of the Cincinnati Southern Railway from Cincinnati to Chattanooga, 'during its construction through Kentucky and Tennessee, I believe to be equal to half the length of the road measured in miles — that is, for every two miles of road there was a man murdered in the vicinity of the line' (p. 107). The population of three sample Southern States — Texas, Kentucky, and South Carolina — is less than that of New England by half a million, but the homicides are eighteen times as numerous (p. 15); there are often more in Kentucky in a month than in Massachusetts in a year, and as many in South Carolina in two as in Massachusetts in ten years (pp. 14, 18), though the Northern State has much the larger population in each case. In Massachusetts, the ratio of killing has decreased with the increase of population — ten per cent against eighteen per cent in 1869-78 (p. 154); in South Carolina, crimes against the person show no diminution under Hampton as compared with those committed under Chamberlain and Scott (p. 105). In Mississippi, according to the *Vicksburg Herald* of May 25, 1879, there is an average of a murder a day (p. 152). At the South the highest ratio of homicide is in the country, at the North in the cities (p. 31). The foreign element forms less than two per cent of the population at the South (p. 15), and in Mississippi, for example, 'so far from the foreigners being the cause of so much murder, it is more probable that so much murder accounts for there being so few foreigners' (p. 153)." Mr. Redfield attributes this excess of homicides in the South to the practices of carrying concealed weapons and drinking whisky. There is, however, a great deal

of the former practice at the North, and probably quite as much of the latter there as at the South. We should incline to attribute it rather to the warmth of the climate, and the consequent exuberance of the emotions and exasperation of the passions. This view is supported by the alleged fact, brought out by Mr. Redfield, that there is a similar excess in the southern half of Ohio, Indiana, and Illinois, as compared with the northern. These statistics cannot be accounted for in the South by the theory of a conflict of races, for they date from a time when the southern whites had a pecuniary interest in being careful of the lives of the blacks. Even now, although very few white men are killed by the black, yet the white and the black seem to kill those of their own color without scruple. Thus, according to Mr. Redfield, in Texas, South Carolina, and Kentucky, in 1878, although only 16 whites were killed by blacks, and 100 blacks were killed by whites, yet 434 whites were killed by whites and 98 blacks by blacks. In connection with this subject, we remark the present prevalence of an epidemic of lynching. Since December 2d there have been 12 lynchings, of which eight were of colored persons, and one was of a woman; eight were in the Southern States, two in New Mexico, one in Nevada, and one was in the peaceable State of Pennsylvania.

Mr. Brown, the Nebraska State reporter, has appended to the last volume of his reports two indexes, one of 61 pages, constructed in the ordinary manner, consisting of a literal reproduction of the head-notes, and another, of 10 pages, consisting of short references, similar to the head-lines and catch-words used by many reporters. In his preface he states his purpose to be to obtain the opinions of the profession as to the propriety of substituting the latter kind of index for the former, and he particularly calls our attention to this subject and asks our opinion on it. Mr. Brown says he "cannot see the utility in thus merely repeating the syllabi." In this we agree with him, adding for ourselves the words, "such as most reporters construct." If the head-notes were properly constructed, the reporter could not do better, we think, than to repeat them in his index. Most head-notes are altogether too long and intricate, giving not the facts in a concise form, with the legal conclusion, but the processes of legal reasoning, and too often omitting the facts altogether. The consequence is that the indexes are long. Taking a few of the last issues of the more prominent reports: 79 New York has an index of 98 pages; 127 Massachusetts, 70; 62 Alabama, 58; 95 Illinois, 81; 68 Indiana, 46; 51 Iowa, 40; 14 Bush, 124; 23 Kansas, 77; 69 Maine, 56; 50 Maryland, 79; 41 Michigan, 84; 69 Missouri, 83; New Jersey, 35; 89 Pennsylvania, 62; 34 Ohio, 61; 48 Wisconsin, 56; 32 Grattan, 41. Some of these reports have a much larger number of cases than others, particularly Michigan, Pennsylvania, Kentucky, and Massachusetts, whose head-notes are generally concise, particularly the two former. Others have an extremely small number of cases, as

Maryland and Virginia. Now taking a few of the last volumes of the American Reports, we find that volume 30 has an index of 67 pages; volume 31, 39 pages; volume 32, 35 pages; or an average of 47 pages. Each of these volumes contains many more cases than the average of the State reports, probably over a third more. We believe, therefore, it is possible to repeat the head-notes in the index, and not make the index burdensome. The repetition saves turning to the case itself in many instances. This of course is the only advantage in the repetition, but it is a considerable one. Mr. Brown's shorter index is well constructed, but after all only suggests the subjects.

We note some humorous phases in recent decisions which we must not fail to chronicle. In *Morgan v. Durfee*, 69 Mo. 469, the case where the defendant sealed the fate of the plaintiff's father by striking him over the head with a notarial seal, in self-defense, Sherwood, C. J., gives this unique periphrasis for "lack of backbone," namely, "a pitiable and painful weakness in the dorsal region." — Business must be dull in Augusta, Ga., if we can credit the recent decision in *Rivers v. City Council of Augusta*. It was there held that where the city council passed an ordinance forbidding the running at large of cattle in the streets, but subsequently suspended its operation indefinitely, on the ground, among others, that the growth of weeds and grass was too luxuriant for comfort, health and good appearance, one who was gored by a cow running at large in the streets would not have a cause of action against the city. Nor would the principle be altered by the fact that the owner paid a municipal tax on the cow. Of course, this law is good, but the reason for the suspension of the ordinance is disheartening.

The committee appointed at a meeting of the bar held at Saratoga, last August, to consider measures for relieving the Supreme Court from the pressure of business, have reported in favor of amending the Constitution by forming an additional General Term Department, and supplying two additional justices severally in the first, fifth, seventh, and eighth, and one in the second, third, fourth, and sixth districts. The statistics exhibited by the report show an appalling amount of arrears in this court — no less than 1000 causes in the General Terms, and 9000 in the Circuits and Special Terms. Even where business is despatched, as it appears to be in the Second General Term Department, we fear it is "despatched" in the wrong sense, for as we happen to know, it is quite customary there for the judges practically to refuse to hear oral arguments and to insist on submissions. The cause of this state of affairs is not at all mysterious. Since the adoption of the Constitution of 1846, as the report states, "the population of the State has nearly or quite doubled; its business, in almost every department of industry, has quadrupled; its material wealth has increased ten-fold, and business in its courts has increased in a still greater proportion." Is it at all singular that the transaction of this increased legal

business should require four times the judicial force that was provided before 1846? This is a very serious matter, and should receive the immediate attention of our Legislature. It is a matter that concerns the public far more than the legal profession. If the public would fairly provide for the prompt transaction of their legal business, we should hear far less grumbling about "the law's delays." The condition of affairs in our State is by no means singular. It is the same in nearly all the larger States, and we notice a great deal of recent agitation about overcoming the difficulty in such States. A census of 50 millions demands ampler provision than one of 40 millions.

In connection with the recent case of Steinman and Heinsell, the attorneys who abused the judge in their newspaper and continue to practice in his court in spite of his fulmination, we note the case of *People ex rel. Spahn v. Townsend*. The relator, a major of militia, at Rochester, was court-martialed on charges of conduct unbecoming an officer, and prejudicial to good order and discipline. The military court found him guilty, because it was shown that he had edited articles published in the newspapers, derogatory to the good name of his regiment, and specially condemnatory of certain acts on the part of its colonel. The sentence of the military court was that the major be cashiered and dismissed from the service. He appealed to the Supreme Court, and Judge Macomber reverses the decision on several grounds, one of which is that "a citizen soldier is one who earns his daily bread by the labor of his hands or brains, in business or professions, and who devotes a portion of his time to military training and to drill and preparation for war. When, however, he is not actually engaged in the duties of the National Guard, and when not in uniform, he is not amenable to court-martial. The proceedings and sentence must be reversed and the accused discharged." Meantime the regiment and the division to which it belonged have been disbanded, on account of these publications, it is said; "snuffed out by an article." The newspapers herald this as "a great triumph for the citizen soldier." Perhaps if the colonel could have proved that the major had his "regimentals" on when he wrote the articles, the result might have been different. We regret to think that the community are to be deprived of the superb spectacle of a gallant colonel curbing his untamed grocery-wagon horse on training days. But the pen is mightier than the sword. Let us hope that the Canadians will not descend on Rochester in its present defenseless condition.

NOTES OF CASES.

IN *Callahan v. First National Bank of Louisville*, Court of Appeals of Kentucky, October, 1880, 10 Rep. 781, it was held that where a negotiable note is presented for discount by the maker, the presumption of law, as to an indorsement on the note, is that the note was paid; and in the absence

of allegations and proof that the indorsement was for the accommodation of the maker, the holder discounting the paper cannot recover against the indorser. The court said: "Weller & Son made a negotiable note payable to Callahan; Callahan indorsed his name on the back of the note, and returned it to them, and they presented it to the appellee and had it discounted for their own benefit. Can the bank recover against Callahan on these facts alone? We think not. The note upon its face imported an indebtedness of the makers to Callahan, but being in the makers' hands it did not import an obligation at all. Callahan's indorsement on the back of the note showed that it had been in his hands, but how or for what purpose it came again into the hands of the makers did not appear. The most reasonable conclusion is, we admit, that he indorsed it for their accommodation. This, however, is a mere inference of fact, and not a presumption of law. The presumption of law is that it was paid, and the liability of the indorser, if any had ever existed, was extinguished." "The fact that it was indorsed for accommodation must appear by appropriate allegation, and without such allegation no cause of action can be shown, and the defect will not be cured by verdict. That Callahan indorsed for the accommodation of Weller & Son, the note having been discounted for them, was the very foundation of the appellee's case. Unless that be shown, his obligation created by the indorsement appears to have been extinguished before the time at which the bank received the note, and it can no more recover without showing some fact to rebut the legal presumption arising from the possession of the note by the makers than if his name had not appeared on the note at all." In *Bank v. Hammett*, 50 N. Y. 158, the same doctrine was held as to a bill of exchange in possession of the drawee and acceptor. The court said that the purchaser must assume that the title of the holder is precisely that indicated by the instrument; that the bill could ordinarily have been in the acceptor's hands only for acceptance or after payment, and in neither case would he have had any right to transfer it; and if the paper had been made for accommodation, that fact should have been proved.

In *Stillman v. Stillman*, Illinois Appellate Court, Chic. Leg. News, Dec. 25, 1890, it was held that the mere fact that a wife, divorced upon her own petition, has re-married, is no ground for the discontinuance or reduction of alimony. The court asked: "Is the mere fact that plaintiff, two years and a half after the decree of divorce, married again, but to a man unable to support her, sufficient to justify a court of equity, acting upon the principles of natural justice, to thus interfere with a party so culpable, and against one otherwise so entirely blameless?" And continued: "No other reason for it is conceivable, but one or all of the following: (1) That equity regards the obligation of the husband to provide alimony for the wife, after separation for his delinquency, as only nominal, and a sort of unjust burden, so that the court

should seize upon slight circumstances, even upon a mere supposititious supply from some other source, as a sufficient reason for relieving the defendant from such burden; or (2) That even after divorce, she owed him certain duties, among which was that of remaining single during the reception of support from him, so that the loss of said support should follow a breach of that duty by way of forfeiture; or (3) That equity instead of favoring marriage favors restraint of marriage." And they conclude: "In order to work out the ends of justice, courts of equity sometimes will regard those things as done which ought to be done. But it would be a perversion of the doctrine to the purposes of injustice to apply it in favor of the wrong-doer and against an injured innocent party, for the purpose of relieving the former from a just obligation to the latter. The statute provides no restraint upon the wife re-marrying, but authorizes the court to allow her to resume her maiden name, thus improving her marriageable condition, and if the doctrine of the court below is to be engrafted upon the law by the courts, then the statute providing for alimony will operate as a restraint upon marriage, which is against the policy of the law. The true rule, as it seems to us, is that while the re-marriage of the wife might be *prima facie* or presumptive evidence that she had acquired other means of support, yet it is not conclusive; and when it is made to appear that actually she did not, then such marriage affords no ground for relieving the former delinquent husband from the alimony provided in the decree, or for reducing it to a mere nominal sum." Wilson, J., dissented. In *Forrest v. Forrest*, 3 Bosw. 661, the court said, *obiter*: "What she may do after she has been divorced and the marriage relation has been dissolved by reason of his adultery can affect no matrimonial engagement, for none exists; nor violate any matrimonial duty, for she no longer owes any to her former husband." In *Shepherd v. Shepherd*, 1 Hun, 240, it was held that on the re-marriage of the wife, even when her second husband had an income of \$2,500 per year, as a salary, but it appearing that the defendant's ability was ample, and she needed the allowance, the allowance would not be disturbed. On the other hand: Bishop says, 2 Marr. and Div. 479: "Though the second marriage is no violation of duties, moral or legal, and is indeed a thing which the law approves, yet it has provided the wife with a new source of support, and thus has wrought a change in the condition and circumstances of the parties." In *Albee v. Wyman*, 10 Gray, 222, the court say: "The application for divorce and alimony was her own affair, a voluntary act of hers, instituted for her benefit. So long as she remained unmarried, no ground existed for lessening the amount of such alimony. By her subsequent marriage she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of alimony." In the principal case this is distinguished on the ground that it did not affirmatively appear that the wife had not secured other resources for her support. In *Bourman v. Worthington*, 24 Ark. 522, where the wife

contracted a second marriage, the Supreme Court of Arkansas held that when a divorced wife marries again, she has no right to alimony or support from her former husband, either during his life or after the death of the second husband. In *Fisher v. Fisher*, 2 Swabcy & Tristram, 411, Sir Creswell Creswell says: "If she avail herself of the freedom conferred by the decree of this court, and marries again, it would be unreasonable to compel the former husband to support her."

In *Seamans v. North-western Mut. Life Ins. Co.*, United States Circuit Court, District of Minnesota, 10 Rep. 799, a life policy provided that it should "cease and determine" if the premium was not paid when due. The agent authorized to receive the premium was changed, but the company neglected to inform the insured of the change, although it had adopted a rule to do so in all cases. The insured tendered the premium in due time to the former agent, who refused it. Held, that there was no forfeiture, and could not be until a reasonable time thereafter, and that 60 days was not unreasonable. The court said: "In the present case it appears that in 1876 the company notified the assured that the Hennepin County Savings Bank, at Minneapolis, was its agent, to whom premiums should be paid. In March, 1877, the defendant appointed a new agent at Minneapolis, and when notices were, in that month, sent out to policy-holders, the company adopted a rule to send a circular with each notice, informing the assured of the place where, and the agent to whom payment should be made. The jury find that this circular was not sent to Seamans. He did not, therefore, know of the change of the agency, and naturally supposed he was to pay to the party to whom he had paid the year before. He sent his money in due time to that party. He did not send it to St. Paul, at which place he was informed there was an agent, because he had been notified that he must pay to the agent at Minneapolis. That the company understood it to be their duty to inform him of the change of the agency, is clear from the fact that they adopted a rule to do this in all cases, and omitted it in his case by oversight. Under the circumstances, I do not think the assured was bound to hunt for an agent in the city of Minneapolis to whom he could make payment. If he was bound to make reasonable inquiry, I think the evidence shows that, through his agent, he did so. The agent he sent to Minneapolis to pay the premium swears that he made considerable inquiry, and names several persons to whom he applied for the name and location of an agent to whom payment could be made. It is said, however, that he continued to neglect payment until the day of his death, about 60 days after the maturity of the premium. If he was excused from making payment on the day of maturity by the facts and circumstances stated, then he was entitled to a reasonable time before a forfeiture could be declared. In considering what time would be reasonable, we are to bear in mind that the company had, in fact,

waived the time of payment the previous year. The jury find that in 1876 the agent of the defendant at Minneapolis informed the assured that a delay of a month or two would not work a forfeiture, and the assured accordingly paid his premium for that year nearly a month after it was due, without objection on the part of defendant or its agents. The following authorities support the general views expressed: *Ins. Co. v. Wolf*, 95 U. S. 326; *Ins. Co. v. Eggleston*, 86 id. 572; *Ins. Co. v. Norton*, id. 234; *Ins. Co. v. Pierce*, 75 Ill. 426; *Thompson v. Ins. Co.*, 52 Mo. 489; *Mayer v. Ins. Co.*, 38 Iowa, 304; S. C., 18 Am. Rep. 34; *Ins. Co. v. Warner*, 80 Ill. 410; *Ins. Co. v. Robertson*, 59 id. 128." In *Insurance Co. v. Eggleston*, 96 U. S. 572; S. C., 17 Alb. L. J. 368, it was held that where an insurance company had been in the habit of notifying the assured of the time when and place where premiums were to be paid, he had reasonable cause to expect and rely on receiving such notice, and that the company was estopped from setting up that the policy was forfeited by the non-payment of a premium of which no such notice was given. To the same effect are *Union Cent. Life Ins. Co. v. Pottker*, 33 Ohio St. 459; S. C., 31 Am. Rep. 555; and *Meyer v. Knickerbocker Life Ins. Co.*, 73 N. Y. 516; S. C., 29 Am. Rep. 200.

WHEN A STABLE IS A NUISANCE.

WHETHER a stable in a populous locality is a nuisance has been considered in a number of cases, including several of recent date. In *Shiras v. Olinger*, 50 Iowa, 571; S. C., 32 Am. Rep. 138, it was held that a livery-stable in a city is not necessarily a nuisance, and so where one has been burned down an injunction will not be granted against rebuilding and using it, but only against its use in a manner proved to have been a nuisance. The court said: "We conclude from the evidence that whatever deleteriousness there may be in gases from a livery-stable, it is not of a very marked character: that persons of out-of-door habits may perhaps be exposed to them with impunity, especially in the absence of any epidemic; but that a residence very greatly permeated by them must be regarded as unwholesome, and to some persons, under some circumstances, likely to prove dangerous. We are aware of the necessity of livery-stables in cities, and of the difficulty of locating them so far from where persons reside that no one shall feel annoyed by their proximity. They are supposed to depreciate the value of residence property to a much greater distance than the gases can be harmful or possibly penetrate. In the disposition which exists to make war upon them, there is great danger that injustice will be done to their proprietors if they can readily be declared a nuisance. We have accordingly hesitated in coming to the conclusion which we have reached that the use of the defendant's premises for a livery-stable was a nuisance. In so doing it is proper that we should say that the objection to the stable, in our mind, arises largely from the construction of the doors upon the alley

so near the plaintiff's residence, the removal of the offal through those doors, and the use of the alley, under the circumstances, as a temporary place of deposit." "It may be taken, then, as established that the nuisance has resulted from the location and structure of the building, and mode of using it, rather than from any negligence in keeping it. Unless some change can be introduced more radical than would pertain to mere care in keeping it, the use, if resumed as proposed, would, we think, be a nuisance. But inasmuch as a livery-stable is not a nuisance *per se*, and it is not impossible that a change may be introduced which would obviate all objections, we think that the decree enjoining the use absolutely went too far, and should be so modified as simply to enjoin such use as we have found would be a nuisance, to wit: All use that would be substantially like the use heretofore made of the premises."

In *Dargan v. Waddill*, 9 Ired. 244, it is said: "It is true that a stable in a town is not, like a slaughter-house or a sty, necessarily and *prima facie* a nuisance. There must be places in towns for keeping the horses of people living in them, or resorting thither; and if they do not annoy others, they are both harmless and useful erections. But on the contrary, if they be so built, or kept, or so used as to destroy the comfort of persons owning and occupying adjoining premises, and impair their value as places of habitations, stables do thereby become nuisances." "A stable may be likened to a privy, which decency and comfort render indispensable. But the proprietor cannot protect himself under that plea, if by neglecting to cleanse it he allows it to become offensive in the adjacent houses or grounds. So care must be taken to prevent a stable from incommoding the neighbors, from the ordure deposited in it. But if the adjacent proprietor be annoyed by it in any other manner, which could be avoided, it in like manner becomes an actionable nuisance, though in itself a stable be a convenient and lawful erection." In this case, the stable had a wooden floor, the stamping of the horses on which disturbed the neighborhood, and this was held a nuisance, as it might have been paved, or covered with or laid on the earth.

In *Coker v. Birge*, 10 Ga. 336, a livery-stable in a city, within 65 feet of a hotel, was held *prima facie* a nuisance to be enjoined. This was based on the allegations that the proprietor kept a jack in it which he let to mares on the premises, within sight of the guests and family of the innkeeper, and that he littered the stalls with leaves to increase the manure, and that the stamping of the horses was annoying.

In *Harrison v. Brooks*, 20 Ga. 537, an injunction against the erection of a stable 80 feet from a hotel was denied, on the ground that "injunctions will only be granted to restrain nuisances, in cases of absolute necessity, in which the evil sought to be prevented is not only probable, but certain and inevitable." This was on bill and answer.

In *Kirkman v. Handy*, 11 Humph. 406, it was held that an injunction would not lie to prevent the erec-

tion of a livery-stable in a city. This is on the authority of *Dargan v. Waddill*, *supra*. The court said: "It cannot be denied that a livery-stable in a town, adjacent to buildings occupied as private residences, is under any circumstances a matter of some inconvenience and annoyance; and must more or less affect the comfort of the occupants, as well as diminish the value of the property for the purpose of habitation. But this is equally true of various other erections that might be mentioned, which are indispensable, and which do and must exist in all towns." "The result of our opinion is, that a livery-stable in a town is not necessarily a nuisance in itself; and as it is contingent and remains to be ascertained from future events, whether or not the erection in question will become a nuisance," an injunction against its erection will be denied.

The same doctrine, as to the nature of a livery-stable, was held in *Burditt v. Svenson*, 17 Tex. 489, on the authority of *Dargan v. Waddill*, and *Kirkman v. Handy*, but an injunction was granted on a verdict that the stable in question destroyed the comfort of the plaintiff, etc. The court said that the defendants' stable was a nuisance "by reason of its locality and construction, as well as the manner of keeping it. According to the testimony of defendants' witnesses it was as well kept as livery-stables generally are. The defendants did not propose to keep it differently; or profess to be able and willing to undertake the keeping of it in any manner which would be less annoying to the plaintiff." "Here the defendants' stable, as kept, is a nuisance, and they do not propose to keep it in any other manner which will be less offensive or injurious. Nor does the evidence warrant the belief, that as it is located and constructed, it will or can be so kept as not to be a nuisance."

To the same effect is *Flint v. Russell*, U. S. Circ. Ct., 8th Circ., Dillon, J., 19 Alb. L. J. 226, where an injunction against erection was denied.

In *Curtis v. Winslow*, 38 Vt. 690, it was held that the erection of a private barn in a village, ten feet from the plaintiff's house, would not be enjoined. In this case some stress was laid on the fact that the plaintiff bought his land and erected his house with notice of the defendant's intention. This was held to defeat his *equitable* remedy.

In *Pickard v. Collins*, 23 Barb. 444, an action of damages for a nuisance caused by the erection of a private stable upon the defendant's land adjoining the plaintiff's dwelling-house, and the allowing of manure and filthy water to accumulate and stand in the cellar, it was held proper for the judge to charge that if the defendant so constructed and adapted the barn, that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors in his house, the defendant and his tenants would be liable.

In *Aldrich v. Howard*, 8 R. I. 246, the instructions to a jury having been, that the noises and smells proceeding from a livery-stable, in order to become a nuisance, must create an annoyance to such an extent as to render life uncomfortable in a neighbor-

upon these officers, and regulated its exercise, under such treaties. The legislation on that subject is now embodied in the Revised Statutes, section 4083, *et seq.* Besides civil jurisdiction in certain cases, power is thereby conferred upon these officers to arraign and try citizens of the United States charged with offenses against the law, committed in such countries respectively. By section 4086 the laws of the United States, so far as necessary to carry out the treaties, and suitable to carry them into effect, are extended over all citizens of the United States in those countries. Where they are not adopted, the common law, and the law of equity and admiralty are likewise extended. Capital cases for murder, or insurrection against the government of said foreign countries, or felonies, shall be tried before the minister, if allowed jurisdiction. § 4090. In other cases these consuls have jurisdiction. Section 4106 provides that the consul shall call four associates, of American citizens, when he thinks it necessary, or the punishment is severe. Section 4110 makes diplomatic officers responsible to the United States and the laws thereof for their conduct as judicial officers.

Having thus stated the general principles of international law applying to our subject, and the actual assumption, by our government of the power in question, let us next inquire into the constitutional foundation of extra-territorial jurisdiction, its extent, and the constitutional mode of its exercise, where it exists.

It cannot be disputed that the United States have power to govern the conduct of their citizens, when outside of the territorial limits of the United States, in some particulars, and punish them for offenses there committed. Clause 10 of section 8 of article 1 of the Constitution, confers upon Congress power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations. Many other powers are conferred upon the United States by the Constitution, and at last power is granted to Congress to make all laws necessary and proper for carrying out the powers granted to the United States; within this clause come criminal laws punishing offenders against the Constitution and laws of the United States. By article 3, section 2, it is declared that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party. It will be observed that none of these clauses confer general jurisdiction over citizens abroad.

Admitting the principle to be correct that "every nation has a right to bind its own subjects by its own laws in every other place, as a consequence of natural allegiance," the United States have a right to govern the conduct of their citizens abroad, and punish them for offenses, *in matters where they owe allegiance to the United States government*, and we might possibly even admit that the United States may invest ministers and consuls with judicial power for the trial of such cases, classing these officers in their judicial character among the "inferior courts," mentioned in section 1 of article 3, although that is taking quite a constitutional risk, in view of the provision of that section, that the judges, both of the supreme and inferior courts shall hold their offices during good behavior.

But it would seem clear that the United States can regulate the conduct of their citizens abroad only in those cases in which they can govern it at home. We must not lose sight of the fact that the American citizen residing within the United States, owes allegiance to two governments; first, that of the United States, and second, that of the particular State in which he resides. This allegiance is distinct toward each of

the two governments, and due to each in those matters only, in which each exercises a lawful dominion over him, respectively. The allegiance to the United States government exists only as to those matters over which power, authority and jurisdiction are vested in that government by the Constitution; it is special and limited, like the powers of that government. His State government is the one to which the citizen owes the general allegiance otherwise existing between a subject and his government, and out of which that portion due to the United States is taken. His allegiance to the United States is indeed superior to that due the State, as the United States government is superior to that of a State, by virtue of the Constitution, but that does not change its limited and special character. In consequence of his allegiance, the governments of the United States and the State have authority to control the conduct of the citizen, but each only in its constitutional sphere. The United States government may prohibit the citizen from committing piracy, robbing the mails, forging money, breaking the neutrality laws, stealing government property, etc., because power over these matters is conferred upon it by the Constitution, either expressly or by necessary implication; but it cannot forbid him to commit an ordinary murder, or larceny, or arson, at home. These offenses come under the constitutional powers of the State government. We call this higher grade of offenses *felonies*, which word is supposed to denote a breach of fealty; they are felonies as against that government only to which fealty is due from the citizen in that particular. This, I think, will be admitted. Now, then, if the United States government cannot punish a citizen for a felony, *e. g.*, murder, committed at home, from where does it derive the power to punish him for the same kind of a felony committed in Turkey or China? The citizen owes the United States government no duty as to abstaining from ordinary murder (I mean by this such not committed on the high seas, or in places under the special jurisdiction of the United States, or the like, where the jurisdiction is expressly conferred by the Constitution), and that government has no right to punish him therefor, when he commits it.

The right on the part of the United States to punish citizens for such offenses abroad, which, when committed under the same circumstances at home, could be punished by the State governments only, has not been conferred by any of the clauses specifying to what cases the judicial power of the United States shall extend, as we have seen before. It cannot be derived from the treaty power. The United States government cannot acquire powers by treaty, which are otherwise prohibited to it by the Constitution, and in our constitutional law it amounts to the same thing, whether a power is not conferred or especially prohibited. A foreign nation cannot give the government rights which the sovereign people of the United States did not confer upon it. If by treaty it could acquire jurisdiction over ordinary offenses committed by citizen's abroad, why should it not, *e. g.*, acquire the right to confer titles of nobility on American travellers? The people of the United States are the *only* source from which the powers of the Federal government can flow, and they have conferred such powers by and in the Constitution; outside of this instrument, there are no powers in the Federal government.

Neither can such extra-territorial jurisdiction be derived out of that clause of the Constitution, which empowers the president to appoint ambassadors, other public ministers and consuls, because none of these officers have, by the general law of nations, judicial powers, and if they had them, their extent would be limited by the Constitution of their country. We conclude, therefore, that the exercise of jurisdiction in the cases mentioned, by officers of the United States

government, *acting as such*, by virtue of the pretended laws of Congress in that behalf, is without constitutional warrant, and illegal.

But if we would admit, for the purposes of the argument, that the United States, by virtue of their national sovereignty, or on some such ground, possess general jurisdiction over their citizens abroad, still it would appear clear that such jurisdiction must be exercised in accordance with the provisions contained in article 3 of the Constitution, and amendments 5, 6, and 7. These provisions are general, and apply directly to the individual citizen. They protect his rights, and regulate the mode of procedure against him, at home and abroad. The Constitution surrounds the life, liberty and property of the citizen, with certain safeguards against possible encroachments of the government, and these safeguards are not removed by the citizen's merely stepping outside of the territory of the United States, and he does not thereby become subject to the exercise of arbitrary power in an arbitrary way by the representations of his government. Our government cannot be free and liberal at home, and despotic abroad; it cannot possess such different characters. By the Constitution the people have conferred certain powers upon certain agents, for a due administration of public affairs, and have at the same time prescribed how these powers are to be exercised. These agents possess no other powers and can exercise them in no other way than is ordained by the Constitution, whether at home or in foreign lands. The government possesses no powers of itself, but all its actions must be based on grants contained in the Constitution, and must be done in the manner the Constitution directs. So, then, under clause 3 of section 2 of article 3, the Congress might have a right to enact, *c. g.*, that offenses against the United States committed in Egypt, or in the waters of the Mediterranean sea, should be tried at Cairo or Constantinople (if Turkey had granted a place there), but there must be an indictment by a grand jury, a trial by jury, and, I think, before a regular judge. The observations of the writer in the *Naratogian*, given in 22 Alb. L. J., 281, that "a trial by jury is out of the question," "Our Constitution does not extend to these countries," "the exercise of our complicated system of jurisprudence would be impossible," and "the American citizen, if not satisfied with this system of justice, must remain within the jurisdiction of the Constitution, or refrain absolutely while abroad from the commission of crimes," may be excusable by the necessity of the case, but they are altogether "unconstitutional." Our Constitution does extend to our officers and citizens, in these capacities, and governs their relations and conduct to each other, wherever they may be. It is monstrous and absurd to maintain that our officers abroad, *while acting as such*, could lawfully violate the Constitution of their country, from which they and the president, that appoints them, draw their official breath of life. This is no question of practicability, but of the strictest right. The citizen may have absolutely refrained from the commission of crimes, and may be accused wrongfully, and if he is to be tried as an American citizen by an American officer, it is his sacred right to have those safeguards thrown around him which are intended to protect him from an unjust conviction, and guaranteed to him by the fundamental law of his country. Dr. Wharton, in his *Conflict of Laws* (see § 853 *et seq.*) seems also to favor this assumption of authority and its unconstitutional exercise. In section 857, he says that the constitutional provision requiring the trial to be in the State or district where the offense was committed, applies only to crimes committed in the United States; and he would seem to hold, generally, that the other provisions securing jury trial, etc., are under the like restriction. He refers to *United States v. Dawson*, 15 How. 467; but

that was a case where a crime had been committed in the Indian Territory—within the boundaries of the United States—and the offender was tried in Arkansas, the district previously established by law, as the Constitution directs. In section 865 he says, the legislation of Congress is a positive claim of the United States government to extra-territorial jurisdiction over its citizens; but that legislation is only in imitation of similar English enactments, and a claim makes no right. In section 866 he states, jurisdiction of this kind is asserted by both German and French jurists over their subjects in barbarous or desert countries. It is also exercised by England; but there is this essential difference between these governments and that of the United States, that they have power to regulate the conduct of the citizen at home in all particulars, while the power of the United States government is very limited in that respect. They only extend their domestic authority over their citizens abroad, while United States government claims a far more extended and altogether different authority from what it has at home. In section 866a, Dr. Wharton says, all the reasoning which gives such (extra-territorial) jurisdiction as to piracies on the high seas, applies to crimes analogous to piracy committed in barbarous lands. That may well be, but with us this is not a question of reasoning, but of positive constitutional limitations. But it may be said that our consular jurisdiction is not intended for the unconstitutional oppression of our citizens abroad, but for their protection against oppression by the authorities of semi-barbarous countries, which also differ from us in faith, and if we have no constitutional power to exercise such jurisdiction, the condition of our citizens abroad will be worse. This might be remedied by constitutional amendment; however, we may exercise this extra-territorial jurisdiction now, as it is. But we must not claim to exercise it as *American officers over American citizens*, because then it can only be exercised, if at all, in the American constitutional mode. As it now stands, it can only be justified, as an exercise of jurisdiction, by the foreign governments over our citizens sojourning within their borders, which by the treaties has been conferred upon judges, who happen to be American ministers or consuls. Every nation has an exclusive right to regulate persons and things within its own territory, according to its own sovereign will and public policy. Citizens of other States, temporarily residing within the territory of such nation, are bound by such regulations. So, Americans residing in Turkey are bound by its laws; if they offend against them, they are liable to prosecution in its courts. If Turkey has seen fit to make American ministers or consuls judges for the trial of such offenders, and if the American government permits these to act as such, the American citizen has no right to object, and can be tried as the laws or treaties of Turkey direct. He is then tried as a temporary *Turkish subject* by the minister or consul, who is a *Turkish judge pro hac vice*; the mode of the trial then depends altogether upon the laws or treaties of Turkey, and there is no question of the rights of the accused as an *American citizen* toward his judge as an *American officer*, because they do not meet in this capacity, but as *Turkish subject and Turkish judge*. On this ground the trial and conviction of Mirzan can be sustained, but on no other.

CROWN POINT, IND., Dec. 16, 1880.

J. KOPELKE.

The *London Law Journal* says: "The other day a learned gentleman of somewhat persistent eloquence, who was employed in an appeal against a decision of Vice-Chancellor Malins, informed the Court of Appeal that in the argument below the vice-chancellor 'stopped' him. 'Indeed!' said the Master of the Rolls; 'how did the vice-chancellor ever manage that?'"

RECEIVERS OF INSOLVENT MUNICIPAL CORPORATIONS.

SUPREME COURT OF THE UNITED STATES, DECEMBER, 13, 1880.

MERIWETHER ET AL., Appellants, v. GARRETT ET AL.

A receiver will not be appointed by the Federal courts to administer the financial affairs of a municipal corporation.

In 1879, the city of Memphis, Tennessee, was heavily indebted, and did not pay its debts or interest thereon, and a large proportion of the taxes levied for several years was uncollected. On the 29th of January of that year, the Legislature of Tennessee passed an act (in terms general) which repealed the charter of the city and vested in the State the possession and control of the city's public property, and the collection of the taxes levied and their application to its indebtedness. Under this, and another act providing for the local government of the territory embraced in the city limits, the State authorities assumed control. On the day previous to the passage of the act named, plaintiff below, a creditor of the city, filed a bill in the United States Circuit Court, setting up the insolvency of the city; that a *mandamus* had been issued to the authorities of the city, directing the levy and collection of taxes to discharge the city's indebtedness; that the taxes directed had not been collected, and asking for the appointment of a receiver. A supplemental bill was filed, alleging the invalidity of the act mentioned, and asking the same relief. The Circuit Court, by a decree, appointed a receiver, who was directed to take possession of the moneys of and debts due the city, and certain property belonging to it, and its tax books, to collect certain of its taxes and its debts, and enforce their payment by the usual means, etc., the proceeds to be held subject to the order of the court. It was also adjudged that all the property within the limits of the city was liable and might be subjected to the payment of the city's debts in the action, etc. *Held*, that the decree was erroneous.

APPEAL from the Circuit Court of the United States for the Western District of Tennessee.

The following facts are stated in the opinion by Field, J.:

In January, 1879, the city of Memphis, in the State of Tennessee, was financially in a bad condition. She had been for many years a municipal corporation, and was invested with the ordinary powers of such bodies to make contracts and incur obligations for municipal purposes, and to levy and collect taxes to meet her expenditures. Her authorities were also at different times specially empowered by the Legislature of the State to subscribe for stock in railroad corporations, to aid in the construction of lines of railway leading to and from the city, and to issue interest-bearing bonds for the amount subscribed; also to issue bonds of like character to raise the means to erect water-works, construct pavements, and make "any public improvements" that might be necessary, and to acquire property for the public use of the city. Indeed, the powers conferred at various times upon the authorities to undertake public works, and engage in enterprises for the benefit of the city, were as large as the supposed necessities of a municipality with great expectations of future growth, could suggest; and these powers appear to have been exercised with a liberality proportionate to the expectations. Taxes were levied to meet the consequent expenditures of the city and the interest on her bonds, but these were not always enforced with the readiness with which the obligations were incurred.

The record shows that for several years preceding 1879 not more than three-fifths of the annual taxes were collected. Whether this arose from the viciousness of the system of taxation adopted, or the inefficiency of the officers of collection, is immaterial. Probably it arose partly from both causes. The nat-

ural result followed: The revenues received became insufficient to meet the just claims of creditors; obligations were not paid as they matured; coupons for interest on bonds were not provided for; the city was in default for much of the principal and all of the interest of her indebtedness; she was insolvent. Suits were soon commenced against her by creditors; some in the Federal courts, some in the State courts; and from the Federal courts in several cases a *mandamus* was issued to the authorities of the city to levy a special tax for the payment of judgments recovered. With taxes uncollected, debts maturing, and both principal and interest unprovided for; with numerous suits commenced and more threatened; with credit gone and the property of her citizens already subjected to burdens difficult to be borne, the city was in a condition out of which she was almost helpless to extricate herself.

While the city was thus burdened with debts and pursued by creditors, the State interfered; and on the 29th of January, 1879, repealed the charter of the city, took the immediate control and custody of her public property, and afterward assumed the collection of the taxes levied, and their application to the payment of her indebtedness.

The repealing act was in terms general, and applied to all municipal corporations in the State having thirty-five thousand inhabitants at the date of its passage, to be ascertained by the governor, and declared by his proclamation. The city of Memphis had that number of inhabitants; and it was so proclaimed by the governor. The act not only repealed the charters of all such corporations, with their amendments, but declared that all municipal officers, held under them, were abolished; that the population within their territorial limits were resolved back into the body of the State; that all power of taxation in any form previously invested in their authorities, was withdrawn and reserved to the Legislature; and that the public buildings, squares, promenades, wharves, streets, alleys, parks, fire-engines, hose and carriages, engine-houses, engineer instruments, and all other property, real and personal, previously used for municipal purposes, were transferred to the custody and control of the State, to remain public property as previously it always had been.

On the same day with the passage of the repealing act, the Legislature passed another act to establish taxing districts in the State, and to provide the means for their local government. It declared that the several communities embraced in the territorial limits of the repealed corporations, and of such other corporations as might surrender their charters under the act, were created taxing districts in order to provide the means of local government, for their peace, safety, and general welfare; that the necessary taxes for the support of the governments thus established should be imposed directly by the general assembly, and not otherwise; that in administering the affairs and providing the means of local government the following agencies and instrumentalities were established, namely: a board of fire and police commissioners; a committee on ordinances or local laws, to be known as the legislative council of the taxing district; a board of health, and a board of public works; and it prescribed in detail the duties and powers of these local agencies. The act prohibited the commissioners from issuing any bonds, notes, scrip, or other evidences of indebtedness, or from contracting for work, material, or services, in excess of the amount levied for them for that year; and declared that no property, real or personal, held by them for public use, should ever be subject to execution, attachment, or seizure under any legal process for any debt created by them; that all taxes due, or moneys in the hands of the county trustee, or on deposit, should be exempt from seizure under attach-

ment, execution, garnishment, or other legal process. It also declared that no writ of *mandamus* or other process should lie to compel them or other governing agencies to levy any taxes, and that neither the commissioners, nor trustee, nor the local government should be held to pay or be liable for any debt created by the extinct corporations, and that none of the taxes collected under the act should ever be used for the payment of any of said debts. The act also declared that all the property, previously used by the corporations for purposes of government, was transferred to the custody and control of the board of commissioners of the taxing districts, to remain public property for the uses to which it had previously been applied, and that all indebtedness for taxes, or otherwise, whether in litigation or not, due to the extinct municipalities, should vest in and become the property of the State, to be disposed of for the settlement of their debts as should thereafter be provided by law.

On the 13th of March following, such provision was made. By an act, passed by the Legislature on that day, the governor was directed to appoint an officer for municipal corporations, whose charters had been repealed under the first act mentioned, or might be subsequently surrendered, to be known as a receiver and back-tax collector. It required him to take possession of all books, papers and documents pertaining to the assessment and collection of taxes, which had been levied at the time of the repeal of the charters. It ordered him to file a bill in the Chancery Court of the county in which the corporation was situated, in the name of the State, in behalf of all creditors against all its delinquent tax payers, and provided that taxes assessed prior to 1875 might be settled in the valid indebtedness of the extinct municipality, whether due or not, and that the receiver should receive evidences of such indebtedness at certain designated rates. It also prohibited him from coercing payment of a greater sum than one-fifth of the taxes in arrears annually, so as to distribute the whole through five equal annual installments, commencing from his appointment and qualification. It authorized the Chancery Court to enforce all liens upon property for the payment of taxes, and to order all sales necessary for their collection; and to settle and adjust all equities, priorities and liens; and to give to the defendants and creditors all the relief which might be given if there were as many separate suits as there were creditors and delinquent tax payers. It provided that the taxes as collected should be paid into the State treasury, and be paid out to parties entitled to receive them, as adjudged by the Chancery Court, upon the warrant of the receiver, countersigned by the chancellor. It required the receiver, in paying the money collected into the treasury, to distinguish the sources whence it was derived, showing the amount from each special and general tax, so that they might be kept separate and be paid out to creditors according to the priority, lien or equity determined. The act was accompanied with a proviso that it should not interfere with any vested rights entitling parties to a speedy collection. On the passage of the repealing act there was a large amount of uncollected taxes, which had been levied upon property in the city of Memphis, such as taxes to pay certain specified creditors under writs of *mandamus*, a special tax to pay interest upon bonds, a special sinking-fund tax, a school tax, a wharfage tax, a tax upon merchants to pay police and firemen, a tax to pay interest upon bonds issued to certain railroads, and a tax for general purposes of government. Under the provisions of the act of March 13th, the defendant, Minor Meriwether, was appointed by the governor receiver and back-tax collector of that city. He accepted the appointment and proceeded at once to the performance of his duties.

The day previous to the passage of the act repealing

the charter of Memphis, and probably in anticipation of the contemplated legislation of the State, Robert Garrett and others, creditors of the corporation, filed a bill against the city, alleging in substance that the city owed them over \$100,000, upon much of which they had recovered judgments and obtained writs of *mandamus* to compel the levy of taxes for their payment; that various writs of *mandamus* had been issued against the city for over \$850,000; that through the malfeasance and incompetency of its officials only about three-fifths of the taxes imposed had been collected, and that this practice had run through a series of years, resulting in delinquent taxes of about \$2,500,000; that the taxes levied, pursuant to the writs of *mandamus* issued, constituted a trust fund which could only be used for the payment of the judgments; that the city was a trustee for the same and been requested to press the collection but had neglected to do so, and that this neglect was a fraud on the complainants relievable in a court of equity.

It is also set up that the Legislature, by an act of the 19th of March, 1877, had authorized the Chancery Court of the State to appoint a receiver to take charge of the affairs of the city, upon application of creditors owning demands against her exceeding \$100,000, when it was made to appear that writs of *mandamus* had been issued against her to enforce debts against the city amounting to over \$850,000. And averring that the court had jurisdiction, both upon general principles of jurisprudence and by authority of that act, the bill prayed the appointment of a receiver to take charge of the assets of the city, including its tax-books and bills for unpaid taxes, and to collect the taxes levied, for the purpose of paying the judgments.

After the repealing act was passed the complainants filed a supplementary bill setting up the passage of the act, alleging its invalidity, and repeating its prayer for the appointment of a receiver.

Subsequently several other parties instituted like suits against the city. All the suits were, in February, 1879, consolidated into one without objection, and by amendment to it, in April following, Meriwether, the receiver appointed by the governor, was made a defendant, as also sundry parties upon whose property taxes had been levied. With the consolidation, a receiver of the assets and property of the city was appointed to hold and dispose of the same under the direction of the court; and he immediately qualified, and proceeded to take possession, so far as practicable, of the property and assets, and to exercise the powers with which he was invested.

To the bill as consolidated and amended a demurrer was interposed by the defendants, upon which several questions arose, on which the judges of the Circuit Court were divided in opinion. The prevailing opinion of the presiding judge being against the demurrer, it was overruled, and the defendants electing to stand upon it, judgment final was rendered in favor of the complainants, from which the defendants have appealed to this court.

The receiver appointed by the court was invested with larger powers than probably any officer of a court was ever before intrusted with. He was required to demand, receive and take possession of all the assets and property of the city of Memphis, including real and personal property, and debts due to it and taxes which had been previously levied, except the taxes appearing on the tax-books for the year 1878, for which special provision was made; and except, also, the public highways of the city, the public squares, the public landings and wharves, the hospital and certain property used in connection with it, and property of the fire, engineer and police departments, and the taxes levied for the support of the public schools, which excepted articles he was not to take possession of or interfere with until the further order of the court. It

does not appear that the court entertained any doubt that it could at some future time place all this public property in the hands of its receiver, as its subsequent decree shows. The receiver was also required to take possession of all the tax-books of the city on which unpaid taxes were charged, except the tax-books for the year 1878; and also all the safes, books, papers, desks, office-furniture and other property belonging to the offices of mayor, controller, register, treasurer, tax-collector, inspector and city-attorney, necessary to the discharge of his duties as receiver, and of the buildings in which the general council of the city had previously assembled, and the property in and belonging to such buildings not previously excepted, and keep them subject to the order of the court; and parties having possession or control of such property, or any part of it, were required to surrender the same to him on demand.

By the order appointing the receiver, the trustee of Shelby county, within which the city of Memphis is situated, was required to pay over to him all the moneys he had on hand collected for taxes levied by the city for the year 1878, except such as were levied for the support of public schools. The former treasurer of the city was also required, with the like exception, to turn over to the receiver, on demand, all the money in his hands or on deposit in the German National Bank, received for the city. The mayor of the city was also to pay over to him any money, and deliver to him any property, belonging to the city, and the papers and vouchers necessary for the discharge of the receiver's duties; and the clerk of the county of Shelby was also to pay over any moneys received by him on account of the redemption of property sold for taxes due the city. The receiver was also required to lease the property of which he might have possession from month to month, and to collect the rents and hold the same subject to the order of the court; and if he found it necessary, he was authorized to bring actions at law or suits in equity against parties indebted to the city, or for any tax or taxes appearing on the tax-books, and to enforce any specific liens on the property, real or personal, for the payment of such taxes; and to employ as many clerks and assistants as he might deem necessary; to make use of the buildings and offices in the city hall, and of such safes, desks, tables, chairs and other furniture and property of the city he might need; to buy and pay for necessary books, stationery, fuel and lights, and whatever else might be necessary to fit his office or offices for use to enable him to discharge his duties; to insure any property, real or personal, which might come into his hands, when he thought it prudent to do so; to employ one or more attorneys, if necessary, to conduct the prosecution or defense of suits that he might find necessary to bring or defend under the authority conferred by him. Other powers were also vested in the receiver, but what has already been said is enough to show the extraordinary character of those conferred and of the duties imposed upon him. He was in fact invested with the administration of the financial affairs of the city, so far as might be necessary for the collection of taxes and debts and disposing of the property of the city to pay the claims of creditors. Executive and administrative functions were invested in him which it has not been supposed could adequately be performed by the same person in any government of a city properly conducted.

The decree adjudged that the complainants in the several suits, and other creditors who had made themselves parties by leave of the court, or who might thereafter make themselves parties, should recover from the city the several debts due them respectively, the amounts to be thereafter fixed by the court, and that all the assets and property of the city, "of every description," or so much thereof as might be necessary

for that purpose, including taxes previously assessed and remaining unpaid and due the city, should be applied to the payment of their debts. The decree also adjudged that the receiver should retain possession of all the assets and property, books, papers, and writings previously placed in his hands to be disposed of as the court might order in the progress of the suit, and that he proceed to collect the assets and property in the manner directed by previous orders for the payment of the debts. It also enjoined the defendant, Minor Meriwether, the receiver and back-tax collector appointed by the governor of the State, from taking possession of, collecting, or attempting to collect, suing for, or in any way interfering with, the assets and property, books, papers, and writings in the possession of the receiver of the court. And the decree further adjudged that all the property within the limits of the territory of the city of Memphis was liable and might be subjected to the payment of all the debts of the city, and that such liability would be enforced thereafter, from time to time, in such manner as the court might direct.

Mr. Chief Justice Waite announced the conclusions reached by the court in the case, as follows:

First. Property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire-engines, hose and hose-carriages, engine-houses, engineering instruments, and generally every thing held for governmental purposes, cannot be subjected to the payment of the debts of the city. Its public character forbids such an appropriation. Upon the repeal of the charter of the city, such property passed under the immediate control of the State, the power once delegated to the city in that behalf having been withdrawn.

Second. The private property of individuals within the limits of the territory of the city cannot be subjected to the payment of the debts of the city, except through taxation. The doctrine of some of the States, that such property can be reached directly on execution against the municipality, has not been generally accepted.

Third. The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the Legislature.

Fourth. Taxes levied according to law before the repeal of the charter, other than such as were levied in obedience to the special requirement of contracts entered into under the authority of law, and such as were levied under judicial direction for the payment of judgments recovered against the city, cannot be collected through the instrumentality of a court of chancery at the instance of the creditors of the city. Such taxes can only be collected under authority from the Legislature. If no such authority exists, the remedy is by appeal to the Legislature, which alone can grant relief. Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the Legislature to perform that duty, is not decided, as the case does not require it.

Fifth. The receiver and back-tax collector appointed under the authority of the act of March 13, 1879, is a public officer, clothed with authority from the Legislature for the collection of the taxes levied before the repeal of the charter. The funds collected by him from taxes levied under judicial direction cannot be appropriated to any other uses than those for which they were raised. He, as well as any other agent of the State charged with the duty of their collection, can be compelled by appropriate judicial orders to proceed with the collection of such taxes by sale of property or by suit, or in any other way authorized by law, and to apply the proceeds upon the judgments.

Sixth. The bills in this case cannot be amended so as

to obtain relief against the receiver and back-tax collector, without making an entirely new suit. They were not framed with a view to any such purpose.

Seventh. The decree of the court below is reversed.

Eighth. The cause is remanded, with instructions to dismiss the bills, without prejudice. If on the settlement of the accounts of the receiver herein, it shall be found he has any money in his hands collected on taxes levied under judicial direction to pay judgments in favor of any persons who have become parties to this suit, an order may be made directing its appropriation to the payment of such judgment.

Upon the first, second, third and fifth of these propositions the judgment of the court is unanimous. Upon the fourth, sixth, seventh and eighth it is by a majority only.

Mr. Justice Field delivered this opinion, which set forth the reasons which controlled him, Mr. Justice Miller and Mr. Justice Bradley, concurring in the judgment rendered.

(After stating the facts.) This decree is manifestly erroneous in its main provisions. It proceeds upon the theory that the property of every description held by the municipality at the time of its extinction, whether held in its own right or for public use, including also in that designation its uncollected taxes, were chargeable with the payment of its debts, and constituted a trust fund, of which the Circuit Court would take possession and enforce the trust. And upon the further theory that the private property of the inhabitants of the city was also liable, and could be subjected by the Circuit Court to the payment of its debts. In both particulars the theory is radically wrong.

The right of the State to repeal the charter of Memphis cannot be questioned. Municipal corporations are mere instrumentalities of the State for the more convenient administration of local government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is common learning, found in all adjudications on the subject of municipal bodies and repeated by text-writers. There is no contract between the State and the public that the charter of a city shall not be at all times subject to legislative control. All persons who deal with such bodies are conclusively presumed to act upon knowledge of the power of the Legislature. There is no such thing as a vested right held by any individual in the grant of legislative power to them. *United States v. Railroad Co.*, 17 Wall. 329; *Commissioners v. Lucas, Treasurer*, 93 U. S. 114; *People v. Morris*, 13 Wend. 337; *Philadelphia v. Fox*, 64 Penn. St. 169; *Montpelier v. East Montpelier*, 27 Vt. 12; *Angell & Ames on Corp.* (10th ed.), § 31; *Dillon on Mun. Corp.*, § 30; *Cooley on Const. Limitations*, 192, 193. By the repeal the legislative powers previously possessed by the corporation of Memphis reverted to the State. A portion of them the State immediately vested in the new government of the taxing district, with many restrictions on the creation of indebtedness. A portion of them the State retained; it reserved to the Legislature all power of taxation. It thus provided against future claims from the improvidence or recklessness of the new government. The power of the State to make this change of local government is incontrovertible. Its subsequent provision for the collection of the taxes of the corporation levied before the repeal of its charter, and the appropriation of its proceeds to the payment of its debts, remove from the measure any imputation that it was designed to enable the city to escape from its just liabilities.

But while the charter of a municipal corporation may be repealed at the pleasure of the Legislature, where there is no inhibition to its action in the Constitution of the State, the lawful contracts of the cor-

poration, made whilst it was in existence, may be subsequently enforced against property held by it, in its own right, as hereafter described, at the time of the repeal. In this respect its position is not materially different from that of a private individual, whose property must, upon his decease, go to the satisfaction of his debts before those who succeed to his rights can share in its distribution. The language used by us in the case of *Broughton v. Pensacola*, on this subject, is quoted by counsel, under the impression that it tends to sustain the position of the complainants. We there said:

"The ancient doctrine, that upon the repeal of a private corporation its debts were extinguished, and its real property reverted to its grantors, and its personal property vested in the State, has been so far modified by modern adjudications that a court of equity will now lay hold of the property of a dissolved corporation, and administer it for the benefit of its creditors and stockholders. The obligation of contracts, made whilst the corporation was in existence, survives its dissolution, and the contracts may be enforced by a court of equity, so far as to subject, for their satisfaction, any property possessed by the corporation at the time. In the view of equity, its property constitutes a trust fund, pledged to the payment of the debts of creditors and stockholders; and if a municipal corporation, upon the surrender or extinction in other ways of its charter, is possessed of any property, a court of equity will equally take possession of it for the benefit of the creditors of the corporation." 93 U. S. 268.

We approve of the doctrine stated in this citation. It expresses what we believe to be sound law. It means that whatever property a municipal corporation holds subject to the payment of its debts, will, after its dissolution, be so administered and applied by a court of equity. It does not undertake to determine what is to be deemed the property of a municipal corporation, which, after the extinction of its charter, is thus applicable. In the case from which it is taken, the bill alleged that the city of Pensacola, upon the surrender of its charter, did not possess any property and of course the question here raised could not have been before the court. The question there was as to the continuation of the city's liability under a new organization.

What then is the property of a municipal corporation, which, upon its dissolution, a court of equity will lay hold of and apply to the payment of its debts? We answer, first, that it is not property held by the corporation in trust for a private charity, for in such property the corporation possesses no interest for its own use; and secondly, that it is not property held in trust for the public, for of such property the corporation is the mere agent of the State. In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use. The dissolution of the charter does not divest the trust so as to subject property of this kind to a liability from which it was previously exempt. Upon the dissolution, the property passes under the immediate control of the State, the agency of the corporation then ceasing. 2 Dill. on Mun. Corp., §§ 445, 446; *Schaeffer v. Cadwalader*, 36 Penn. St. 126; *Davenport v. Ins. Co.*, 17 Iowa, 276; *Louisville v. Commonwealth*, 1 Duval, 275; *President v. Indianapolis*, 12 Ind. 620.

In the third place, we say that taxes previously levied, but not collected on the dissolution of the cor-

poration, do not constitute its property; and in the absence of statutory authority they cannot be subsequently collected by a court of equity through officers of its own appointment, and applied to the payment of the creditors of the corporation. Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some States, and we believe in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character. *City of Augusta v. North*, 57 Me. 393; *City of Camden v. Allen*, 2 Dutch. 378; *Perry v. Washburn*, 20 Cal. 350. Nor are they different when levied under writs of mandamus for the payment of judgments, and when levied for the same purpose by statute. The levy in the one case is as much by legislative authority as in the other. The writs of mandamus only require the officers of assessment and collection to obey existing law. In neither case are the taxes liens upon property unless made so by statute. *Philadelphia v. Greble*, 38 Penn. St. 339; *Hovell v. Philadelphia*, id. 471; 2 Dill. on Mun. Corp. 659. Levied only by authority of the Legislature, they can be altered, postponed or released at its pleasure. A repeal of the law under which a tax is levied, at any time before the tax is collected, generally puts an end to the tax, unless provision for its continuance is made in the repealing act, though the tax may be revived and enforced by subsequent legislation. We say generally, for there are some exceptions, where the tax provided is so connected with a contract, as the inducement for its execution, that the courts will hold the repeal of the law to be invalid as impairing the obligation of the contract. It is not of such taxes, constituting the consideration of contracts, that we are speaking, but of ordinary taxes authorized for the support of government, or to meet some special expenditure; and these, until collected—being mere imposts of the government, created and continuing only by the will of the Legislature—have none of the elements of property which can be seized like debts by attachment or other judicial process and subjected to the payment of creditors of the dissolved corporation. They are in no proper sense of the term assets of the corporation. They are only the means provided for obtaining funds to support its government and pay its debts, and disappear as such means with the revocation of the charter, except as the Legislature may otherwise provide. When they are collected, the moneys in the hands of the collecting officer may be controlled by the process of the courts, and applied by their direction to the uses for which the taxes were levied; but until then, there is nothing in existence but a law of the State imposing certain charges upon persons or property, which the Legislature may change, postpone or release at any time before they are enforced. So long as the law authorizing the tax continues in force, the courts may, by mandamus, compel the officers empowered to levy it or charged with its collection, if unmindful and neglectful in the matter, to proceed and perform their duty; but when the law is gone and the office of the collector abolished, there is nothing upon which the courts can act. The courts cannot continue in force the taxes levied, nor levy new taxes for the payment of the debts of the corporation. The levying of taxes is not a judicial act. It has no elements of one. It is a high act of sovereignty, to be performed only by the Legislature upon considerations of policy, necessity and the public welfare. In the distribution of the powers of government in this country into three departments,

the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenue for the support and due administration of the government throughout the State and in all its subdivisions. Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.

It is the province of the courts to decide causes between parties, and in so doing, to construe the Constitution and the statutes of the United States, and of the several States, and to declare the law, and when their judgments are rendered, to enforce them by such remedies as legislation has prescribed, or as are allowed by the established practice. When they go beyond this they go outside of their legitimate domain, and encroach upon the other departments of the government; and all will admit that a strict confinement of each department within its own proper sphere was designed by the founders of our government, and is essential to its successful administration.

This doctrine is not new in this court. It has been repeatedly asserted, after the most mature consideration. It was asserted in *Rees v. The City of Watertown*. There the plaintiff, being the owner of certain bonds issued by the city of Watertown, in Wisconsin, to a railroad company, brought suit upon them in the Circuit Court of the United States and recovered two judgments amounting to about \$10,000. Upon these judgments he issued executions, which were returned unsatisfied. He then applied to the Circuit Court and obtained a writ of mandamus upon the authorities of Watertown to levy and collect a tax upon the taxable property of the city to pay the judgments; but before the writs could be served a majority of the members of the council resigned their offices. Subsequent writs of mandamus obtained by him proved ineffectual for similar resignations. He then filed a bill alleging that the corporate authorities were trustees for the benefit of the creditors of the city; that the property of the citizens was a trust fund for the payment of its debts, and that it was the duty of the court to lay hold of such property and cause it to be applied, and he prayed that the court would subject the taxable property of the city to the payment of the judgments. To this bill the city made answer, and on the argument of the case, among other points, the question arose whether it was competent for the court, on the failure of the officers of the city to levy the tax as required by law, to appoint the marshal of the court to levy and collect the tax to pay the judgments. Upon this question, the judges being divided, the point was certified to this court. In disposing of it we said: "We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." 19 Wall. 116.

In the case of *Helne v. Levee Commissioners of New Orleans*, the question again arose whether it was competent for the Circuit Court of the United States to direct its officers to levy and collect a tax to pay the claims of the plaintiffs, who were holders of bonds issued by the commissioners, and the answer was equally emphatic both in the Circuit Court and in this court.

In the Circuit Court, over which Mr. Justice Bradley then presided, the possession of the power of taxation

had been denied. "The judicial department," said the justice, "has no power over the subject. If the officers who are charged with the duty of laying or collecting taxes refuse to perform their functions, the court, in a clear case of failure, and at the instance of a party directly interested, can, by the prerogative writ of mandamus, compel them to perform acts which are ministerial, as distinguished from those which are judicial or discretionary. This is all that the judicial department can do on the subject, unless the Legislature has expressly conferred upon it further powers." 1 Woods, 247.

And when the case came before this court, we here said, Mr. Justice Miller delivering the opinion: "The power we are here asked to exercise is the very delicate one of taxation. This power belongs, in this country, to the legislative sovereignty, State or national. In the case before us the national sovereignty has nothing to do with it. The power must be derived from the Legislature of the State. So far as the present case is concerned, the State has delegated the power to the levee commissioners. If that body has ceased to exist, the remedy is in the Legislature, either to assess the tax by special statute or to vest the power in some other tribunal. It certainly is not vested, as in the exercise of an original jurisdiction, in any Federal court. It is unreasonable to suppose that the Legislature would ever select a Federal court for that purpose. It is not only not one of the inherent powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the Federal government of the legislative functions of the State government. It is a most extraordinary request, and a compliance with it would involve consequences no less out of the way of judicial procedure, the end of which no wisdom can foresee." 19 Wallace, 661.

These authorities — and many others to the same purport might be cited — are sufficient to support what we have said, that the power to levy taxes is one which belongs exclusively to the legislative department, and from that it necessarily follows that the regulation and control of all the agencies by which taxes are collected must belong to it.

When creditors are unable to obtain payment of their judgments against municipal bodies by execution, they can proceed by mandamus against the municipal authorities to compel them to levy the necessary tax for that purpose, if such authorities are clothed by the Legislature with the taxing power, and such tax, when collected, cannot be diverted to other uses; but if those authorities possess no such power, or their offices have been abolished and the power withdrawn, the remedy of the creditors is by an appeal to the Legislature, which alone can give them relief. No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law. However urgent the appeal of creditors and the apparent hopelessness of their position without the aid of the Federal court, it cannot seize the power which belongs to the legislative department of the State and wield it in their behalf.

To return to the question propounded: what is the property of a municipal corporation, which, on its dissolution, the courts can reach and apply to the payment of its debts?

We answer it is the private property of the corporation, that is, such as it held in its own right for profit or as a source of revenue, not charged with any public trust or use, and funds in its possession unappropriated to any specific purpose. In this respect the position of the extinct corporation is not dissimilar to that of a deceased individual; it is only such property as is possessed, freed from any trust, general or special, which can go in liquidation of debts.

The decree of the Circuit Court proceeding upon a

different theory of its control over the uncollected taxes of the repealed corporation, and of the property which could be applied to the payment of its debts, cannot be maintained.

On another ground, also, the decree is equally untenable. It adjudges that "all the property within the limits of the territory of the city of Memphis is liable, and may be subjected to the payment of all the debts" for which the suits are brought, and that "such liability shall be enforced thereafter, from time to time, in such manner" as the court may direct.

In no State of the Union, outside of New England, does the doctrine obtain that the private property of individuals within the limits of a municipal corporation can be reached by its creditors, and subjected to the payment of their demands. In Massachusetts and Connecticut, and perhaps in other States in New England, the individual liability of the inhabitants of towns, parishes, and cities, for the debts of the latter, is maintained, and executions upon judgments, issued against them, can be enforced against the private property of the inhabitants. But this doctrine is admitted by the courts of those States to be peculiar to their jurisprudence, and an exception to the rule elsewhere prevailing. Elsewhere the private property of the inhabitants of a municipal body cannot be subjected to the payment of its debts, except by way of taxation; but taxes, as we have already said, can only be levied by legislative authority. The power of taxation is not one of the functions of the judiciary; and whatever authority the States may, under their Constitutions, confer upon special tribunals of their own, the Federal courts cannot by reason of it take any additional powers which are not judicial.

In *Rees v. City of Watertown*, from which we have already quoted, the power asserted by the decree was claimed by counsel, but was rejected by the court. "Assume," said the court, "that the plaintiff is entitled to the payment of his judgment, and that the defendant neglects its duty in refusing to raise the amount by taxation, it does not follow that this court may order the amount to be made from the private estate of one of its citizens. This summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defense to the debt itself, or if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are, in some cases, beyond legislative interference. The proceeding supposed would violate the fundamental principle contained in chapter twenty-ninth of Magna Charta, and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law; that is, he must be served with notice of the proceeding, and have a day in court to make his defense." 19 Wall. 122.

It is pressed upon us with great earnestness by counsel, that unless Federal courts come to the aid of the creditors of Memphis, and enforce, through its own officers, the taxes levied before the repeal of its charter, they will be remediless. But the conclusion does not follow. The taxes levied pursuant to writs of mandamus issued by the Circuit Court are still to be collected, the agency only for their collection being changed. The receiver appointed by the governor has taken the place of the collecting officers of the city. The funds received by him upon the special taxes thus levied cannot be appropriated to any other uses. The receiver, and any other agent of the State for the collection, can be compelled by the court, equally as the former collecting officers of the city, to proceed with the collection of such taxes by the sale of property or by suit, or in any other way authorized by law, and to

apply the proceeds upon the judgments. If relief is not thus afforded to the creditors, they must appeal to the Legislature. We cannot presume that the appeal will be in vain. We cannot say that on a proper representation they will not receive favorable action.

It is certainly of the highest importance to the people of every State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individual; it entails reproach upon the State.

The Federal judiciary has never failed, so far as it was in its power, to compel obedience to all lawful contracts, whether of the individual, or of the municipality or of the State. It has unhesitatingly brushed aside all legislation of the State impairing their obligation. When a tax has been authorized by law to meet them, it has compelled the officers of assessment to proceed and levy the tax, and the officers of collection to proceed and collect it, and apply the proceeds. In some instances, where the tax was the inducement and consideration of the contract, all attempts at its repeal have been held invalid. But this has been the limit of its power. It cannot make laws when the State refuses to pass them. It is itself but the servant of the law. If the State will not levy a tax, or provide for one, the Federal judiciary cannot assume the legislative power of the State and proceed to levy the tax. If the State has provided incompetent officers of collection, the Federal judiciary cannot remove them and put others more competent in their place. If the State appoints no officers of collection, the Federal judiciary cannot assume to itself that duty. It cannot take upon itself to supply the defects and omissions of State legislation. It would ill perform the duties assigned to it by assuming power properly belonging to the legislative department of the State. Strong, Swayne and Harlan, J.J., dissented from the fourth, sixth, seventh and eighth propositions above set forth.

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

CARRIER—LIABILITY OF SHIP OWNER FOR SHRINKAGE OF CARGO BY REASON OF NATURE OF STOCK.—A number of bags of cutch were received on board a vessel at Calcutta, during the months of January and February, for shipment to Boston, and bills of lading were delivered for the same, containing the usual exception of the perils of the sea, and the memorandum, "weights and contents unknown." The cutch, when received, had become somewhat softened by a voyage, from Singapore, of 1,600 miles, and was therefore re-bagged at Calcutta. It was stowed in the customary manner on the bottom of the ship's hold, but piled in tiers somewhat higher than usual. The ship sailed from Calcutta in March, and reached Boston in July. Every precaution was taken during the voyage to diminish the heat of the hold by ventilation, and upon reaching Boston, the bags were hoisted out of the hold and delivered on the wharf, in the usual manner by means of slings. Held, under the circumstances of the case, that a shrinkage of about 5 per cent of the weight of the cutch was owing to the inherent nature and quality of the article itself, and not to any negligence of the owners of the ship. The authorities are numerous and conclusive that the ship owner is not responsible for loss to goods arising under such circumstances, whether in his relation as common carrier or upon bills of lading in the form given in this case.

* Appearing in 3d Federal Reporter.

Nelson v. Woodruff, 1 Black, 156; *Brig Coleaberg*, id. 170; *Clark v. Barnwell*, 12 How. 272; *Lamb v. Parkman*, 1 Sprague, 343; *The Invincible*, 1 Low, 225; *Libby v. Gage*, 14 Allen, 261. United States District Court, Massachusetts, July, 1880. *Janney v. Tudor Company*. Opinion by Nelson, D. J.

— LIABILITY BEYOND ROUTE.—In the absence of a special contract the liability of a common carrier does not extend beyond the terminus of his own route. Such contract is not established, however, by proof that the carrier accepted the goods with knowledge of their destination, and named the through rate for the same. *Railroad Co. v. Manufacturing Co.*, 15 Wall. 318; *Railroad Co. v. Pratt*, 22 id. 123; *Darling v. Railroad Co.*, 11 Allen, 256; *Nutting v. Railroad Co.*, 1 Gray, 502; *Burroughs v. Railroad Co.*, 100 Mass. 28; *Railroad Co. v. Berry*, 68 Penn. St. 272; *Root v. Railroad Co.*, 45 N. Y. 524; *Babcock v. Railroad Co.*, 49 id. 491; *Convers v. Trans. Co.*, 33 Conn. 163; *Perkins v. Railroad Co.*, 47 Me. 673; *Bank v. Trans. Co.*, 23 Vt. 200; *Buntall v. Railroad Co.*, 32 id. 673; *Express Co. v. Rush*, 24 Ind. 403; *McMillan v. Railroad Co.*, 10 Mich. 119; *Hogland v. Railroad Co.*, 39 Mo. 451; *Coates v. Express Co.*, 45 id. 238. United States Circuit Court, E. D. Missouri, Oct. 1, 1880. *Stewart v. Terre Haute & Indianapolis Railroad Co.* Opinion by McCrary, C. J.

CORPORATION—SUBSCRIPTION TO STOCK—PAYMENT.—A corporation whose charter and by-laws require each subscriber to its capital stock to pay a given percentage of his subscription in cash at the time of subscribing, cannot enforce payment of a subscription where the required cash payment has not been made. Cases referred to, *Pearce v. M. & I. R. Co.*, 21 How. 441; *Black R. & U. R. Co. v. Clark*, 25 N. Y. 208; *Crocker v. Crane*, 21 Wend. 211; *Beach v. Smith*, 30 N. Y. 116; *Hibernia Turnpike Co. v. Henderson*, 8 S. & R. 217; *Jenkins v. Union Turnpike Co.*, 1 Cal. Cts. 80; *Highland Turnpike Co. v. McKean*, 11 Johns. 98; *Sturges v. Stetson*, 1 Biss. 246; *Fosdick v. Sturges*, id. 255. United States District Court, Arkansas, July, 1880. *State Insurance Co. v. Redmond*. Opinion by Caldwell, D. J.

MARITIME LAW LIABILITY AND DUTY OF PILOT—ADMIRALTY JURISDICTION.—(1) A pilot is responsible to the owner of a vessel for negligence or default in the performance of his duty. When a pilot takes charge of a vessel at sea, to bring her into port, his duty is to stay by her, unless discharged, till she reaches her destination or some place of safety. A discharge, however, will not avail him, when the same has been procured by an untrue statement, though with no wrongful intent, in respect to a matter touching the safety of the ship, on which the master had a right to rely. (2) When damage results from such omission of duty, the pilot is guilty of a marine tort, and is subject for the same to the jurisdiction of a court of admiralty. Cases referred to, etc.: 1 *Parsons on Sh. & Adm.* 118, 119; 3 *Kent's Com.* 176; *The China*, 7 Wall. 53; *The Alexandria*, L. R., 3 Ad. & Ec. 574; *The Urania*, 10 W. R. 97; *Hobart v. Dragan*, 10 Pet. 168. United States District Court, S. D. New York, July, 1880. *Sideracadi v. Mapes*. Opinion by Choate, D. J.

PATENT—WARRANTY UPON SALE OF—AFTER-ACQUIRED TITLE.—The sale of a patent right creates an implied warranty as to title. Such warranty grows out of the sale, and not out of the form of the conveyance. In such case the warranty draws to it any after-acquired right or title of the warrantor. 2 *Bl. Com.* 451; *Long on Sales*, 208; *Defreeze v. Trumper*, 1 Johns. 274; *Coolidge v. Brigham*, 1 Metc. 547; *Heermance v. Vernoy*, 6 Johns. 6; *Hannum v. Richardson*, 48 Vt. 508; *Medina v. Stoughton*, 1 Salk. 201; *Pasley v.*

Freeman, 3 T. R. 51; Cammeyer v. Newton, 94 U. S. 225; Pierce v. Woodward, 6 Pick. 206; Chambers v. Critchley, 33 Beav. 374. United States Circuit Court, S. D. New York, July, 1880. *Faulks v. Kamp*. Opinion by Wheeler, D. J.

PRACTICE SERVICE OF PROCESS BY FRAUD.—Where a defendant, residing in another district, is enticed and induced to come into the district where the plaintiff resides by the false representations or deceptive contrivances of the plaintiff, or of any one acting in his behalf, for the purpose of serving legal process upon him, and the same is served through such improper means, such service is illegal, and ought to be set aside, and the process dismissed. *Union Sugar Refinery v. Mathieson*, 2 Cliff. 304-309; *Havenor v. Helst*, 30 Leg. Int. 46. United States Circuit Court, New Jersey, October 18, 1880. *Steiger v. Bonn*. Opinion by Nixon, D. J.

REMOVAL OF CAUSE—STATUTE OF 1875—PROBATE PROCEEDING.—By the law of Wisconsin, at the time this action was begun, jurisdiction to establish lost wills was vested in the Circuit Courts of the State and not in the probate courts. In an action brought in the State court by an alleged legatee under a lost will, against the sole heir at law, to establish the will, and removed to the Federal court under the removal act of 1875, the parties being citizens of different States, held, that although the Federal court might not have jurisdiction of such an action, if originally brought in that court, the case was removable under the act, and that after it was transferred to the Federal court, that court had jurisdiction of the same. Cases referred to: *Armstrong v. Lear*, 12 Wheat. 169; *Tarver v. Tarver*, 9 Pet. 174; *Gaines v. Chew*, 2 How. 619; *Fouvergus v. New Orleans*, 18 Id. 470; *Gaines v. New Orleans*, 6 Wall. 642, 703; *Broderick's Will*, 21 Id. 503; *Gaines v. Fuentes*, 92 U. S. 10. United States Circuit Court, E. D. Wisconsin, October 18, 1880. *Southworth v. Adams*. Opinion by Dyer, D. J.

UNITED STATES SUPREME COURT ABSTRACT.

CORPORATION—WHAT CONSTITUTES SUBSCRIPTION TO STOCK.—Defendant, in 1871, was requested by R. the agent of an insurance company, to subscribe for its stock. In consequence of the inducements offered, he subscribed the paper and delivered it to the agent. "The Great Western Insurance Company. [\$200.] Capital stock \$500,000, with liberty to increase to \$5,000,000. Stock non-assessable. Organized July 20th, 1857, under act of Legislature approved March 4th, 1857. Know all men by these presents, that for and in consideration of ten shares of the capital stock of the Great Western Insurance Company of Chicago, Ill., received by me, I am held and firmly bound, and agree to pay the Great Western Insurance Company of Chicago the sum of two hundred dollars in installments, as follows. twenty-five per cent thereof upon receipt of stock certificate, twenty-five per cent in three months from date hereof, twenty-five per cent six months from date hereof, twenty-five per cent nine months from date, with interest 10 per cent after due." At the time he paid the agent \$25. No certificate of stock was ever given to him and he demanded none, and paid no assessments. The company became bankrupt. In an action by the assignee in bankruptcy against defendant as a stockholder, held that he was such and liable for the amount of stock set forth in the paper signed by him. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, id. 65. Judgment of U. S. Circ. Ct. Iowa, affirmed. *Hawley, plaintiff in error, v. Upton*. Opinion by Waite, C. J. [Decided Dec. 13, 1880.]

MANDAMUS—DISTRICT COLUMBIA SUPREME COURT MAY ISSUE TO SECRETARY OF INTERIOR TO COMPEL ISSUE OF PATENT FOR LANDS—WHEN IT WILL ISSUE.—The Supreme Court of the District of Columbia is authorized to issue the writ of mandamus as an original process in cases where, by the principles of the common law, the party is entitled to it. (2) When a patent to a citizen for a part of the public lands has been regularly signed by the president, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right to its possession by the grantee is perfect, and a writ of mandamus will lie to the officer in whose possession it is, to compel its delivery. In the progress of the proceedings to acquire, under the laws of the United States, a title to the public lands, there must, in all cases where the claimant is successful, come a period when the power of the executive officers, who constitute the land department, over those proceedings ceases. That period is precisely when the last official act has been performed which is necessary to transfer the title from the government to the citizen. Title by patent from the United States is title by record, and delivery of the instrument to the grantee is not essential to pass the title, as in conveyances by private persons. Therefore, when the officers, whose action is required by the laws necessary to vest the title in the claimant, have decided in his favor, and the patent has been duly signed, sealed, countersigned and recorded, the title of the land has passed to the grantee, and there remains nothing more to be done by the land office but the ministerial duty of delivering the instrument, which can be enforced by mandamus. An acceptance of the grant will, in such case, be presumed from the efforts of the grantee to secure the favorable action of the department, and especially from the demand for possession of the patent. Right of writ of mandamus to the Secretary of the Interior sustained. Cases referred to *McIntire v. Wood*, 7 Cranch, 506; *McClung v. Silliman*, 6 Wheat. 599; *Kendall v. United States*, 12 Pet. 618; *Kendall v. Stokes*, 4 Miss. 98; *Decatur v. Paulding*, 14 Pet. 497; *Comm. v. Whiteley*, 4 Wall. 554; *United States v. Stone*, 2 Id. 625; *Johnson v. Towsley*, 13 Wall. 72; *Marbury v. Madison*, 1 Cranch, 137; 2 Bl. Com., 346; *Shepherd's Touchstone*, 54; *Coke's Littleton*, 208b; 3 Washb. on Real Prop. 308; *Church v. Gilman*, 15 Wend. 656; *Butter v. Baker*, 3 Coke, 266; *Warren v. Levitt*, 11 Fost. (N. H.) 340; *Hatch v. Hatch*, 9 Mass. 307; *Green v. Lister*, 8 Cranch, 229; *Ex parte Kuhlman*, 3 Rich. Eq. 257; *Downer v. Palmer*, 31 Cal. 613; *Leroy v. Jamison*, 3 Sawyer, 309; *Case of Mutelle*, 3 Opin. Atty.-Gen. 354. Judgment of Sup. Ct. of District of Columbia, reversed. *United States ex rel. McBride, plaintiff in error, v. Schurz*. Opinion by Miller, J.; Waite, C. J., and Swayne, J., dissented. [Decided Dec. 13, 1880.]

ILLINOIS SUPREME COURT ABSTRACT. NOVEMBER, 1880.

EQUITABLE ACTION—CONTRACT IN RELATION TO FURNISHING MEDICAL DIPLOMAS—RESTRAINING USE OF FICTITIOUS NAME—PUBLIC POLICY.—An agreement to admit a person into a medical institute and assist in the graduation and granting to him a diploma, in consideration of such person abandoning a fictitious name nearly the same as that of the other party, a member of the faculty, is of such doubtful propriety that equity will not lend its aid to enforce it. The granting of diplomas to students in colleges ought not to be made the subject of private contracts with individual members of the faculty for personal advantage to themselves. A bill by Henry Olin, who was a physician treating diseases of the eye and ear in the city of

Chicago, charged that the defendant, Bates, had assumed the fictitious name of Andrew G., or A. G. Olin, and was engaged in practicing his profession in the same city, whose business was treating venereal diseases, that in such name he advertised extensively both in the newspapers and by publications and pamphlets largely circulated by which means the complainant's reputation was injured, many taking him for the defendant. It appeared that defendant had been practicing in the city under the same name before the complainant came there; the bill sought to enjoin the defendant from the use of the name Olin. On the hearing the bill was dismissed. *Held*, that the bill was properly dismissed for want of equity. *Olin v. Bates*. Opinion by Scott, J.

NEGLIGENCE—CONTRIBUTORY, OF PARENTS OF MINOR CHILD—MUNICIPAL CORPORATION—DUTY AS TO GUARDS TO SWING-BRIDGES.—(1) When a child only four years old left his parents' home without their knowledge or consent, his father being absent engaged in his usual labor, and his mother being sick and confined to her room, and while thus away from home playing with other boys he was personally injured, and the proof showed that the mother as soon as she discovered the child's absence had search made for him, and that the family were dependent upon the father's daily labor for support, it was *held* that a finding of no negligence on the part of the parents of the child was proper and correct. (2) It is the duty of a municipal corporation to keep and maintain bridges within the corporate limits in a reasonably safe condition, but it is not required by law to so construct its streets and bridges that accidents are impossible to persons using them. Persons using them must exercise reasonable care for their personal safety. When a swing bridge in a city is reasonably safe for persons using ordinary care, and a child without the fault of its parents with other children playing upon and about such bridge is injured, while the bridge is being handled with the requisite and usual care and skill, no recovery can be had and the injury must be attributed to accident. The law does not make it the duty of corporate authorities to so construct such bridges as to make them safe for children to play around or upon. Hence they are not bound to place guards or mechanical contrivances to keep children off the same. *Gavin v. City of Chicago*. Opinion by Scott, J.

VERMONT SUPREME COURT ABSTRACT.*

CONSTITUTIONAL LAW—STATE INSOLVENT LAW ENACTED WHILE BANKRUPT LAW IN FORCE—EFFECT OF REPEAL OF BANKRUPT LAW.—The State Legislature, while the National bankrupt act was in force, passed an act providing for the equal distribution of the estates of insolvent debtors. *Held*, that the State act, although in a degree dormant during the existence of the National act, took such vitality as was not inconsistent with that act, and was not void. After the repeal of the National act, creditors of an insolvent debtor brought actions against him to recover debts incurred while that act was in force and before the State act was passed, and procured his property to be attached therein. Within sixty days after such attachments were made, the debtor was adjudged insolvent, and afterward an assignee was appointed, and the debtor's property was conveyed to the assignee, who demanded it of the attaching officer. *Held*, that as the right to attach was not a part of the contract, but a right to a remedy for the breach of it, the Legislature might provide that in case a debtor had not sufficient property to pay all his debts it should be equitably dis-

tributed among all his creditors, without violating that provision of the Constitution that forbids the passing of a law "impairing the obligation of contracts;" and that therefore the assignee was entitled to possession of the property. *Held*, also, that at the time the State act was passed the creditors had no absolute priority that they could assert by attachment; for that under the National bankrupt act, which was in force when the debts were incurred, they would have been bound, in case of bankruptcy of the debtors, to release their attachments and surrender the property for distribution. *Ogden v. Saunders*, 12 Wheat. 213; *Abbott v. Kimball*, 19 Vt. 551; *Harrison v. Sterry*, 5 Cranch, 290; *Stocking v. Hunt*, 3 Denio, 274; *Morse v. Gould*, 11 N. Y. 281; *Edwards v. Kearzey*, 6 Otto, 595, 610; *Bigelow v. Pritchard*, 21 Pick. 169; *Stone v. Tibbetts*, 28 Me. 112; *Kilborn v. Lyman*, 6 Metc. 299; *Ward v. Proctor*, 7 Id. 318. *Baldwin v. Buswell*. Opinion by Redfield, J.

PAYMENT—CREDITOR ASSUMING TO DEAL WITH MONEY OF DEBTOR.—Defendant, having bought cattle of plaintiff, offered him in payment a check greater than the price thereof, but plaintiff being unable to give defendant money for the difference, it was agreed that defendant should take the check to A., to be sent to a bank to be cashed, and defendant took it to A. accordingly, and directed A. to pay plaintiff the price of the cattle, which A. agreed to do. Defendant afterward told plaintiff what he had done, and plaintiff said it was "all right." A., in sending the check to the bank, directed that it should be placed to his credit. Afterward plaintiff called on A. for the money, but not needing it, agreed with A. that A. should keep it thirty days. *Held*, that as plaintiff assumed to deal with the money, he had in legal effect received payment of defendant, and that it made no difference that the check was put to A.'s credit. *Goochie v. Brock*. Opinion by Veazey, J.

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

SEPTEMBER, 1880.

GIFT—DONATIO CAUSA MORTIS—GIFT OF BANK DEPOSIT BY DELIVERY OF BOOK.—(1) A depositor in a bank, intending to give M. the deposit as a *donatio causa mortis*, delivered to M. his bank-book during his last illness. *Held*, sufficient to constitute a *donatio causa mortis*. The court say: It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*; and that such a gift may be proved by the delivery of the bank-book to the donee, or to a third person for the donee, accompanied by an assignment. *Kingman v. Perkins*, 105 Mass. 111; *Foss v. Lowell Five Cents Savings Bank*, 111 Id. 285; *Kimball v. Leland*, 110 Id. 325; *Sheady v. Roach*, 124 Id. 472; *Davis v. Ney*, 125 Id. 590. We have not had the question presented to us until now, whether the delivery of the book without a written assignment or order is sufficient to constitute a valid gift *causa mortis* or *inter vivos*. The question has, however, been decided in other jurisdictions in the affirmative. *Hill v. Stevenson*, 63 Me. 364; *Tillinghast v. Wheaton*, 8 R. I. 536; *Camp's Appeal*, 36 Conn. 88; *Penfield v. Thayer*, 2 E. D. Smith, 305. (2) The estate of the depositor was largely indebted to M., but to no one else, and it was claimed that the gift made the estate insolvent, and was therefore void as in fraud of creditors. *Held*, that it is true that a gift *causa mortis* cannot avail against creditors. M., as donee *causa mortis*, therefore, took his title to the bank deposit subject to the right of the administrator to reclaim it if required for the payment of debts. *Mitchell v. Pease*, 7 Cush. 350; *Chase v. Redding*, 13 Gray 418. But M. is the only person in

* To appear in 38 Vermont Reports.

this case against whom, as creditor, the gift would be void, and it cannot be said to be a fraud as against him. *Pierce v. Boston Five Cent Savings Bank*. Opinion by Endicott, J.

NEGOTIABLE INSTRUMENT — STOLEN BOND — LIABILITY OF OBLIGEE TO OWNER FOR INTEREST COUPONS — PAYMENT. — In an action against a railroad company to recover the amount of interest coupons which had become due upon a bond issued by defendant and stolen from plaintiff, its owner, it appeared that immediately after the loss, plaintiff notified defendant thereof, and subsequently, on April 1, 1879, made a formal demand upon defendant for the amount of the coupons that were due. A few days after defendant's agent, which had notice of the theft of the bonds, received from a bank several of the coupons and paid the same, without making inquiry. *Held*, (1) that a declaration upon the coupons as promissory notes payable to bearer was proper. *Spooner v. Holmes*, 102 Mass. 503. It is well settled in this Commonwealth that when such a negotiable promissory note is stolen from the holder before it is due, the amount of it may be recovered from the maker in an action at law, on filing a sufficient bond for his indemnification. *Fales v. Russell*, 16 Pick. 315. (2) When a negotiable promissory note payable to bearer has been lost or stolen without the fault or neglect of the owner, and is presented for payment when long overdue, the party liable to pay it is bound by previous notice of the loss to inquire into the title of the *de facto* holder before payment. See *Miller v. Race*, 1 Burr. 452; *Wheeler v. Guild*, 20 Pick. 545. There is in this last case the strongest implication of the rule that if the party paying has notice of any defect of title or authority to receive, the payment will not be good; a rule which is in accordance with the decisions of this court. And notice previously given of the loss of a negotiable instrument distinguishable by number or other ear mark is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. There was another circumstance in this case which tended to fix more clearly upon the defendant the duty of inquiry, and that is that the coupon was long overdue. After maturity, a coupon, like any other negotiable security, loses the protection of the law merchant, and becomes a mere chose in action. (3) The defendant notified the plaintiff, before this suit was brought, of the name of the person to whom and the date at which the coupon was paid. *Held* that this did not affect the plaintiff's right to recover in this action. The only payment which can be a discharge to the party paying is a payment to a *bona fide* holder, whose title was acquired before maturity for value and without notice. The payment of a lost negotiable instrument after notice, overdue and without inquiry, is a payment wholly at the payer's own risk. *Hinkley v. Union Pacific Railroad Co.* Opinion by Lord, J.

NEGLIGENCE — LIABILITY OF OWNER OF PREMISES FOR INJURY TO ONE ON PREMISES BY INVITATION — INJURY TO ONE ATTENDING CHURCH. — A meeting of a conference was, with the consent of the pastor and officers of the defendant society, a congregational church, held in defendant's edifice, and all members of certain congregations of the same religious body were invited to attend in the usual manner. Plaintiff, who was a member of one of the congregations mentioned, attended the meeting, and was injured by (without his own fault) falling over a dangerous wall which defendant had constructed upon its premises. *Held* that there was enough to justify a jury in finding that plaintiff attended the meeting by defendant's invitation, and that in such case defendant was bound to keep its premises safe for plaintiff. To maintain an action for injury under such circumstances, it must be shown

that the defendant was chargeable with some neglect of duty which it owed to the plaintiff, by reason of which she suffered the injury complained of. The owner or occupier of real estate is under no obligation to keep the premises safe for those who enter without inducement or invitation express or implied; and the plaintiff must show that, at the time of the injury, she was passing over the way in question by the invitation of the defendant, and not by mere license or permission. The fact that the plaintiff was induced by the defendant to enter upon a dangerous place without warning is the negligence which entitles the plaintiff to recover. *Sweeny v. Old Colony Railroad Co.*, 10 Allen, 308; *Carlton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Lamo v. Farren Hotel Co.*, 116 id. 87. The authority given by the defendant to the conference to hold its meetings in this place implied an authority to secure an attendance by invitations given in the known and usual manner. The application of the rules on which the defendant's liability depends is not affected by the consideration that this is a religious society, and that the plaintiff came solely for her own benefit or gratification. It makes no difference that no pecuniary profit or other benefit was received or expected by the society. The fact that the plaintiff came by invitation is enough to impose on the defendant the duty which lies at the foundation of this liability; and that, too, although the defendant, in giving the invitation, was actuated only by motives of friendship and Christian charity. *Davis v. Central Congregational Church of Jamaica Plain*. Opinion by Colt, J.

WILL — MAYOR OF CITY APPOINTED TRUSTEE. — Testator by his will gave a certain estate in trust for the establishment of a free school in New Bedford, and appointed several persons named and the "mayor of the city," a board of trustees to carry into effect the provisions of the will as to such trust. By a codicil, testator provided that the fund was to be paid over to the city for educational purposes, if two-thirds of the trustees should be of opinion that they could not administer it as the testator intended. *Held*, that the mayor of the city, at the time of testator's death was entitled to be appointed trustee. There was nothing in the will to indicate that the testator intended that the city of New Bedford should take any interest in the fund given to the trustees for the establishment of a school; or that the city, in its corporate capacity, should have any control or direction in its management. The provision in the codicil did not in any way change the character of the trust, or the duties of the trustees while they hold it. Nor was there any thing to indicate that the "mayor of the city" was to execute the trust conferred upon him in his official capacity; or that the testator intended he should bear a different relation to the board of trustees from that of his co-trustees, or that his rights, duties, or tenure of office differed from theirs. It is the common case of a gift to a person by an official designation, which leaves no doubt as to his identity. See *Inglis v. Trustees of Sailors' Snug Harbor*, 3 Pet. 99. In this case, there are no words added to the mere official designation. *Dunbar v. Soule*. Opinion by Endicott, J.

NEW BOOKS AND NEW EDITIONS.

HERMAN ON MORTGAGES OF REAL ESTATE.

Commentaries on Mortgages and Vendors' Liens. By Henry M. Herman, author of Treatises on Chattel Mortgages, Executions, etc. Volume I. New York: Cockcroft & Company, 1879.

A THOROUGH acquaintance with the law governing mortgages is necessary to every lawyer, for so universal and frequent is the use of these instruments that one professing a knowledge of jurisprudence can

hardly fail to be consulted upon numerous occasions in reference to them. The entire profession is therefore interested in every new treatise upon that subject which appears, and if such treatise be found of merit it is sure to meet with a generous welcome and an extended circulation.

The work before us, so far as we can judge by the first volume, will form a considerable addition to the elementary learning in this branch of the law. The object of the author, namely, "The unification of a system of pledging or mortgaging property" is an excellent one, and even its partial attainment will render what he is doing of great value not only to the legal profession, but to all persons who are interested in mortgages. The method in which he treats the contract of mortgage, that is, not as a conveyance of an estate, but as it was under the civil law a mere contract of hypothecation, which may eventually lead through foreclosure into a conveyance of the estate hypothecated, is the proper one for these reasons. In no other way can decisions of various courts apparently conflicting be harmonized. The tendency of the authorities is toward such a view, and it is the view or notion of a mortgage popularly held. In addition, it facilitates the application of the same principles to pledges of different kinds of property.

The topics embraced in the volume before us are these: Definitions, history and general principles, Property subject to mortgage, What constitutes a mortgage, Equitable mortgages, Liens in favor of a vendor by implication, Essentials of a mortgage, Consideration, Description of property, Conditions. The citations of authorities are very numerous, an excellent feature in a work of this nature, which should be useful not only as an exponent of principles, but as an aid to the practitioner in the preparation of cases. We think, however, that in some instances the extracts from opinions in reported cases are too extended. The province of an elementary law book is to give the results of the decisions of the courts, not the elaborate reasoning which led to those results. If that is important to the reader at any time, he should consult the decisions themselves. The statements of principle are, as a rule, clear and concise, but they are not so in every instance. There are sometimes long and involved sentences which require careful reading to determine their meaning; and there is occasionally a statement which, though it may not be absolutely incorrect, is liable to lead to an incorrect inference. An instance of this fault appears on page 673, where it is said "In the New England States and New Jersey the common law seal is required, while in nearly all the other States the scroll or a printed L. S. is sufficient." The impression from reading this naturally is, that in New York a scroll or the L. S. answers as a seal, which is not so. The word "nearly" in the sentence quoted, is not sufficient to embrace a State of the importance of New York. Besides the book is published in New York, and the law there, if anywhere, should be definitely stated.

Taken as a whole, however, the work if completed in accordance with the promise held out in this volume, will be a text-book of merit, and of more than ordinary value to practicing lawyers.

X NEBRASKA REPORTS.

This volume, reported by Mr. Guy A. Brown, and published at Lincoln, Neb., by the State Journal Company, contains the following cases of general interest: *Fraser v. Syas*, p. 115.—Where a husband absconds, and his wife continues to carry on his farm, she becomes the head of the family and may maintain his claim to property exempt from execution. *Lausman v. Draxon*, p. 172.—A tenant in possession cannot acquire an adverse title to his landlord by purchase at

a judicial sale. *McMillan v. Malloy*, p. 228.—On a contract to thresh an entire crop of wheat at a given price per acre, the employee, failing fully to perform, may recover at the contract price for what he has done, less the damages sustained by the employer by the breach of contract. *Ward v. School District*, p. 203.—A school district treasurer deposited school money in a bank, to his own individual credit, directing the bank to pay out of it certain school district bonds, about maturing, payable at that bank. The bank failed and the money was lost. *Held*, that the treasurer was liable for it in an action on his bond. *Skinner v. Reynick*, p. 323.—A homestead may be mortgaged, and one who purchases the premises subject to and agreeing to pay such mortgage, cannot avoid it. *Forbes v. Omaha Nat. Bk.*, p. 338.—An indorser living outside the place of dishonor, but nearer to the post-office in such place than any other, and obtaining his mail matter there, yet having no regular or usual place of business therein, cannot be held by notice of dishonor deposited in such post-office. *Rose v. O'Leary*, p. 304.—A's servant being injured by B's wrongful act, B called a physician to attend him, to whom A said, after such attendance, that B was responsible for the accident, adding, "but you need not be at all alarmed, I will see you paid;" *held*, that this promise was within the statute of frauds. *Krigbaum v. Vindquest*, p. 435.—Under a partnership agreement between A and B, conditioned that A may terminate it if B becomes dissipated and neglects the business, A cannot terminate it because B has simply become dissipated. *Delaney v. Erickson*, p. 492.—Letter-press copies of private writings are not admissible as original evidence. *McCormick v. Denary*, p. 515.—Independent of agreement, a master may discharge a servant for intoxication unfitting him for the performance of his duties. *Sioux City and Pacific Railroad Co. v. First Nat. Bk.*, p. 556.—A railroad company is estopped as against a bona fide purchaser, to deny a bill of lading issued by its authorized agent, although the goods were not received by the company. *Townsend v. Star Wagon Co.*, p. 615.—The unauthorized insertion of a place of payment in a promissory note made payable generally, is a material alteration that avoids the note as to an indorser.

OBITUARY.

BENJAMIN K. PHELPS.

BENJAMIN K. PHELPS, District Attorney of the city and county of New York, died on Dec. 30th, after an illness of three months. His death was undoubtedly hastened, if not caused, by the death of his wife on the 21st of December. Mr. Phelps was born at Haverhill, Mass., in 1832; graduated at Yale College in 1853; formed a law partnership with his classmate, Mr. Knevals, in the city of New York in 1856, which firm was afterward merged into the late firm of Arthur, Phelps, Knevals and Parsons, the senior member being the vice-president elect of the United States. He served as assistant United States district attorney under Edwards Pierrepont and Samuel G. Courtney. In 1872 he was elected district attorney of New York, has been twice re-elected, and died in that office. Mr. Phelps was a prominent member of the Republican party, at one time chairman of its State central committee. In his office of district attorney, the most important in the administration of criminal justice in this country, he was distinguished by energy, integrity, devotion and efficiency, and received the extraordinary compliment of a third election in a city largely opposed to him in politics, and quite too much accustomed to yield to partisan motives rather than to worth and abilities in filling its judicial and ministerial offices. He was a lawyer of ample learning, especially

in criminal jurisprudence; a forcible and graceful orator; an adroit and vigorous manager of a cause. He tried many causes of celebrity. At times he rose to a very high order of eloquence, as for example, in the recent case of the Rev. Mr. Cowley, convicted of cruelty to children, in which case his summing up is pronounced by competent critics to have been one of the most eloquent and affecting addresses ever heard by our generation in this State. Mr. Phelps was a man of the purest and most amiable nature; of elegant presence and manners; and of great dignity and weight of character. The public loss caused by his death might by a fortunate concurrence of circumstances be made good; it will be impossible better to fill his place.

WILLIAM WAIT.

William Wait, the eminent law writer, died at his home in Johnstown, N. Y., Dec. 29th, of consumption, after an illness of several months, brought on by overwork. For the past fifteen years his energies have been devoted almost incessantly to the compilation and publication of books on legal practice and other kindred topics. The result of this work is twenty odd volumes, which are recognized by the profession as the standard publications in their line. His first work, *Wait's Law and Practice*, in two volumes, published in this city in 1865 by William Gould & Sons (who have issued all his works), made his reputation at once, and led him to abandon active practice at the bar. Since that time three editions of this work have appeared, and at the time of his death he was engaged in rewriting the book. The new edition was nearly finished and will be completed and published in a short time. His second work was the *Digest of the New York Reports*, in five volumes. This was followed by his *Supreme Court Practice* in seven volumes, an *Annotated Code*, *Table of Cases*, and his last great work on *Actions and Defenses*, in seven volumes, a national work, which has had an immense sale in every State in the Union. In the preparation of these volumes he overworked himself and brought on the disease which caused his death. He was a painstaking and accurate writer. He was in his fifty-ninth year and leaves a fortune of \$100,000, obtained from the sale of his books, for the benefit of his wife and four children.—[*Albany Evening Journal*.]

CORRESPONDENCE.

"THE NATION" AND LIBEL.

Editor of the Albany Law Journal:

In your issue of December 25 you say "it must be said that the *Nation* never libels anybody." Have you forgotten its savage and unjust attacks upon Judge Dillon two or three years ago, for his decision in the Central Railroad Co. of Iowa foreclosure case, in the United States Circuit Court, for the District of Iowa? It is interesting in this connection to note that the decree was afterward affirmed by the Supreme Court. 99 U. S. 334. L.

NEW YORK, Dec. 31, 1880.

[We had forgotten the articles referred to by our correspondent, as we suppose almost everybody else has forgotten them. But we correct our statement that "*The Nation* never libels anybody," by the inevitable reference to "Pinafore."—ED. ALB. L. J.]

NOTES.

THE fourth annual meeting of the Illinois Bar Association was announced to be held at Springfield, Illinois, January 6th and 7th. Theses were to be read on the Obligations resting upon the State with respect

to the rendition of fugitives from justice, by Hon. Charles Dunham; on Special assessments by municipal corporations for public improvements, by Hon. Wm. E. Nelson; on the History of statute law in Illinois, by Hon. Wm. L. Gross; on the Present state of the common-law practice in England, by Hon. James B. Bradwell; on the Legal relations of Railroad corporations, their rights and obligations, by Hon. J. Mayo Palmer; the president, Hon. David McCulloch, was to deliver the annual address; Hon. Isaac Arnold was to give some Reminiscences of the Illinois bar forty years ago, Lincoln and Douglas as lawyers and orators; Hon. Joseph Gillespie was to give some Reminiscences; there was to be an oral discussion on the proposition that No one should be incompetent as a witness, the affirmative to be sustained by Hon. Wm. H. Barnes, the negative by Hon. S. W. Moulton; and there was to be a banquet and ball at the close. We acknowledge an invitation with thanks. It would have given us pleasure to be present, especially at the closing ceremonies, but we feared our attendance would have prevented our getting home at our usual early hour.

The American, the new Philadelphian rival of *The Nation*, is not so strong in its law as it might be. In speaking of the recent decision in the English case of *Debenham v. Mellor*, respecting the wife's authority to pledge her husband's credit for necessities, it says: "Where the parties were in actual cohabitation, the courts have constantly recognized an implied authority to the wife to pledge her husband's credit, which the husband could not avoid, except where he could show that the articles purchased were not necessities, or that he had withdrawn the authority by actual notice to the world." There never was any such law, and the law of *Debenham v. Mellor* is as old as the hills. Again, *The American* says: "In some States a married woman may enter into some of the most solemn contracts, and yet cannot be held to them, unless, first, the contract is in writing; second, that it states that a specific charge is made upon her separate estate; and third, that the charge is for the benefit of her estate. The absence of either one of these particulars nullifies the contract, and leaves the woman free to avoid it." This is as wrong as can be. *The American* should at once retain a "Philadelphia lawyer," for if these matters are worth writing about by the secular press, they are worth stating right.

Mr. Stewart L. Woodford, United States Attorney for the southern district of New York, has done a great work in his office. On his accession, in January, 1877, there were over 6,500 cases on his office dockets. He has brought and defended over 4,500 more, and the dockets now number only 3,320. In four years he has disposed of more than 7,680 cases. — The Chicago Bar Association have had a dinner. The *Chicago Legal News* testifies to the usual effect of such dinners as follows: "A question arose as to the meaning of the verse on the program, said to be in Latin, and after an animated discussion no two could agree as to its meaning, and no one could be found who could give a correct translation of it."

The following is a part of an advertisement from a London law journal: "A gentleman, who has had the entire charge of several heavy cases in litigation, and who has just returned from a tour round the world, which he has made on behalf of an eminent firm of solicitors in Lincoln's Inn, having brought to a successful issue the object of his mission, is prepared to undertake the getting up of evidence and the obtaining of reliable information in any litigious matter of importance." "For obvious reasons" he omits his name and address. This is rather ahead of Yankee "enterprise."

The Albany Law Journal.

ALBANY, JANUARY 15, 1881.

CURRENT TOPICS

MESSRS. DAY & CO., of Ithaca, N. Y., propose, if sufficiently encouraged, to publish a monthly illustrated magazine of current legal literature, historical and biographical, with portraits and sketches of distinguished judges and practitioners at the bar, to be called *The American Jurist*. Its scope includes "a discussion of the ever-growing and diversified questions arising in Federal and State legislation, international law, and the more important questions springing from the complex nature of State and Federal jurisdiction." This seems to us an important and interesting project, and one that in this country is practically untried, although we cannot quite subscribe to the statement in the circular that "the legal profession * * * is unrepresented save only by the published reports of the courts, and the dry details of judicial decisions." We have tried to make this JOURNAL something broader than that. We hope the publishers will meet with encouragement, and to fire the blood of the profession accordingly we extract the following piece of fine writing from the circular: "Military chieftains may grasp for power: tyrants may for an hour dazzle with the glamour of military parade and the pomp of war an oppressed and frenzied people; but as the bugle notes are silenced and the cannonade dies away, they turn from the tinsel trappings and triumphal marches of military display to the statesmanship of the country, and call to their parliaments and congressional halls the jurists of the country for the final debate and arbitrament of the liberties of the people. From the days of King John to the present hour, the bench and the bar have furnished the statesmen who have erected the bulwarks of constitutions and law, and extorted from tyrants the Magna Charta, securing to the oppressed the guarantees of free institutions." If the publishers can hit the just mean between triviality and gossip, on the one hand, and profound dryness on the other, they will at least deserve success.

We have received another prospectus, which, although not exactly of professional interest, must not be neglected. "An association of ladies at Ottawa, Illinois, propose to present to Mrs. President Hayes a satin hanging and autograph album, as a testimonial of her high moral worth and courage in banishing the wine cup from the White House. The album will be composed of autographs written upon the inclosed parchment blanks, which, with an engraving of the hanging, will be handsomely bound. The invitations for autographs will be confined chiefly to the State of Illinois, a limited number only being appropriated to each county. A few will be issued to distinguished persons outside the

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State, such as ex-presidents' widows, president elect and wife, justices of the Supreme Court U. S., Senate of U. S., supreme justices and governors of the several States, ex-president and wife, president, heads of departments U. S., Congress of U. S., army and navy officers, and representative persons in the professions." It is intended to suspend the hanging by rods and rings of wood from the homestead of Abraham Lincoln. There is to be a presentation poem, and a testimonial reception. For this album our characteristic autograph is requested, and a "note" asks a contribution of one dollar. Our autograph must be regarded as peculiarly valuable, for two blanks are inclosed, with a request that we sign both. It seems however that only one dollar is wanted. Now assuming that this project is all in good faith, there are several reasons why we are reluctant to comply. First and foremost, there is our invincible modesty. Of course we shrink from classing ourselves with "representative" or "distinguished" persons in our profession, and on carefully looking over the list of other persons, we do not find that we are or are likely ever to be among any of them. We are tolerably sure about "president" elect, and perfectly certain about the widows or wives of any such. Then again, if there is any thing we cordially abhor it is an "autograph album." Possibly an "autograph bed-quilt" is worse. We are hostile to "hangings," too, of every description. Finally, we are opposed to the dollar matter, both on principle and from necessity. The price of writing our name is not high. We have often paid a great deal more than that for the privilege. But the ladies in addressing us have apparently forgotten our invariable editorial privilege at all entertainments. All this is without prejudice to Mrs. Hayes. That lady has our sincere admiration. Not that we are precisely a teetotaler. But we admire any lady who will have her own way in her own house, and especially a lady who will try, in doing that, to do something to abolish whisky from our National capitol. If it could be abolished from our whole country we should rejoice. If Mrs. Hayes had always tolerated wine, we should not have censured her for offering it in the White House; but we applaud her for not sacrificing her convictions, on elevation to a high position, to the custom and prejudices of genteel society. On the other hand, we have no fault to find with Mrs. Garfield, who, it is said, has just sent twelve barrels of cider to market. So while we decline to array ourselves with the distinguished company to which we are invited, the ladies who have so politely invited us are welcome to hang this up where Mrs. Hayes can see it, if they will.

We call attention to a communication in another column from a distinguished lawyer, on Abbott's New Cases. We hope this series, in many respects so excellent, is not going to wreck on the same rock which destroyed Howard's Reports. This seems a good opportunity for us to say something to reporters which has long been on our minds. First, we wish they would never cite cases simply by the report,

but would always give the titles. Some judges are in the habit of omitting these, and where they do, it is the duty of the reporter to supply the deficiency. This should also be done in the arguments of counsel. Again, the citations, both in arguments and opinions, should always be verified, if possible. Lawyers are notoriously careless, and once in a while their handwriting is hard to decipher. Errors thus creep in, and frequently quite vexatious and cause considerable loss of time. In the citations in one argument of about a page in a recent volume we find no less than a dozen errors, and among them "Jurist" is cited twice as "Tur," and once as "Fur," and "Vesey, Sr.," is cited as "Vesey's Tr." In another volume we find three errors in four "errata." If this goes on, there should be "errata" upon "errata." Of course errors will occur, spite of the greatest caution, but reporters should not proceed on the assumption that such small matters are unimportant. Finally, we cannot see the propriety of covering page after page of reports with bare citations from counsel's arguments. Judge Grover once said to a counsel who had cited a score of cases on a single point: "Now the court can't look at all these cases; which do you think is the best of the lot?" But what may be tolerated in a brief may be intolerable in a report, and so it would seem sufficient, in long arguments, to report a few of the citations under each division of the argument.

In view of a probable vacancy on the bench of the United States Supreme Court, to be caused by the resignation of Mr. Justice Swayne, the name of Judge Cooley has been suggested as his successor. This is an eminently fit nomination. It may be doubted whether any other could be suggested that would find so large and so unhesitating a concurrence among the lawyers of the country. Judge Cooley has an enviable and deserved reputation as a constitutional lawyer. His experience as a judge has been long and varied. The court of which he is a member is one of the best in this country. His work on Constitutional Limitations is of unique excellence. Such talents and such studies as his are the most appropriate for the supreme bench. The coming vacancies should be supplied by such men as himself and Judge Dillon, rather than by obscure men, promoted for political or personal reasons. We only hope that Judge Cooley was born or once lived in Ohio. If he was not, and would like this office, let him remove or go visiting there at once, or send his children there to be educated, and there will be some chance for him. We think a great deal of Mr. Stanley Matthews, the supposed successor of Mr. Justice Swayne. He is a remarkably brilliant and talented man, but about as fit for a judge as Rufus Choate.

Judge Osborn has recently decided a singular election case. In 1878, Mr. William L. Thornton, of Sullivan county, was a candidate for the office of judge of that county, and defeated Judge Bush, who had last held the office. During the canvass, Mr. Thornton announced that he would serve the

county, if elected, for \$1,200 a year, although the salary was \$2,500, and since January, 1879, has only taken \$1,200 a year, although the board of supervisors raised the usual salary. His opponent brought *quo warranto*, setting up that Thornton's agreement to serve for \$1,200 per annum, if elected, was in the nature of a bribe, made to influence the voters of the county, and praying that Thornton should be declared ineligible, and that Bush should be installed in the office as the one who had received the highest number of legal votes. Judge Osborn holds that Thornton's promise was in the nature of a bribe, and renders him ineligible, but he refuses to re-place Judge Bush on the county bench, only going so far as to declare the office vacant. The result is that the governor will find it necessary to fill the vacancy for this year, and another election must be held next fall. Judge Osborn's decision is supported by *Carrothers v. Russell*, Iowa Supreme Court, April, 1880, 22 Alb. L. J. 413. It was there held that a promise by a candidate to pay into the public treasury, if elected, a part of his compensation, if made with intent to induce electors to vote for him, was an offer of a bribe, within the meaning of the statute, and disqualified the candidate. See, also, cases there cited.

NOTES OF CASES.

THE Pennsylvania Supreme Court, in *Heinman's Appeal*, November, 1880, 11 Pitts. Leg. Jour. 171, found a novel reason for depriving a father of the custody of his minor children, and conferring it upon their maternal grandmother. The children were respectively eight and five years old. The father was indigent, but the children had some property. The evidence showed that the father had lost his wife and three young children, with diphtheria, within a month of each other. The evidence further showed that during the sickness of these members of his family the respondent refused to call physicians to their attendance or to provide any medical treatment except that practiced by himself, called the Baunscheidt system, which consisted in pricking the skin of the patient on different parts of the body with an instrument armed with a number of needles and operated with a spring, and then rubbing the parts thus pricked with an irritating oil. The court refused to consider the poverty of the father as a sufficient reason for depriving him of his children, but the other point they thought sufficient, saying: "While the evidence reveals that he had no faith in allopathic physicians, it also reveals that he had neglected to call any others for his wife and three children, who had died within less than seven months prior to the hearing. He may have been an affectionate husband and father, and have done what he thought was best, yet according to the evidence, they were shamefully neglected as regards medical treatment. His oldest child was the first to die, after being sick for several days, but he sent for no physician. For the others he employed no physician at all, except allopathic, and did not call them till death was at

the door. He himself practiced the exanthematic treatment on his sick wife and children, although he makes no pretensions as a practicing physician, and says, through his counsel, that he is a simple journeyman mechanic. When the physicians were called their directions were disregarded, but probably that made little difference, for they were called so late. There were two practicing physicians, Charles and Leithead, in Pittsburgh, as appellant informs us, who use the mode of treatment he believes in, but he called neither. Doubtless, he thinks the Baunscheidt panacea as good in his own hand as any other. He has used it on his two surviving children, and should they become ill, and he have opportunity, he would be as likely to apply the treatment to them as he was to those which are dead, and as unlikely to call any physician, of any school, qualified for his business. His own testimony shows no change in his mind as to the medical treatment of his family."

In *Bailey v. Ragatz*, Wisconsin Supreme Court, December, 1880, 7 N. W. Rep. 564, a policeman in the city where both parties resided came to plaintiff's house in the night, after the family had retired and the lights were extinguished, and demanded entrance, with a threat to burst open the door if it were not opened; plaintiff rose and opened the door, and defendant entered, but without plaintiff's permission; the reason assigned by defendant for entering the house was that he expected to find there, unlawfully cohabiting, a certain woman of alleged bad character, and a certain boy (neither of them a member of plaintiff's family); he had no warrant, and no intention of making an arrest, but claimed that, if the woman was there, he "wanted to see her and give her a good talking to," etc.; in fact neither the boy nor the woman was there, and the boy had never been there; defendant had never heard any thing against the character of plaintiff's house, except a statement made to him that night, by the boy's brother, that the woman in question "stopped there," which was not true; and defendant in fact knew that the boy was not there. *Held*, that it was error to order a nonsuit in an action for the trespass. The court said: "The nonsuit can only be sustained upon the ground that a policeman in one of our cities has the right to rouse up the family of any respectable citizen in the night, after they have retired, and force himself into his house upon the mere statement of any person that he has heard that a woman of bad character is stopping at such house." "The defendant had no right to disturb the plaintiff's family for the mere purpose of gratifying his inquisitiveness in regard to the whereabouts of this supposed lewd woman on that particular evening." "It is very questionable whether the defendant, by virtue of his office as policeman, would be justified in demanding an entrance into the plaintiff's house in the night-time, and after the family had retired, even though the boy he claims he was looking for had been there. Having no warrant for or authority for his arrest,

we think he would not have been justified in going further than making a proper inquiry upon the subject, and requesting, in a proper manner, to be permitted to enter the house to make search. He was not in a position to demand an entrance. And as there is evidence tending to prove that the defendant demanded an entrance into the house, and that he entered against the will of the plaintiff, the court was not justified in saying, as a matter of law, that the defendant lawfully entered the house of the plaintiff. This was, at least, a question of fact for the jury, and not one of law for the court. We do not think that the law gives either an implied or express license to a policeman to demand an entrance, or to enter into the house of a respectable citizen at night, by way of the kitchen-door, after the family have retired, for the purpose of making insulting inquiries as to the character of the house or its inmates; and especially when such policeman has no information, either by hearsay or otherwise, that the character of the house or its inmates is bad. There can be no presumption of law or fact that the plaintiff, either expressly or by implication, licensed the defendant to arouse his family after they had retired, by knocking upon his kitchen-door and demanding an entrance, by virtue of his authority as a policeman of the city of Oshkosh. After a citizen closes his doors at night, and retires with his family, the law does not imply a license to any one to enter his premises and disturb the repose of the family, except for some reason which fully justifies such disturbance and entry. When the safety of the family or any of its members requires it, the law will presume a license to enter, and there are undoubtedly many other things which would justify such entry, but we are unable to see any thing in the evidence in this case which justified the defendant in disturbing the plaintiff and his family, and demanding an entrance into his house. The question whether the defendant finally entered the house by the express or implied permission of the plaintiff was a question of fact for the jury, and the purpose for which he demanded the entrance was also a question of fact for the jury, and not of law for the court."

In *Hewitt v. Watertown Fire Ins. Co.*, Iowa Supreme Court, December, 1880, 7 N. W. Rep. 596, a policy of insurance insured, among other things,
 * * * "grain in stacks and granary on farm."
 * * * *Held*, to cover unthreshed flax in stacks, on the farm, that had been raised solely for the seed and not the fiber. The court said: "The sole question to be determined is whether the word 'grain,' as used by the parties, includes flaxseed. Mr. Webster says: 'Grain signified corn in general, or the fruit of certain plants which constitute the chief food of man and beast, as wheat, rye, barley, oats, and maize.' It does not necessarily follow, from the fact that certain kinds of grain are named, that there may not be others that as clearly come within the definition as those named. Certainly, buckwheat is grain, although not specially named. It is so because it is clearly an article of food when pre-

pared as usually used. But we believe it is seldom if ever used as food in its natural state. Measurably, at least, this can be said as to flaxseed. After it has been ground, and the oil largely extracted, the residuum is the 'oil cake' known to commerce, which is largely if not exclusively used as food for cattle and other beasts, and is regarded as highly nutritious. This being so, flaxseed comes within, to an extent, at least, the definition of grain given by Mr. Webster, that it is an article used as food for man or beast. But if it be conceded flaxseed is not grain, strictly speaking, or is not so regarded in commercial transactions, this cannot be regarded as decisive of the question before us; for the rule is that this contract, 'like other contracts, must receive the construction which is most probable and natural under the circumstances, so as to attain the object which the parties to it had in contemplation in making it.' It was accordingly held in *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, the term 'cattle' included hogs, and in *State v. Williams*, 2 Strobh. 474, that the legislative intent in making it larceny to take cotton, rice, 'corn or other grain' from a field, was to include peas; or in other words, that 'other grain' included peas. In *Holland v. State*, 34 Ga., the statute provided: 'It shall not be lawful for any person in this State to make any spirituous liquors out of any corn, wheat, rye, or other grain, except for medicinal purposes;' and it was held that 'sugar-cane seed' and 'millet' were within the meaning of the words 'other grain;' both being grain, as such word was used by the Legislature. In the case at bar the parties must, we think, have intended the policy to cover whatever was usually and ordinarily stacked on the farm or put into a granary. The term 'grain' was used as being sufficient for this purpose. Wheat, rye, oats, and flax would ordinarily be stacked together, and from the combustible nature thereof, if the wheat caught fire the flax would ordinarily be burned if the wheat was. The intent of the plaintiff undoubtedly was to insure his crop raised on the farm, and put into stacks or into a granary, and the company must, we think, have so understood, and executed the policy with the intent of insuring the property in question."

EVIDENCE OF DEFENDANT'S PECUNIARY STANDING IN SLANDER.

IN *Brown v. Barnes*, 39 Mich. 211; S. C., 33 Am. Rep. 375, it was held that in an action of slander, the pecuniary standing of the defendant may be shown to indicate the influence of his speech, but not in itself to enhance damages.

The majority of the cases hold that evidence of the defendant's wealth is admissible in actions of slander, to enhance damages. To this effect is *Haynor v. Cowden*, 27 Ohio St. 292; S. C., 22 Am. Rep. 303. Even if admitted, as in the principal case, to show the defendant's probable influence, it must indirectly operate on the question of damages, and the distinction drawn is futile. The following are the chief decisions:

In *Bennett v. Hyde*, 6 Conn. 24, it was held that in an action of slander, the plaintiff may prove the amount of the defendant's property, to aggravate damages. The court said: "It has been frequently adjudged, in this State, and may be considered as established law, that the plaintiff in an action of slander may prove the amount of the defendant's property, to aggravate damages; and on the other hand, that the defendant may recur to the same evidence for the purpose of mitigating them." "It is not to be inferred that the damages are of course to be proportioned to the defendant's property; but merely that property forms an item which, in the estimate, is deserving of regard. Great wealth is generally attendant with correspondent influence; and little influence is the usual concomitant of little property. The declarations of a man of fortune concerning the character of another, like a weapon thrown by a vigorous hand, will not fail to inflict a deeper wound than the same declarations made by a man of small estate, and as a consequence not uncommon, of small influence. Property therefore may be, and often is, attended with the power of perpetrating great damage, and in the estimate of a jury becomes an interesting inquiry. I am not asserting what ought to be but what is; and that the degree of injury necessarily is dependent in some measure on the considerations before mentioned."

In *McBride v. McLaughlin*, 5 Watts, 375, the same doctrine was assumed in discussion.

In *Buckley v. Knapp*, 48 Mo. 153, the court said: "The weight of the authorities, and reason, we think, is decidedly in favor of the admissibility of the evidence." "In all cases where vindictive damages are allowed it is upon the theory that the defendant's conduct has been such that he deserves to be punished, and they are given with a view of measuring out punishment to him as well as awarding compensation to the plaintiff. When we arrive at this conclusion it seems to me that it logically follows that the inquiry as to the pecuniary resources of the defendant becomes pertinent and material, for what would be a severe punishment to a very poor man would be of no consequence to a rich one."

In *Hosley v. Brooks*, 20 Ill. 115, an instruction that the jury "may take into consideration the pecuniary circumstances of defendant and his position and influence in society, in estimating the amount of damages," was held correct without any reported consideration.

In *Humphreys v. Parker*, 52 Me. 502, such evidence was held proper in an action of slander and malicious prosecution, on the question of damages. The court said: "In actions of slander we regard the law as well settled, that the defendant's wealth, as an element which goes to make up his rank and influence in society, and therefore his power to injure the plaintiff by his speech, is a fact not to be overlooked by the jury in estimating the damages."

In *Kanev v. Paisley*, 13 Iowa, 89, such evidence was held admissible in aggravation or mitigation of

damages. The court said: This "has been a rule of practice so frequently established and followed by the courts, that we have no disposition to change it." Citing *Bennett v. Hyde* and *Hosley v. Brooks*.

Bell v. Morrison, 27 Wis. 68, sometimes cited in this connection, was a case of assault and battery, and this class of evidence was held proper, Fisher, J., dissenting. After remarking on the rule of exemplary damages in cases of injury to person or character, the court said: "If this rule * * * be just and salutary, it can only be properly and effectively applied by taking into consideration * * * the situation of the parties as to wealth, character, and influence," etc.

In *Larned v. Buffinton*, 3 Mass. 546, it was held that the plaintiff might prove his own rank and condition to aggravate, and the defendant might avail himself of such evidence to mitigate, the damages. This however seems not to have extended to proof of property or pecuniary standing.

The class of evidence in question was held admissible in *Adcock v. Marsh*, 8 Ired. 360. The court said: "The object of the law in giving damages in actions of tort is to compensate the plaintiff for the injury he has sustained; and in giving vindictive damages to punish the defendant for his iniquitous conduct. In neither case ought justice to be lost sight of, and in neither case does the law contemplate or intend the ruin of the defendant. Without a knowledge of his circumstances, the jury might give damages against him utterly ruinous, and such as against another of greater property would not be felt." This theory of tenderness to the poor defendant seems a novel reason for the admission of evidence by the plaintiff to aggravate damages.

In *Lewis v. Chapman*, 19 Barb. 252, the court said: "The question then arises, is evidence of the pecuniary circumstances and standing of the defendant in the community admissible in actions of this character, for any purpose? In a case recently decided in the Court of Appeals (*Dain v. Wycoff*, 3 Seld. 191), Gardiner, J., seems to be clearly of opinion that such evidence is incompetent. He remarks that it has been the custom at the Circuit to admit evidence of this character, but that he could discover no authority for the practice in the elementary books. On this point, however, the other judges expressed no opinion, and the case was decided upon another ground." (That was an action of seduction.) The court then distinguishes *Myers v. Malcolm*, 6 Hill, 292, which was an action of damages for injury by explosion of gunpowder, and continue: "Greenleaf * * * admits that wherever the defendant's rank, wealth, or influence in society would naturally tend to aggravate the injury complained of, and increase its extent, evidence of such facts is pertinent to the issue. And he puts the case of actions of slander, seduction, and the like, as those in which the character of the parties is necessarily involved in the nature of the action. But this evidence, he insists, is proper by way of showing the extent of the injury, and not for the purpose of establishing the defendant's abil-

ity to pay." The court conclude: "It seems to me therefore clear from authority that the evidence was properly admitted, as bearing upon the extent of the injury, if for no other purpose. It is apparent that a statement of this kind, coming from a banker of wealth, whose solvency was unquestioned, would operate far more extensively and injuriously than the same statement from a less responsible and less influential source." This decision was reversed on another point.

In *Palmer v. Haskins*, 28 Barb. 90, it was held that such evidence was not admissible on the subject of damages, and the court said: "If the evidence is admitted simply for the purpose of showing the influence of the defendant, and hence the extent of injury to the plaintiff, it should be confined to the time when the slander was uttered. The defendant may at that time have been poor; and at the time of the trial rich, or *e converso*." "I find no adjudication, where the question has been distinctly raised, holding that the wealth of the defendant may be proved as an item to show his character, standing and influence in society. That the general standing in society of either of the parties may be proved, I have no doubt. But I do not think that it is necessary or proper to prove to the jury the wealth or poverty of either of the parties. It is a question with which they have nothing to do in estimating the damages." "I am not satisfied that such evidence, as a separate independent item, should be admitted for any purpose."

In *Case v. Marks*, 20 Conn. 248, it was held that in an action of slander the defendant cannot prove his own poverty in mitigation of damages; and the court said of *Bennett v. Hyde*, 6 Conn. 24: "This court held that the plaintiff might prove the amount of the defendant's property, to aggravate damages, in an action of slander; and this solely on the ground of a supposed weight and influence which wealth might give to the slanderous words. We do not intend to overrule that decision, although we could better reconcile it to our views of correct principle if we could see that wealth alone, especially in this state of society, gives of course to its possessor rank and influence. If it does in some instances, this is not so commonly true, we think, as that a new and important legal principle should grow out of it. However this may be, in the present case it is the defendant who offers to prove his own pecuniary condition to shield himself from the consequences of his own wrong."

Such evidence was held inadmissible in *Ware v. Cartledge*, 34 Ala. (N. S.) 622. The court said: "The mere ownership of \$20,000 worth of property is not legal evidence of the owner's rank and influence in society. Greenleaf and Starkie agree that the defendant's ability is not a legitimate inquiry in an action of slander, and the courts of New Jersey agree with them; and this conclusion is fortified by the general principles regulating the assessment of damages. Greenl. Ev., § 269; Stark. on Slander, 402; Coxe, 79, 80; *Seay v. Greenwood*, 21 Ala. 495; *Jones v. Donnell*, 13 id. 490. Opposed to this array of principles and authorities, one or

two States have, without reason and contrary to principle, adopted a different rule. *Case v. Marks*, 20 Conn. 248, shakes the force of *Bennett v. Hyde*, 6 id. 24, and in *Morris v. Barker*, 4 Harr. 520, it was expressly held that the defendant's circumstances cannot be given in evidence in an action of slander."

CRIMINAL LIBEL.

THE subject of criminal libel, always one of very considerable interest in a community in which free speech and a free press prevail, and especially so at this time, when by reason of the conduct of the recent political campaign and the comments thereupon by the public journals, it has been brought prominently before both the people and the profession, would seem to merit more careful and exact consideration than that accorded it by Mr. John Miller, in your issue of December 25. In the first place, it is obvious that the offense in question must itself be thoroughly understood before the intent and scope of the statutes which prescribe its punishment can be comprehended. Blackstone defines it as "a malicious defamation of any person, and especially of a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, to expose him to public hatred, contempt and ridicule." Further, that in a criminal prosecution "the tendency which all libels have to create animosities and to disturb the public peace, is the whole that the law considers." Bl. Com., Vol. iv., §§ 150, 151 (Wend. ed.)

It is apparent from this, the common-law definition of the offense, that so far as the administration of criminal justice is concerned, libel is not a crime because, as Mr. Miller says, it is "an injury to the person," but rather because of its "tendency to create animosities and to disturb the public peace." So far as it is merely an injury to the person, it comes within the category of private wrongs or torts and as such is cognizable by courts of civil law, but the bare fact that all libels are personal injuries, is a matter of indifference to the criminal law, whose sole concern, as Blackstone expresses it, is with "the breach and violation of the public rights, and duties due to the whole community, considered as a community, in its social, aggregate capacity."

Regarded in this light, therefore, it hardly needs to be said that Mr. Miller's wire-drawn distinction, making libel an injury to the person, and not to the reputation, is entirely immaterial in the present discussion and for the reason, as above stated, that the criminal law ignores the private injury, leaving that to be remedied by a civil action, and exercises itself solely in the conservation of the public peace. And this being so, the reasoning is conclusive that wherever a criminal libel is published, there an indictment will lie, and this, too, regardless of the question as to the residence of the person libelled. Mr. Miller is indeed correct, so far as he goes, in his proposition that "crimes are committed where they take effect upon the object injured," but his quotation of Justice Story is hardly in point, at least so far as the present question is involved. It must be remembered that a libel is capable of too extensive and diffusive an injury to be localized, and that consequently all the places "where it takes effect upon the object injured" may be exceedingly difficult of ascertainment. And besides, as we have above demonstrated, "the object injured" is not, in the contemplation of the criminal law, the individual who happens to be libelled, but the peace of the community. Indeed, it is not even necessary that there should be a person *in esse* capable of being libelled, for in strict consistency with the doctrine, as we have maintained it, it has been repeatedly held that one

may be indicted for criminal libel where the offense has been committed in derogation of the good name of a deceased person, and that in all cases it is against "the tendency to a breach of the peace," not necessarily on the part of "the object of the injury," but as well by any one interested in that object, that the criminal law makes provision. 3 Chit. on Cr. L. 868. And it has even been further held that publications casting general defamatory imputations on a particular body of men, though no particular individuals are pointed out, are indictable, and for the same reason. 2 Barn. 138, 166. As to the place of indictment, Mr. Miller argues that because the statute provides that in the case of libelled non-residents, it shall be had in only one county, therefore a criminal libel is not possible in every place. But this is certainly a *non sequitur*, for it has been held time and again that every copy of a libel sold by a defendant is a separate publication and subjects him to a distinct prosecution, and if this be so is it not evident that this provision as to the venue is intended solely for convenience in procedure, and does not interfere with the prosecutor's right to obtain other indictments in different counties for republishings of the same libel? Upon the whole, it is apparent that Mr. Miller, in the consideration of his subject, has fallen into two errors: First, of regarding the crime of libel as an injury to the person, and second, of placing such a construction upon the intention of the Legislature in providing for its punishment as a public wrong, as would, if adopted by our courts, put the fair name of every non-resident not included within the class particularized by Mr. Miller, at the mercy of every petty and infamous detractor.

FREDERICK W. BRYDON.

NEWBURGH, N. Y., Jan. 1, 1881.

AUTHORITY OF DECISIONS OF OTHER STATES—DUTY OF CARRIER AS TO DELIVERY OF GOODS.

NEW YORK COURT OF APPEALS, NOV. 16, 1880.

FAULKNER ET AL., Appellants, v. HART.

The decisions of the courts of other States upon a question of general commercial law are not binding upon the courts of this State even though they relate to the construction of a contract made in New York, to be performed in the State in which such decision is made. Where such decision is opposed to the current of authority in England and America, the Court of Appeals will not follow it.

The contract of a common carrier is not fulfilled by the transportation of the goods intrusted to him. He must deliver, or offer to deliver them to the consignee, or give the consignee a reasonable opportunity to remove them after notice to him where he can be found, of their arrival at the place of destination.

ACTION to recover value of goods shipped for transportation. Sufficient facts appear in the opinion.

Samuel Hand, E. P. Wheeler and C. E. Souther, for appellants.

George H. Forster, for respondents.

MILLER, J. The goods for the value of which the plaintiffs claim to recover in this action were shipped at New York, to be transported to Boston, and after they had been called for and delivery refused, because it was not convenient for the defendant to deliver them, and while on deposit in the defendant's warehouse and before the plaintiffs had an opportunity to make another demand, the warehouse was destroyed by fire together with the goods. The plaintiffs were doing business both in New York and Boston, and all resided in Boston except one of them, who lived in New Jersey. The contract for the transportation of

the goods was made in New York with the Norwich and New York Transportation Company, in behalf of themselves and the connecting carriers to Boston, and they were to be conveyed to Boston.

The last part of the route they were placed in cars upon the roads operated by the defendants. The rule as to the liability of carriers under the facts stated is well established by the law merchant, and the authorities are numerous in this country and in England, which sustain the position that the carrier is bound to pay for the loss of the goods destroyed. It is his duty not only to transport the goods, but he has not performed his entire contract as a common carrier until he has delivered the goods or offered to deliver them to the consignee, or has done what is equivalent, by giving to the consignee, if he can be found, due notice after their arrival, and by furnishing him a reasonable time thereafter to take charge or to remove the same. *Galliff v. Bowne*, 4 Bing. (N. C.) 314; *S. C.*, 11 Clarke & Fin. 45; *Price v. Powell*, 3 Comst. 322; *Zutn v. N. J. St. Co.*, 49 N. Y. 442; *Sherman v. H. R. R. Co.*, 64 id. 254; *The Sultana v. Chapman*, 5 Wis. 454; *Slade v. Payne*, 14 La. Ann. 453; *Grave v. H. & N. Y. St. Co.*, 38 Conn. 143; *C. I. R. R. v. Warren*, 16 Ill. 502; *Moses v. B. & M. R. R.*, 32 N. H. 523; *The Tangier*, 1 Clifford, 396.

In view of the rule laid down in authorities cited, there would appear to be no serious question as to the plaintiffs' claim to recover for the value of the goods actually destroyed. The right of the plaintiffs to recover is resisted, and exemption from liability is claimed by reason of the decisions of the courts of the State of Massachusetts, holding adversely to the rule which is established at common law, and which, as we have seen, has been generally adopted and sustained in this country and in England.

The decisions of that State establish that the proprietors of a railroad, who transport goods for hire and deposit them in a warehouse until the owner or consignee has a reasonable time to take them away, are not liable, as common carriers, for their loss by fire without negligence or default on their part; that the railroad corporation ceases to be a common carrier and becomes a warehouseman as a matter of law when he has completed the duty of transportation, and has assumed the position of a warehouseman, as a matter of fact and according to the usages and necessities of the business in which it is engaged. *Norway Plains Co. v. B. & M. R. R. Co.*, 1 Gray, 263; *Rice v. Hart*, 118 Mass. 281.

These decisions are entitled to the highest respect, but like all other adjudications, are the subject of reversal, limitation, and even to be overruled in the court in which they originated.

The same right exists in the courts to consider and pass upon the same questions; and how far they should be allowed to control their decisions in a cause of action where the contract was made in another State, but which arises in part in the State where they were first enunciated as the law, is the question to be determined. This question is legitimately before us, and it was long since held in this State that we could not break in upon the settled principles of our commercial law to accommodate them to those of any country. *Aymar v. Sheldon*, 12 Wend. 439.

This principle is well established in regard to all contracts of a commercial character, and so far as may be practicable, it is of no little importance that the rule should be harmonious and uniform. Contracts of this description have been the subject of frequent consideration in the Federal courts, and the decisions have been direct and clear, that while the decisions of local courts in reference to matters purely local in the States are obligatory throughout the country, they are not conclusive and final as to questions of commercial law.

In *Swift v. Tyson*, 16 Peters, 19, the court say: "The true interpretation and effect of contracts and other instruments of commercial nature are to be sought, not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of local tribunals upon such subjects are entitled to, and will receive the most deliberate attention and respect of this court, but they cannot furnish positive rules or conclusive authority by which our own judgments are to be bound up and governed." In a recent case (*Oates v. National Bank*, 100 U. S. 239), the State court in Alabama held that by the rules of the commercial law one, who receives a promissory note as collateral security for a pre-existing debt, does not become a purchaser for value in the course of business so as to cut off equities which the maker may have against the payee; and on appeal, it was held that the courts of the United States are not bound by the decisions of the State courts upon questions of commercial law.

This principle has been repeatedly upheld in other cases. *Meade v. Beale*, Toney, 339, 360; *Austen v. Miller*, 5 McLean, 153; *The Ship George Olcott*, 89; *Pine Grove v. Talcott*, 19 Wall. 666; *Robinson v. Com. Ins. Co.*, 3 Sumn. 220.

In *Meade v. Beale*, *supra*, it is said, "where the State court does not decide a case upon the particular law of the State or established usage, but upon general principles of commercial law, if it falls into error, that erroneous decision is not regarded as conclusive."

From the authorities cited, it follows that if the higher court in the State of Massachusetts has made an erroneous decision, wrong in principle and contrary to a well-settled rule of commercial law in the English courts, in the Supreme Court of the United States, and many of the State courts, and especially adverse to the decisions of this court, it should not be followed, and it is not only the right but the duty of this court to adhere to its own decisions. Any other rule would lead to confusion in regard to a principle of general application; for if the doctrine of the Massachusetts court is to prevail, the right of the aggrieved party might depend upon the fact whether the action was brought in the Federal or State court, and if the action in this case had been brought in the Circuit Court of the United States for the State of Massachusetts, the plaintiffs would be entitled to recover, while in the State court a different result would prevail. *Richardson v. Goddard*, 23 How. (U. S.) 38; *The Tangier*, 1 Clifford, 396; *Moses v. B. & M. R. R.*, 32 N. H. 523.

This court has the same authority to disregard the Massachusetts decision, in a case involving a commercial question, as the court had to establish a rule adverse to the decisions of this court, as was done virtually in the cases cited.

Now it is important to determine whether upon reconsideration any different rule would have been adopted. It is sufficient to say that in reference to a law, not of a single State, but affecting the commerce of the world, the decisions of the courts of such State are not obligatory upon the courts of other States or countries.

The learned counsel for the respondent argues, that as the delivery of the goods was to be made in Boston, where they were destroyed, the law of Massachusetts should control in respect to such delivery, and we are referred to several decisions which, it is claimed, sustain this doctrine. *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 id. 9; *Knottton v. Erie Railroad Co.*, 19 Ohio St. 260; *M. St. P. R. R. Co. v. Smith*, 7 Chicago Leg. News, 174.

While these cases uphold the general principle that where the contract is to be performed partly in one country and partly in another country, each portion is to be interpreted according to the laws of the country where it is to be performed — a rule which is fully estab-

tained by authority; see *Story on Cont.*, § 655; *Pope v. Nickerson*, 3 Story, 474, 485; *Scudder v. Union Nat. Bank*, 1 Otto, 413; *Pomeroy v. Atsworth*, 22 Barb. 118; none of them hold that where a great principle of commercial law has been established, which is universally acknowledged and acquiesced in, the law announced by the courts of a single State can overturn that principle and control the decisions of the courts of another and distant State.

No such question arose in any of the cases cited, and the answer to the position taken, that the decisions of the local courts should control, is that such decisions are not, under the circumstances, a correct interpretation of the rule of law in such a case, and are not the accepted law of the land. It is erroneous, and must fall for the reason that it cannot be upheld either upon principle or authority. Nor are any of the authorities cited applicable to the case considered. As to those cited from the State of New Hampshire, it may be remarked, that the precise question was presented in *Moses v. B. & M. R. R. Co.*, 32 N. H. 523, where the goods were transported to Boston and burned before the consignee had an opportunity to remove them, and the authority of the Massachusetts cases repudiated, and it was said that by the rule there laid down, the salutary principles of the common law are sacrificed to considerations of convenience and expediency in the simplicity and precise and practical character of the rule which is established.

The case of *Curtis v. D. L. W. R. R. Co.*, 74 N. Y. 116, involved a question as to the effect of a local statute of Pennsylvania, limiting the defendant's liability upon the law applicable to such a case in the State of New York. It was held that the *lex loci contractus* did not control the place of delivery, being a material and important part of the contract, and in contemplation of the parties at the time.

It was said that it was a reasonable inference that it was entered into with reference to the laws of the place where delivered. The case last cited did not involve any such question as here presented, as there was no conflict in reference to the decisions of the courts, and no question made as to any general rule of commercial law being involved, as is the case here.

If there had been a positive statute of the State of Massachusetts, providing that the carrier's liability should cease when the goods had been deposited at the end of the route in a suitable warehouse, a different question would arise, and it might well be contended that, as the question arose under the statute of that State, the question of liability would depend upon the construction placed upon such statute by the court in Massachusetts, in accordance with the decision of the courts of this State and the Supreme Court of the United States. *Jessup v. Carnegie*, Mans. Opin., 80 N. Y.; *Mills v. M. C. R. R. Co.*, 45 N. Y. 626; *Whitford v. Panama R. R. Co.*, 23 id. 465; *Elmendorf v. Taylor*, 10 Wheat. 152; *Skelly v. Grey*, 11 id. 367; *Town of Ottawa v. Perkins*, 94 U. S. 260; *Fairfield v. County of Gallatin*, Mans. Opin. U. S. Sup. Ct. But no such question arises in the case at bar. So, also, if the Massachusetts cases were decisive as to the law upon the question considered, it might well be urged that the plaintiff entered into the contract having them in view. But as we have seen they are not conclusive and the real point is what is the common law rule, and the courts of Massachusetts having decided one way, and the courts of the United States and of this State, as well as those of other States and countries differently, it is open in a case arising in the courts of this State to determine the rule. It is the same subject and involves the precise point whether the common law shall prevail, and whether the decision of the State court is erroneous. The question is not as to the application of a local statute or a local law, but one of a comprehensive character, affecting a general rule ap-

plicable to all contracts of the nature of the one now involved. The fact that the defendants were carriers between New York and Boston only for a portion of the route, and that directly they made no contract with the plaintiffs, cannot affect the question as to the liability upon the contract made on their behalf for transportation over their portion of the route. As the original contract was made in New York for a through transportation, the connecting carrier was entitled to all the benefit of the contract, as well as any special exemption it contained. *Maghee v. C. & A. R. R. Co.*, 45 N. Y. 514-521; *Lamb v. The Same*, 46 id. 271.

For the same reason they would be subject to all the obligations incurred thereby. The contract between the first carrier and the connecting carrier is deemed to have been made for the shippers' benefit and is ratified by bringing the suit. *Green v. Clark*, 2 Kern. 343, and each of the connecting lines is responsible for injuries on its own line, except where there is an express contract for carriage beyond the terminus. *Condict v. G. T. R. R. Co.*, 54 N. Y. 500; *Root v. G. W. R. R. Co.*, 45 id. 524; *Sherman v. H. R. R. Co.*, 64 id. 280.

The contract, being made in New York, is binding upon the plaintiffs, the shippers and the defendants, the connecting carriers, so far as they undertook to perform it; and although their liability arose at the end of their route, yet it was under the contract as made in New York. We are referred to a number of cases by the learned counsel for the respondent to sustain the proposition that the general obligation created by the law of the place of delivery, in respect to the mode of delivery by a carrier, controls, and it is urged, that when by the law of the place of delivery, the carrier had a right to store the goods, the nature of the bailment is changed, and the carrier is relieved from the responsibility originally assumed, and the liability of a warehouseman is substituted. We do not deem it necessary to controvert the correctness of the rule laid down, where it does not interfere with the general principles and doctrines of commercial jurisprudence; but there is no case cited which holds that the court of another State, where an action is pending, may not adhere to its own rules and disregard the decision of a State which overrules a great principle. As we have seen, the United States Supreme Court have refused to sustain the decisions of the State court when violating a great principle, and the rule is a sound one which upholds the position that the decision of the State court should not be followed to such an extent as to make a sacrifice of truth, justice and law. *Gelpcke v. Dubuque*, 1 Wall. 175, 205; *Olcott v. Supervisors*, 16 id. 678.

It is upon a principle of comity that one State recognizes and admits the operation of the laws of another State within its own jurisdiction, where such law is not contrary to its own rules of policy, or to abstract right, or the promotion of justice and morality; but the principle should never be carried to the extent of holding that a suitor in its courts is debarred from the maintenance of his just rights according to its well-established decisions and law, and the general principles of the common law, which it has fully recognized and which are almost universally regarded and accepted, in reference to the question presented wherever the common law prevails. No rules of comity demand any such sacrifice in the business intercourse between the people of the different States, and great injustice might follow by yielding to such a principle, and in sustaining a rule of law which was wrong in itself, hostile to the policy and law of the State where the contract was made, and adverse to the general current of authority elsewhere. *King v. Sarria*, 69 N. Y. 24.

In the consideration and determination of the case before us, it is worthy of notice that the contract made

in New York, as the record shows, was in effect in conformity with the usual course of business, that the goods were to be delivered to the consignees. In *Rice v. Hart*, *supra*, the contract was merely to transport to Boston, and was silent as to delivery. It may perhaps be doubted whether the agreement to deliver to the plaintiffs as consignees was satisfied by a delivery to the defendants; especially after a demand by the plaintiffs and a refusal to deliver to them. If the shipper was entitled to the benefit of a contract to deliver the goods to the consignee without any restriction, it is not entirely clear that the rule laid down in the Massachusetts decisions is applicable. Without, however, expressing a decisive opinion upon the question last discussed, for the reason already apparent, the rule adopted in these cases cannot be sustained.

It should not be overlooked that the point presented does not involve solely a question as to a local law but part of a system of general commercial law.

That the court in Massachusetts had decided the law contrary to what it was, is not controlling, for it may be assumed, even if the parties had knowledge of the decision, that they knew it was wrong, and contracted, having in view the law as it actually existed. Like an unconstitutional law, void of itself, the decision was not the law and is not to be regarded as authority for that reason. The judgment must be reversed and judgment should be rendered in favor of the plaintiff for \$6,156.35, with interest from November 7, 1872, with costs.

All concur, except Fulger, C. J., and Earl, J., who concur in result.

EMPLOYMENT BY STATE NOT AN OFFICE— STATE LAW IMPAIRING CONTRACT.

SUPREME COURT OF THE UNITED STATES, NOV. 15, 1880.

HALL, Plaintiff in Error, v. STATE OF WISCONSIN.

By an act of the Legislature of Wisconsin, plaintiff and others were directed to make a survey of the State and the governor was directed to make a written contract with each for the performance of his work, such contract to provide for a fixed compensation. In pursuance of this, the governor did enter into a contract with plaintiff for a time and at a rate of compensation within the limits of the legislative authority. By a subsequent act the act above mentioned was repealed. *Held*, that the employment of plaintiff was not an office which the Legislature had the right to abolish at pleasure, but a contract the obligation of which could not be impaired by a State Legislature.

IN error to the Supreme Court of the State of Wisconsin. The opinion states the case.

SWAYNE, J. This is a writ of error to the Supreme Court of Wisconsin. The case we are called on to consider is thus disclosed in the record:

By an act of the Legislature, entitled "An act to provide for a geological, mineralogical, and agricultural survey of the State," passed March 16, 1857, James Hall of the State of New York, the plaintiff in error, and Ezra Carr and Edward Daniels of Wisconsin, were appointed "commissioners" to make the survey. Their duties were specifically defined and were all of a scientific character. They were required to distribute the functions of their work by agreement among themselves, and to employ such assistants as a majority of them might deem necessary.

The governor was required "to make a written contract with each commissioner" for the performance of his allotted work, and "the compensation therefor, including the charge of each commissioner," and it was declared that "such contract shall expressly provide that the compensation to such commissioners

shall be at a certain rate per annum, to be agreed upon, and not exceeding the rate of two thousand dollars per annum, and that payment will be made only for such part of the year as such commissioner may actually be engaged in the discharge of his duty as such commissioner."

In case of a vacancy occurring in the commission, the governor was empowered to fill it, and he was authorized to "remove any member for incompetency or neglect of duty."

To carry out the provisions of the act, the sum of \$6,000 per annum for six years was appropriated, "to be paid to the persons entitled to receive the same."

By an act of the Legislature of April 2, 1860, Hall was made the principal of the commission and was vested with the general supervision and control of the survey. He was required to contract with J. D. Whitney and with Charles Whittlesey for the completion within the year of their respective surveys. To carry into effect these provisions the governor was authorized to draw such portion of the original appropriation, not drawn previous to the 29th of May, 1858, as might be necessary for that purpose—the residue to be otherwise used as directed.

By a subsequent act of March 21, 1862, both the acts before mentioned were repealed without qualification. On the 29th of May, 1858, Hall entered into a contract with the governor, whereby it was stipulated on his part that he should perform the duties therein mentioned touching the survey, "this contract to continue till the 3d day of March, 1863, unless the said Hall should be removed for incompetency or neglect of duty, * * * or unless a vacancy shall occur in his office by his own act or default."

On the part of the State it was stipulated "that the said Hall shall receive for his compensation and expenses, including the expense of his department of said survey, at the rate of \$2,000 per annum." * * * "Provided that for such time as said Hall or his assistants shall not be engaged in the prosecution of his duties according to the terms of said act and of this contract, deduction shall be made, *pro rata*, from the sum of his annual compensation and expenses."

Hall brought this action upon the contract. The declaration avers that immediately after the execution of the contract he entered upon the performance of the duties thereby enjoined upon him and continued in their faithful performance until the time specified in the contract for its expiration, to wit, the 3d of March, 1863; that he was not removed by the governor for incompetency or neglect, nor was any complaint ever made by the governor against him; that he never at any time, directly or indirectly, assented to the repeal of the acts of 1857 and 1860, and that thereafter he continued in the performance of his labors the same as before, and that for the year ending March 3, 1863, he devoted his whole time and skill without cessation to the work.

He avers further, that for his services performed prior to March 3, 1862, he was fully paid, but that for the year ending March 3, 1863, he had received nothing; that payment was demanded and refused on the 3d of December, 1863, and that the defendant is, therefore, justly indebted to him in the sum of two thousand dollars with interest from the date last mentioned. He avers finally, that on the 30th of January, 1875, he presented his claim to the Legislature by a proper memorial and that its allowance was refused.

The State demurred upon two grounds: 1. That the complaint did not show facts sufficient to constitute a cause of action. 2. That it appeared upon the face of the complaint that the cause of action did not accrue within six years before the commencement of the action.

In support of the first objection it was insisted that the employment of the plaintiff was an office and that

the Legislature had therefore the right to abolish it at pleasure. For the plaintiff it was maintained that there was a contract and that the repealing act impaired its obligation in violation of the contract clause of the Constitution of the United States.

The court sustained the demurrer upon the first ground, and the plaintiff declining to amend, dismissed his petition. The opinion of the court is limited to the first point, and ours will be confined to that subject. The whole case resolves itself into the issue thus raised by the parties.

No question is made as to the suability of the State. The proceeding is authorized by a local statute. The question raised by the record is within our jurisdiction. In the exercise of that jurisdiction in such cases, this court is unfettered by the authority of State adjudications. It acts independently and is governed by its own views. *Pine Grove v. Talcott*, 19 Wall. 603.

The question to be considered was before us in *The United States v. Hartwell*, 6 Wall. 393. It was there said that "an office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties." * * * "A government office is different from a government contract. The latter is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other."

In *The U. S. v. Maurice et al.*, 2 Brock. 96, Chief Justice Marshall said: "Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to perform a service without becoming an officer."

The case before us comes within the definition we have taken from *The United States v. Hartwell*. The statute under which the governor acted was explicit that he should "make a written contract with each of the commissioners aforesaid, expressly stipulating and setting forth the nature and extent of the services to be rendered by each, and the compensation therefor," and that "such contract" should "expressly provide that the compensation of each commissioner should be at a certain rate per annum, to be agreed upon, and not exceeding \$2,000 per annum for the time such commissioner may be actually engaged."

The action of the governor conformed to this view. The instrument executed pursuant to the statute recites that it is an "agreement" between the governor as one party, and Hall, Carr and Randall, the commissioners, as the other. They severally agreed to do what the statute contemplated and he agreed to pay all that it permitted. The names and seals of the parties were affixed to the agreement and its execution was attested by two subscribing witnesses, as in other cases of contract.

Where an office is created the law usually fixes the compensation, prescribes its duties, and requires that the appointee shall give a bond with sureties for the faithful performance of the service required. To do all this, if the employment were an office, by a contract with the officer and without his bond would, to say the least, be a singular anomaly.

The acts of 1857 and 1860 both speak of Hall as "of Albany, N. Y." He was not, therefore, a citizen or resident of the State of Wisconsin. It is well settled in Wisconsin that such a person cannot be a public officer of that State. *State ex rel. Off v. Smith*, 14 Wis. 497; *State ex rel. Schmit v. Murray*, 23 id. 96.

In *The U. S. ex rel. Noyes v. Hatch*, 1 Pinney (Wis.) 182, the Supreme Court of the State decided that "the term civil officers as used in the organic law (act of Congress of April 20, 1836) embraces only those officers in whom a portion of the sovereignty is vested or to whom the enforcement of municipal regulations or

the control of the general interests of society is confided, and does not include such officers as canal commissioners."—Syllabus 3.

In *Butler v. The Regents of the University*, 32 Wis. 124, the same court held, without dissent, that a professor in the State University, appointed for a stated term with a fixed salary, was not a public officer, in such a sense as prevented his employment from creating a contract relation between himself and the Regents.

It is hard to distinguish that case in principle from the one before us. In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or employees who occupy them, with fuel, light, stationery, and other things necessary for the public service. The same reasoning is applicable to the countless employees in the same way, under the National government. It would be a novel and startling doctrine to all these classes of persons, that the government might discard them at pleasure, because their respective employments were public offices and hence without the protection of contract rights.

It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere and have stipulated as he did to serve the State of Wisconsin for the period named, if the idea had been present to his mind that the State had the reserved power to break the relation between them whenever it might choose to do so. Nor is there any thing tending to show that those who acted in behalf of the State had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

Undoubtedly as a general proposition a State may abolish any public office created by a public law (*Newton v. Commissioners*, 100 U. S. 559), but even with respect to those offices the circumstances may be such as to create an exception. In the *Dartmouth College* case, 4 Wheat. 694, Justice Story said: "It is admitted that the State Legislature have power to enlarge, repeal, and limit the authorities of public officers in their official capacities, in all cases where the Constitutions of the States respectively do not prohibit them; and this among others for the very reason, that there is no express or implied contract that they shall always, during their continuance in office, exercise such authorities. But when the Legislature makes a contract with a public officer, as in case of a stipulated salary for his services during a limited period, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

When a State descends from the plane of its sovereignty and contracts with private persons, it is regarded *pro hac vice*, as a private person itself, and is bound accordingly. *Davis v. Gray*, 16 Wall. 232.

The general government has no powers but such as are given to it expressly or by implication. The States and their Legislatures have all such as have not been surrendered or prohibited to them. *Gilman v. Phila.*, 3 Wall. 725; and see, also, 2 Greenleaf's Cruise, 67.

That the laws under which the governor acted, if valid, gave him the power to do all he did, is not denied. We will not, therefore, dwell upon that point. The validity of those laws is too clear to admit of doubt. It would be a waste of time to discuss the subject.

We are of the opinion that the Supreme Court of the State erred in the judgment given. It is therefore reversed and the case will be remanded for further proceedings in conformity with this opinion.

EX POST FACTO LAW—REPEAL OF STATUTE OF LIMITATION.

NEW JERSEY SUPREME COURT, JUNE TERM, 1880.

STATE OF NEW JERSEY V. MOORE.

A statute which repeals an act limiting the time within which crimes shall be proscribed is not an *ex post facto* law, within the meaning of the Federal or State Constitution.

A person committed certain crimes at a time more than two years antecedent to the finding of an indictment, and at a time when the law barred the prosecution for such crimes by the lapse of two years; after two years had run and the prosecution was thus barred, the Legislature repealed the act of limitation, and extended the time three years beyond the original limit. *Held*, such repeal and extension were valid.

CASE certified from the Middlesex Oyer This was an indictment for embezzlement, etc., and was found in September term, 1879, and at the trial the State was permitted to show criminal acts done within five years antecedent to the finding of such indictment. There was no pretense that the defendant had been a fugitive from justice.

C. T. Covenhoven and John P. Stockton, attorney-general, for the State.

A. V. Schenck, for defendant.

BEASLEY, C. J. By the one hundred and thirteenth section of the criminal procedure act it is provided, among other things, that no person shall be "prosecuted, tried or punished for any offense not punishable with death, unless the indictment shall be found within two years from the time of the committing of the offense, or incurring of the fine or forfeiture aforesaid." On March 14, 1879, an act was passed changing this period of limitation from two years to five.

At the trial of this case the counsel of the defendant objected to the reception of any evidence showing the commission of any criminal act of his client at a date prior to the period of two years before March 14, 1879, and the objection having been overruled, exception was taken. On the part of the State it was then shown that various acts of embezzlement had been committed by the defendant prior to two years before the above-mentioned date, and consequently at a time which was more than two years before the finding of the present indictment. It will be, therefore, observed that the defendant may have been convicted for an offense the prosecution of which had become barred by the original act of limitations first above cited. The question, therefore, now to be considered by this court, on this application for its advisory opinion, is, whether this right to prosecute, thus barred by lapse of time, could be resuscitated by the modifying act passed in the year 1879.

The principal position taken against the validity of this statute which removes the bar of the limitation in question is, that such law is an *ex post facto* law, and is therefore prohibited by both the Federal and State Constitutions.

But does this act bear the legal character thus imputed to it? It is impossible intelligently to settle this question unless we first ascertain with entire clearness what is an *ex post facto* law.

These words are technical, and have, and always have had, a fixed and definite meaning in their application to criminal law. In the same sense they were used before their introduction into the Federal Constitution, by Blackstone and other English writers; by Hamilton in *The Federalist*, and in the resolutions passed by several of the State conventions. Nor do I find that since such occasions, when subjected to judicial exposition, they have had any other signification

ascribed to them. The established import of the phrase *ex post facto* law, in the connection in question, is, a law that originates a punishment, or an increase of punishment, for an act already done. It was a legislative power to convert that which was innocent into that which is criminal, and after the transaction to adjudge its culpability and punishment. Referring to the injustice of enforcing laws before their proper promulgation, Blackstone says: "There is still a more unreasonable method than this, which is called making of laws *ex post facto*; when an action (indifferent in itself) is committed, the Legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it." The case of *Calder v. Bull*, 3 Dall. 386, is the leading case upon the subject, and it announces the doctrine, and which has been since uniformly confirmed, that the expression *ex post facto* law applies only to criminal laws, and that the phrase as used in the Federal Constitution declares that the State Legislatures shall not by statute, "inflict a punishment for any act which was innocent at the time it was committed, nor increase the degree of punishment previously denounced for any specified offense." Before leaving this interesting case it is proper to remark, however, that Judge Chase, in his full and able discussion of the subject, extends the definition of an *ex post facto* law so as to embrace not only those creating or increasing the punishment, but also "every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." Such a construction obviously expands the constitutional prohibition so as to interdict an alteration by subsequent legislation of a part of the legal procedure in force at the time of the committing of the offense. I am not aware that this view has ever been sanctioned by a judicial decision, but it is important to notice that it originated not in any loose notion with respect to the character or scope of the legislation that was prohibited, but from the consideration that this clause of the Constitution was remedial, and that the particular subject over which it was thus sought to be extended was, from special considerations, within the mischief. The learned judge thus summarizes the evil uses to which these laws had been put by the English Parliament; he says: "Sometimes they respected the crime by declaring acts to be treason which were not treason when committed; at other times they violated the rules of evidence to supply a deficiency of legal proof by admitting one witness, when the existing law required two; by receiving evidence without oath; or the oath of the wife against the husband, or other testimony which the courts of justice would not admit; at other times they inflicted punishments where the party was not by law liable to any punishment; and in other cases they inflicted greater punishment than the law annexed to the offense." Conceiving these to be the evils to be extirpated, Judge Chase so amplified the remedy by his construction, as to make it effective against such evils. It should be observed, however, that the view so taken has no tendency to introduce any uncertainty embarrassing to the present inquiry, with respect to the subjects to which the provision is applicable, for it still applies only to specialized classes of cases.

It is obvious, then, excepting either the wider or narrower exposition of the constitutional clause in question, that it does not comprehend an inhibition against the passage of the enactment now challenged by this defendant. This statute plainly does not denounce a punishment in consequence of any act already done which was not punishable when done; nor does it increase a punishment incident to a past act; nor does it affect the mode of proving the offense. It leaves all these things absolutely as they were at the time of the

commission of this crime. All that it does is to modify a matter of procedure. The legislative declaration that a crime of this class should not be prosecuted or punished unless an indictment was found within two years, was beneficial to the defendant as long as the rule existed; but it was a mere privilege, and constituted a part of the public policy, being a regulation of the course of the prosecution of the crime. It neither created the crime, nor in any degree affected its punishment. In order to bring such an act within the category of *ex post facto* laws, the definition of such a law would have to be stretched, so as to take in all modifications of law existing at the time of the doing of the criminal act that have any tendency inimical to the culprit. But there is nothing to justify such a notion. Even if the extravagant assumption should be admitted that it is oppressive to disappoint the expectations of this defendant, arising out of this abrogated law, that he would not be held to answer for crimes of this kind after they had slept, perhaps from being undiscovered, for over two years, yet such admission cannot in any degree affect the subject of inquiry, because the Legislature has the undoubted general right to pass retrospective laws, and to decide whether such laws, even if they are harsh, are not necessary for the public welfare. Nor is the circumstance that this limitation existed at the time of the doing of these criminal acts, and that its removal by subsequent legislation has a tendency to increase the risk of punishment, any thing to the present purpose, because such an enhancement of the risk of punishment is not prohibited by the clause under review. The Constitution does not guarantee to criminals that their risk of conviction, arising out of the modes of their prosecution, shall not be increased by future legislation. Indeed, it seems to run into the absurd for a criminal to assert an indefeasible right, as against the Legislature, not to be tried or punished for his offenses after a specified time, for such a claim assumes the semblance of an assertion that the criminal act was done in reliance on such an expectation. I cannot perceive that the clause in question is a restraint on the legislative power to modify at will any of the regulations of the trial of the offense even in the most essential particulars. But for the presence of another constitutional restriction, the party charged could be deprived even of trial by jury. The rule of procedure that the indictment in matters of this class should be tried within two years, was no more sacred against repeal than many of the other rules designed for the protection of the culprit against possible injustice. In our laws there are provisions, that on indictment for the higher crimes, the person indicted shall have a copy of such indictment and a list of the jury served upon him two entire days at least before the trial, and that every indictment shall be tried the term in which issue is joined or the term after, unless the court, for just cause, shall allow further time; and yet, would it be pretended that an act repealing such regulations and operating retrospectively, would be an *ex post facto* law? It is presumed no one would pretend this, and yet their rescission would materially and injuriously affect the interest of delinquents. Laws of this kind are retrospective laws, but not *ex post facto* laws, and they are not, therefore, within the scope of the prohibition in question. The mistake sometimes made is in omitting to notice that an *ex post facto* law is not a law that in a general way alters the old law to the oppression of the party accused; but that it is a law that works oppression in one of three enumerated instances, to wit, when it originates or increases the punishment by retrospective legislation; or (perhaps) changes the rules of evidence to the detriment of such accused. If the constitutional prohibition forbade any modification of the existing law whose tendency was to increase the party's peril, then undoubtedly the present law,

as well as many of those which have been judicially sanctioned, could not be vindicated. But that such was not the true doctrine has been very uniformly decided. "The expressions, *ex post facto*," says the court, in the case already cited from Dallas Reports, "are technical; they had been in use long before the revolution, and had acquired an appropriate meaning by legislators, lawyers and authors." In *Fletcher v. Peck*, 6 Cranch, 87 138, Chief Justice Marshall says: "An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed," and Chancellor Kent eulogizes the comprehensive brevity and precision of this definition (4 Kent, 409), and this is the definition adopted in the case of *Hartung v. People*, 22 N. Y. 104, by the Court of Appeals of the State of New York. To the same effect I find the judicial definitions in all the books, and yet it seems certain that these constructions are all wrong, if a law of the kind in question embraces not only the particular cases thus specified, but the present case also, which is the instance of a law reviving the right to prosecute. The time of limitation, as originally prescribed, had no connection with the punishment as then prescribed. Such limitation was beneficial to the prisoner, not because it affected the penalty in any respect whatever, but inasmuch as its tendency was to diminish the chances of the discovery of his crime in case of his guilt, or on the assumption of his innocence, to insure a trial while the transaction was fresh in the memory of the witnesses. Such an advantage is similar in kind to the privilege possessed by a prisoner to have counsel assigned for his defense, or to have the right to challenge peremptorily a certain number of jurors, and it has never been supposed that the abrogation by subsequent legislation of such privileges was unconstitutional. This is the principle sustained by the authorities. A subsequent law giving the government additional challenges was adjudged legitimate in *Walston v. Commonwealth*, 16 B. Mour. 15, and the same result was reached with respect to a similar exercise of the legislative power authorizing the amendment of indictments in *State v. Manning*, 14 Tex. 402. So, also, a statute was not deemed objectionable in its application to past transactions by the Supreme Court of Massachusetts, that abolished the common-law doctrine of variance. *Commonwealth v. Hall*, 97 Mass. 570. There are other cases having the same aspect.

Such changes as these are justly regarded as adjustments of the methods of procedure, and consequently as being legitimate exercises of legislative authority, and in this same class the prescription of the time within which a crime shall be prosecuted is placed by Mr. Bishop. On this subject this is the language of this experienced author: "A statute of limitations compels the State to prosecute the crime within a specified period, if at all, by withholding from the courts jurisdiction over the offense afterward. And it has already been decided, in a case of another class, that if the Legislature takes away the jurisdiction so that no prosecution can be had, it may revive the old, or create a new jurisdiction, and then, though the right to prosecute had once lapsed, the prosecution may be carried on under the new law. This is something pertaining not to the right, but to the remedy, and a statute authorizing a prosecution after the period of limitation had lapsed, would seem to come within this principle. It pertains to the remedy. It does not punish an act innocent when committed, or add to the punishment which the law then prescribed."

The authority to which reference is made in this extract is that of *Commonwealth v. Getchell*, 16 Pick. 452, and the doctrine of which is confirmed in *Commonwealth v. Mott*, 21 Pick. 492. A judgment was called for on this point: a person had committed certain offenses for which he was liable to punishment under

an existing statute; the Legislature repealed such statute, and subsequently this repealer was itself repealed; the question was, whether the culprit could be punished under the original act so revived. The decision was in favor of this exercise of the legislative power, and the criminal was accordingly punished under the act so re-enacted. In that case, as in the present one, there was a period during which the crime could not have been punished under any law, and there seems to be nothing more than a phantastical distinction to be drawn between the revival of a right to prosecute, when such right has been suspended by the revocation of the statute in which it is inherent, and when such effect has been the result of lapse of time under a statute of limitations. In either event, in my judgment, the right to prosecute may be thus restored.

In addition to the foregoing considerations, it is to be remembered that the finding of an uncertainty with respect to the subject under consideration, is to resolve the question involved against the defendant. The power of the Legislature cannot be circumscribed except upon sure grounds. Such is the familiar rule of construction. Neither should it escape observation, that to extend the constitutional clause in question so as to embrace the present case, would be to extend it indefinitely; the prohibition would have nothing like settled boundaries; the entire matter would be thrown into confusion. And if it be said that the legislative power exercised in this case is liable to be much abused to the oppression of the citizen, the answer is that this is an imperfection necessarily inherent in all delegations of the law-making prerogative.

Touching the second point raised in the brief of the counsel of the defendant, that the act of limitation had the operation of a pardon of the crimes antecedently committed by the defendant, I think it sufficient to say, that nothing is perceived in this statute which will sustain such a construction. The design of the law is to protect the innocent, and not to absolve the guilty. The bar against prosecution established by it can be taken advantage of by both of such classes of persons, and consequently there is no induction to be derived from the purpose to be accomplished, of an intent to condone an offense. Such a force has never heretofore been supposed to be lodged in such laws. I have not been able to see any plausibility in this contention.

I conclude with the remark that all the authorities cited in the brief of the defendants' counsel have been carefully examined, and that it is not conceived that any of them are in opposition to the views above expressed.

My conclusion is, that the ruling of the trial judge was correct.

Van Syckel, J., concurred; Dixon, J., dissented.

GUARANTY BY LIGHTNING-ROD DEALER AGAINST LIGHTNING, NOT INSURANCE.

IOWA SUPREME COURT, DECEMBER 7, 1893.

COLE BROTHERS AND HART V. HAVEN, Appellant.

An agreement by a lightning-rod dealer to make good any loss to a specified amount caused by lightning to a building upon which he has erected a rod, held, a contract of guaranty and not of insurance, so as to require a compliance, by the dealer, with the statutes regulating insurance.

ACTION commenced before a justice of the peace on a promissory note. Upon an appeal to the Circuit Court the plaintiff obtained judgment.

Ball, Nichols & Stotts, for appellant.

H. W. Hanna, for appellee.

SHEVEM, J. The defendant pleaded the note sued on was executed in consideration of a policy of insur-

ance, which under the statute was void, and therefore the note was without consideration. What is claimed to be the policy of insurance is as follows:

"COLE BROTHERS.

"Policy of protection, security, and indemnity against damages by lightning.

"Franklin Lightning-Rod Works, 723 Seventh street, St. Louis, Mo.

[Large engraving.]

"Having, through our agent, B. P. Farmer, erected in good order their improved Franklin lightning-rod on the following described buildings, viz.: One farm barn belonging to J. C. Haven, and situated on the south-west quarter of the north-west quarter of section 36, town 51, range 38, county of Audubon, and State of Iowa, this fifteenth day of August, 1878,—

"We hereby guaranty that the said rods will protect said buildings or building from all damages by lightning for the term of five years, commencing at noon (12 o'clock) of above date; and said Cole Bro. & Hart hereby agree to make good unto the said J. C. Haven, his, her, or their heirs, assigns, or administrators, all such immediate loss or damage as may occur by lightning communicated directly to said building, and not by or through any intermediate or contiguous building, to an amount not to exceed \$500. The said loss or damage by lightning is to be estimated by the cash value of the property at the time the same shall occur, and to be paid within 90 days after notice and clear proof thereof is made to (Cole Bro. & Hart, by the above J. C. Haven, that said damages were caused by lightning, and that said rods were in good repair at the time of the accident."

The amount in controversy being less than \$100, the trial judge has certified but a single question upon which it is desirable to have the opinion of the Supreme Court. It is as follows:

"The note in suit being given for lightning-rods erected by plaintiff for defendant on his barn, and the written contract of guaranty, indemnity or insurance (whichever it may be called), which is set up in defendant's answer, having been executed by plaintiff to defendant as a part of the same transaction or contract on the sale of the rods, does the said contract of guaranty, indemnity, or insurance constitute such an illegal consideration as will defeat the recovery on the note, it being shown in evidence that the plaintiff had never complied with the laws of the State of Iowa in relation to insurance companies?"

Other questions have been discussed by counsel for the appellant, but we can only consider the one certified. Whether what is claimed to be a policy of insurance is such in fact, was somewhat considered, but not determined, in *Cook v. Weirman*, 51 Iowa, 561. We think the contract is one of guaranty and not of insurance. If one is employed to watch a building he may agree, in consideration of such employment, that he will pay therefor if it burns down through his negligence. In fact the agreement to pay might be absolute and unconditional. This would not be a contract of insurance but a guaranty. So one may sell goods and agree that the purchaser will receive certain named benefits or advantages. Such a contract would be a guaranty or warranty and not a contract of insurance. The plaintiff "guaranteed" the lightning-rods would protect the building from all damage by lightning, and if they failed in so doing the plaintiff would pay a certain specified amount. Such a contract could be lawfully made, and the note is not without consideration.

Affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

INSURANCE—FIRE POLICY—EVIDENCE AS TO VALUE—STIPULATION AS TO USE OF BUILDING—VACANCY—NOTICE OF NON-OCCUPANCY.—(1) In an action to recover for the loss of plaintiff's dwelling-house which was insured by defendant, it was shown that the house was insured for \$7,000 and a barn for \$2,000, the defend-

ant promising in the policy to pay assured all such loss or damage not exceeding \$9,000 "as shall happen by fire to the property, to be estimated according to the actual cash value of the property at the time the fire shall happen." By another section of the policy it was provided that the cash value of the property should in "no case exceed what would be the cost to the assured at the time of the fire of replacing the same." The complaint claimed the \$7,000 as due; the answer set up that the dwelling-house was worth only \$3,000. Upon the trial the testimony of a carpenter and builder, an architect, a real estate agent, who had appraised buildings, etc., all of whom knew the house, was offered to show what it would cost to build such a house in the location at the time of the fire. *Held*, that the testimony was admissible. (2) In the application for insurance there was, among other questions in regard to the building, this: "For what purpose used? state fully." The answer was, "Dwelling." The house was at that time vacant. *Held*, not a misrepresentation. The answer was descriptive not of present occupation or actual use, but of the class or character of the building. (3) The answer set up that plaintiff at the time of the fire used the first story of the building as a depository of straw for which no premium was paid for the additional risk, but no breach of warranty was set up as to occupation of the house. *Held*, that the cases of *Alexander v. Germania Ins. Co.*, 66 N. Y. 464, and *Ashworth v. Builders Ins. Co.*, 112 Mass. 422, did not apply, but that the case was within *Browning v. Home Ins. Co.*, 71 N. Y. 508; *Cumberland Valley Ins. Co. v. Douglass*, 58 Penn. St. 419, where it is held that calling the premises a dwelling-house is a description of the subject, not a stipulation, and is no engagement that they are occupied. (4) In this case at the time of the insurance, defendant was informed that the premises were unoccupied, and with that knowledge accepted the premium and issued the policies. *Held*, that the defendant could not be permitted to say that it never assumed the risk. *Van Schoick v. Niagara Ins. Co.*, 68 N. Y. 434; *Cone v. Niagara Ins. Co.*, 3 T. & C. 33; *S. C.*, 60 N. Y. 619. The stipulation requiring notice of non-occupancy and indorsement under such circumstances is waived. There is no inconsistency between this result and the cases *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Alexander v. Germania Ins. Co.*, 66 id. 464; *Walsh v. Hartford Ins. Co.*, 73 id. 5. Judgment affirmed. *Woodruff v. Imperial Fire Insurance Co.*, appellant. Opinion by Danforth, J.

[Decided Dec. 7, 1880.]

MUNICIPAL CORPORATION—LIABLE FOR MONEY, TAKEN BY IT UNDER INVALID ASSESSMENT AND APPLIED TO PAY BONDS ISSUED TO ANTICIPATE SUCH ASSESSMENT.—In an action against the town of New Lots, for money had and received by defendant to the use of plaintiff, the complaint alleged that there was a sum of money belonging to plaintiff in the official custody of the county clerk of Kings county. This money was the surplus arising upon the foreclosure of a mortgage upon certain lands in the town of New Lots, devised to the plaintiff, which mortgage was laid upon such lands by plaintiff's devisee, and foreclosed after his death. An assessment had been in form laid upon these lands to pay for a local improvement, by which they were supposed to be benefited, under Laws 1869, chapter 217, section 4, and 1870, chapter 619, section 3, which acts were declared unconstitutional and void, and the assessment of no validity or effect. *Stuart v. Palmer*, 74 N. Y. 183. The board of supervisors of Kings county, believing the acts valid, levied a tax upon the premises to pay the assessment, and issued a warrant for its collection to the collector of New Lots. He levied upon and took the money from the custody of the clerk and paid it to the county treasurer of Kings, to the credit of the town of New

Lots, on account of the assessment. In the progress of the improvements named, and under authority of the acts mentioned, bonds of the town of New Lots were issued to pay for the improvements, in anticipation of the collection of the assessments, which were alleged to be valid obligations against the town, and the money paid to the county treasurer was applied to the payment of these bonds. It was not averred how or by whom the money was thus applied. It was also alleged that the town of New Lots had wrongfully taken and received, without the knowledge or consent of plaintiff, the money mentioned, the property of plaintiff, and neglected to pay the same to plaintiff. *Held*, that a demurrer to the complaint, on the ground that it did not show a cause of action against defendant, could not be sustained. The invalidity of this assessment was so clear that a suit in equity to vacate it as a cloud upon the title could not be maintained. The cases where there must first be a vacating of the assessment to recover back the money paid on it (*Peyser v. Mayor*, 70 N. Y. 497; *in re Lima*, 77 id. 170; *Wilkes v. Mayor of N. Y.*, 79 id. 621), are those where the invalidity is latent and does not appear upon the proof that must be made to sustain proceedings under such assessments. *Marsh v. City of Brooklyn*, 59 N. Y. 280. The fact that the town was an enforced agent in the matter of issuing the bonds and paying the assessment would not relieve it from liability. *Marsh v. Little Valley*, 64 N. Y. 112. The Legislature had power to direct the improvement and put the burden of providing for it upon the town (*People v. Flagg*, 46 N. Y. 401), and a contract made under lawful power is not avoided by the illegality of provisions in the same act for the levying of an assessment. *Moore v. Mayor of N. Y.*, 73 N. Y. 238. The averment that the town took and received the money and applied it to its own use, taken with the other averments, constituted an allegation that the town received the money, and with it made payment of its bonds, which were town charges, and for which it was liable, and thus a liability on the part of the town arose. See *City of Rochester v. Town of Rush*, Ct. App., March, 1880; *Hathaway v. Cincinnati*, 62 N. Y. 434; *Gould v. Oneonta*, 71 id. 298; *Supervisors of Dutchess v. Sisson*, 24 Wend. 387; *People v. Hawkins*, 46 N. Y. 9. Judgment reversed. *Horn, appellant, v. Town of New Lots*. Opinion by Folger, C. J.

[Decided Dec. 1, 1880.]

PARTNERSHIP—LAWS 1833, CHAPTER 281, FORBIDDING FICTITIOUS PARTNERSHIPS—ACTION—SUCCESSIVE ON DIFFERENT ITEMS OF ACCOUNT.—(1) The statute (Laws 1833, chap. 281) providing that "no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and company' or '& Co.' is used, it shall represent an actual partner or partners," is not violated when the words "& Co." represent the wife of the person whose name appears as the head of the firm. The provision in question is highly penal and will not be extended. It was intended to prevent the use of the name of a person not interested in a firm and thus inducing a false credit to which it was not entitled. *Wood v. Erie R. Co.*, 72 N. Y. 196, 198. It does not apply to and is not intended to include the use of a real name of an actual partner even though such partner was under a disability at the time. The use, therefore, of the name of a *feme covert*, an infant, or person of unsound mind as one of the firm, when there was no intention to impose upon the public by obtaining undue credit, cannot be regarded as a violation of either the letter or the spirit of the statute. (2) Goods sold at various times were sold upon each occasion upon a credit of four months. *Held*, that each sale was separate and distinct, and a cause of action accrued when the time of credit expired and as the several amounts became due. The different sales did not constitute one entire and

Indivisible demand, and the plaintiff could bring separate action, for each separate sale or for all of them together as he saw fit. The different demands were like several promissory notes or several distinct trespasses, and in the nature of separate and distinct transactions for each of which a separate action might be brought. *Secor v. Sturgis*, 18 N. Y. 548; *Staples v. Goodrich*, 31 Barb. 317. The rendering of an account containing all the items would not change the nature of the transaction. Judgment affirmed. *Zimmerman et al. v. Erhard et al.*, appellants. Opinion by Miller, J. [Decided Dec. 1, 1880.]

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW—COURT OF CLAIMS—TRIAL WITHOUT JURY.—The provision in the Court of Claims Act of March 3, 1863, authorizing that court, without the intervention of a jury, to hear and determine claims against the government, and also any set-off, counter-claim, claim for damages, or other demand asserted by the government against the claimant, does not violate the seventh amendment of the National Constitution. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defense, or to any set-off, or counter-claim which the government may assert, are not controlled by the seventh amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Judgment of Court of Claims affirmed. *McElrath, appellant, v. United States*. Opinion by Harlan, J. [Decided Dec. 12, 1880.]

PLEADING—WHAT BILL TO SET ASIDE JUDGMENT ON PATENT MUST SHOW.—A bill in chancery to set aside a judgment or decree of a court of competent jurisdiction on the ground of fraud, must set out distinctly the particulars of the fraud, the names of the parties who were engaged in it, and the manner in which the court or the party injured was misled or imposed on. So, also, a bill to set aside or annul a patent of the United States for public lands, or to correct such a patent on account of fraud or mistake, must show, by like averments, the particulars of the fraud and the character of the mistake and how it occurred. *Marquez v. Frisbie*, 101 U. S. 478. Decree of United States Circuit Court, California, affirmed. *United States, appellant, v. Atherton*. Opinion by Miller, J. [Decided Dec. 20, 1880.]

NEW JERSEY SUPREME COURT ABSTRACT. JUNE TERM, 1880.*

CONSTITUTIONAL LAW—PROTECTING FISH IN STREAMS NOT NAVIGABLE—DESTRUCTION OF PRIVATE

* To appear in 22 Vroom's (48 N. J. Law) Reports.

PROPERTY UNDER STATUTE.—(1) The State has the right, by legislation, to protect fish in rivers and streams not navigable. *Shoemaker v. State*, Spence, 153. Parker, C. J., in *Commonwealth v. Chapin*, 5 Pick. 199, says: "The common-law right of several fishery in the owners of lands bordering on rivers not navigable, is subject to a reasonable qualification, in order to protect the rights of others, who, in virtue of owning the soil, have the same right, but might lose all advantage from it if their neighbors below them, on a stream or river, might, with impunity, wholly impede the passage of fish into the lakes or ponds, where they, by instinct, prepare for the multiplication of the species. The restriction is founded upon that universal principle of every just code of laws, 'Sic utere tuo, ut alienum non laedas.' Shaw, C. J., says: 'It seems to be well settled that the obstruction of the passage of the annual migratory fish through the waters and streams of the Commonwealth is not an indictable offense at common law; but the right to have these fish pass up rivers and streams, to the head waters thereof, is a public right, and subject to regulation by the Legislature.' *Commonwealth v. Essex Co.*, 18 Gray, 247; *Holyoke Co. v. Lyman*, 15 Wall. 500. (2) A fish warden for a county, appointed by the governor, under a State statute giving him authority, has the right to enter on lands and destroy a fish-basket, constructed in violation of the statute, and the materials of which it is composed, so that it may not be again used; and such materials may be forfeited to the State. The question whether the destruction of private property for public purposes is a taking for public use, within the meaning of the constitutional prohibition of such taking without compensation, has been elaborately discussed in *American Print Works v. Lawrence*, 1 Zab. 248; *Hale v. Lawrence*, id. 714; 8 C., 3 id. 590, in cases where buildings were destroyed by public officers, to prevent the spread of a conflagration. In *Wynebruner v. People*, 13 N. Y. 378, in reference to intoxicating liquors, and in *Phelps v. Racey*, 50 id. 292, as to game birds, of kinds specified. As a deduction from that case it may be said, that after a statute has declared an invasion of a public right to be a nuisance, which may be abated by the destruction of the object used to effect it, the person who, with actual or constructive notice of the law, sets up such nuisance, cannot sue the officer whose duty it has been made, by statute, to execute its provisions. *Weller v. Snover*. Opinion by Scudder, J.

REMOVAL OF CAUSE—EFFECT ON JURISDICTION OF STATE COURT—CONFLICT OF LAW—REMEDY FOR IMPERFECT PROCEEDINGS FOR REMOVAL.—(1) The jurisdiction of a State court over a cause is not, *ipso facto*, suspended by the filing of a petition and bond for the removal of the cause into the Federal court. In cases arising under the act of Congress, the question of jurisdiction rests upon this principle, if the case be one of which the Federal court has jurisdiction, under the act of Congress, upon compliance with its provisions for the removing the cause, the jurisdiction of the State court is, *ipso facto*, determined; but if the cause be one of which the Federal court has not jurisdiction, under the act of Congress, or the proceedings to remove it are not in compliance with the act, the State court retains its jurisdiction, notwithstanding a petition and bond be filed for that purpose. *Insurance Co. v. Pechner*, 95 U. S. 183; *Yuld v. Voss*, 99 id. 539; *Mathews v. M. & L. R. R. Co.*, 111 Mass. 74. (2) Whether a particular cause has been removed from the State to the Federal court, by the proceedings to effect its removal, may be decided by either court; but in case of a conflict of decision, the decision of the Federal court will prevail, and if it be ultimately decided that the Federal court had obtained jurisdiction over the cause, the proceedings in the State court, subsequent to the

filing of the petition of appeal, if they be not considered void, as being *coram non judice*, will at least be reversed as erroneous. *Dill. on Remov. Caus.* 75; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149; *Illius v. N. Y. & N. H. R. R. Co.*, 13 id. 597; *Holden v. Putnam Co. Ins. Co.*, 46 id. 1; *Whiton v. Chicago, etc., R. R. Co.*, 25 Wis. 424; *Gordon v. Longest*, 16 Pet. 97; *Kanouse v. Martin*, 14 How. 23; *Insurance Co. v. Dunn*, 19 Wall. 214; *Insurance Co. v. Morse*, 20 id. 445; *Amory v. Amory*, 95 U. S. 186. (3) If the proceedings on the part of a defendant to remove the cause into the Federal court are so imperfect as not, in fact, to effect a removal of the cause, the suit in the State court is not stayed, pending the decision of the Federal court as to the removal of the cause. If the defendant desires to protect himself from the consequences of proceedings in the State court, pending a decision by the Federal court of the question of the removal of the cause, if in fact the decision on that subject be adverse to him, he should obtain a stay of proceedings either by *certiorari* or by an order of the State court to that effect. See *Com. Dig.*, "*Certiorari*," G; *Bac. Abr.*, "*Certiorari*," G; *Kingsland v. Gould*, 1 Halst. 161; *McWilliams v. King*, 3 Vroom, 21-24. *National Union Bank of Dover v. Dodge*. Opinion by Depue, J.

SALE — SALE OR RETURN — WHEN TITLE REMAINS IN VENDOR AFTER DELIVERY.—Delivery of possession under a conditional contract of sale, which stipulates that the goods shall remain the property of the vendor until the contract price be paid, will not pass title to the vendee until the condition be performed. A vendor who delivers the possession of a chattel under an executory contract of sale, on condition that the property shall not pass until payment of the contract price, may forfeit his property by conduct which the law regards as fraudulent. But where the case presents no other features than that the vendor has entered into a contract of sale on credit, and has delivered the goods to the vendee, upon an agreement that they shall remain the property of the vendor until payment of the purchase-money be made, the transaction is not fraudulent *per se*, and the property in the goods will remain in the vendor until payment be made, without being subject to execution at the suit of creditors of the vendee, and the title of the vendor will be preferred to that of purchasers from the vendee. *Shep. Touch.* 118; *Benj. on Sales*, 222; 2 *Kent's Com.* 496; *Smith v. Lynes*, 1 Seld. 41; *Carleton v. Sumner*, 4 Plck. 516; *Smith v. Dennie*, 6 id. 262; *Farlow v. Ellis*, 15 Gray, 229; *D'Wolf v. Babbett*, 4 Mason, 289; *Copland v. Bosquet*, 4 Wash. C. C. 588; *The Oriole*, 1 Sprague, 31; *Pars. on Cont.* 537; *Ballard v. Burgett*, 40 N. Y. 314; *Runyon v. Groshon*, 1 Beas. 86; *Broadway Bank v. McElrath*, 2 id. 24; *Miller v. Pancoast*, 5 Dutcher, 250; *Herring v. Hoppock*, 15 N. Y. 409; *Marsten v. Baldwin*, 17 Mass. 606; *Blanchard v. Child*, 7 Gray, 155; *Porter v. Pettengill*, 12 N. H. 299; *McFarland v. Farmer*, 42 id. 386; *Gaylor v. Dyer*, 5 Cranch's C. C. 461; *Strong v. Taylor*, 2 Hill, 326; *Forbes v. Marsh*, 15 Conn. 384. With regard to a purchaser from a vendee in possession under a contract of sale, a distinction is observed between the vendor's right to rescind the sale for fraud and his right to resume possession where goods have been delivered under a conditional contract of sale. Where the sale is upon credit, but is absolute in terms, and the vendor intends to transfer property as well as possession, the property passes to the vendee, by the contract of sale, leaving in the vendor only a right of rescission for fraud. He may, in that case, re-possess himself of the property, notwithstanding a levy upon it, under an execution against the vendee. *Williamson v. N. J. S. R. Co.*, 2 Stew. 311. The title passing to the vendee, by the contract, and being vested in him until the sale be disaffirmed, an innocent purchaser for

value may, before disaffirmance of the sale, acquire an indefeasible title, though the sale be voidable as between the original parties. *White v. Garden*, 10 C. B. 919; *Stevenson v. Newnham*, 13 id. 285; *Mowrey v. Walsh*, 8 Cow. 238; *Root v. French*, 13 Wend. 570; *Hoffman v. Noble*, 6 Metc. 68. But where the vendee is in possession under a conditional contract of sale, he has no property to convey to a purchaser, and the vendor's title never having been divested, he may reclaim the property if the condition be not performed, even as against a purchaser for value in good faith. *Ballard v. Burgett*, 40 N. Y. 315; *Dresser Manuf. Co. v. Waterston*, 3 Metc. 9; *Coggill v. Hartford and New Haven R. Co.*, 3 Gray, 645; *Sargent v. Metcalf*, 5 id. 306; *Burbank v. Crooker*, 7 id. 158; *Deshon v. Bigelow*, 8 id. 159; *Hirschorn v. Canney*, 98 Mass. 149; *Zuchtmann v. Roberts*, 109 id. 53; *Benner v. Puffer*, 114 id. 376; *D'Wolf v. Babbett*, 4 Mason, 289; *Copland v. Bosquet*, 4 Wash. C. C. 508; *Tibbetts v. Towle*, 12 Me. 341; *Haven v. Emery*, 33 N. H. 66; *Kimball v. Jackman*, 42 id. 242. See, also, *Chamberlain v. Smith*, 44 Penn. St. 431; *Rose v. Story*, 1 id. 190; *Marsh v. Mathiot*, 14 S. & R. 214; *Haak v. Linderman*, 64 Penn. St. 499. *Cole v. Berry*. Opinion by Depue, J.

KANSAS SUPREME COURT ABSTRACT.

DECEMBER, 1880.*

NEGLIGENCE — ANIMALS KILLED BY RAILROAD TRAINS.—Where a railroad company is not guilty of negligence in failing to protect its track from swine in a township where they are not permitted to run at large, and it appears from an agreed statement of facts that a hog was killed by the negligence of the railroad company in such township; and it further appears that the negligence of the owner in permitting the animal to run at large in violation of section 46, chapter 106, Comp. Laws of 1879, contributed directly to the injury, *held*, the negligence of the defendant was offset by the negligence of the plaintiff, and the owner of the animal could not recover for his loss. *Kansas City, Fort Scott & Gulf Railroad Co. v. McHenry*. Opinion by Horton, J.

STATUTE OF LIMITATIONS — PROMISE TO CREDIT OVERPAYMENT.—Plaintiff, in 1874, was an accommodation indorser upon a note belonging to defendant. The maker was insolvent. Suit was brought. Plaintiff interposed no answer. Upon request of defendant, plaintiff, pending the suit, paid several hundred dollars upon defendant's promise to credit it on the claim and take judgment for the balance only. Notwithstanding this, defendant took judgment for the face of the paper, of which fact plaintiff soon had knowledge. Calling defendant's attention thereto, he promised to correct the error and allow the payment on the final settlement of the judgment. Several payments were made from time to time, and this promise frequently repeated, but no correction was ever made. Defendant was the attorney of a company of which plaintiff was president. They occupied the same office and had intimate personal and business relations, in the latter of which defendant was plaintiff's confidential adviser. After over four years had passed, defendant refused to credit the judgment with this prior payment and demanded the full amount due upon its face. *Held*, in an action brought by plaintiff to compel the credit of this amount and restrain the collection of the judgment therefor, that the statute of limitations was a bar to any relief. *Sweet v. Hentig*. Opinion by Brewer, J.

* To appear in 24 Kansas Reports.

CRIMINAL LAW.

BURGLARY — EVIDENCE — ALMANAC — AMOUNT OF LIGHT AFTER SUNSET DOES NOT AFFECT CRIME.—(1) Upon a trial for burglary the State was allowed to introduce an almanac for the purpose of showing when the sun set on the day on which the crime was committed. *Held* to be no error. The matter was one of which the court would have taken judicial notice, and the almanac was received, not strictly as evidence, but to refresh the memory of the court and jury. (2) It will not avail a prisoner on a charge of burglary that there was light enough from the moon, street lights, and lights of buildings, aided by newly-fallen snow, to enable one person to discern the features of another. There must have been daylight enough left for the purpose. Connecticut Sup. Ct. of Errors, June term, 1879. *State of Connecticut v. Morris*. Opinion by Carpenter, J. (To appear in 47 Conn. Rep.)

CONSPIRACY — CONSPIRATOR NOT LIABLE UNLESS PRESENT AT OR ABETTING ACT, NATURALLY INCIDENT TO AGREED CRIME.—Defendant was a conspirator with others in the commission of a burglary, in which goods were stolen. In pursuance of the agreement between the conspirators, the goods stolen were taken in an express wagon in front of a pawn shop, into which they were being removed, when a person came up to the wagon and was shot by some one near the wagon. It was alleged that defendant was not present at or near at the time of the homicide, and had neither aided, abetted, advised or encouraged its perpetration, nor had, before its commission, advised the persons in charge of the stolen goods to oppose and resist all persons who should attempt to seize the same or interrupt them in secreting or disposing of them. *Held*, that a conviction in that case could not be sustained. Where the accused is present and commits a crime with his own hands, or aids and abets another in its commission, he may in either case be considered as expressly assenting thereto. So where he has entered into a conspiracy with others to commit a felony or other crime, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he must be presumed to have understood the consequences which might reasonably be expected to flow from carrying into effect such unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go. For if the accused in such case has not expressly assented to the commission of the crime, and the unlawful enterprise is expressly assented to, and the enterprise is not of such a character as will probably involve the necessity of taking life in carrying it into execution, there can be no implied assent, and consequently no criminal liability. When, therefore, one enters into an agreement with others to do an unlawful act, he impliedly assents to the use of such means by his co-conspirators as are necessary, ordinary or usual in the accomplishment of an act of that character. But beyond this his implied liability cannot be extended. So, if the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not. But where the unlawful act agreed to be done is not of a dangerous or homicidal character and its accomplishment does not necessarily or partially require the use of force or violence which may result in the taking of life unlawfully, no such criminal liability will attach

merely from the fact of having been a party to such an agreement. 1 Bish. Crim. L. (6th ed.), § 614; *Hawkins' P. C.*, book 2, ch. 29, §§ 19, 20, 21; *Foster*, 369, 370; *Regina v. Franz*, 2 F. & F. 580; *Regina v. Horsey*, 3 id. 287; *Regina v. Lusk*, id. 443; *Roscoe's Crim. L.* 673-655; *Regina v. Tyler*, 8 C. & P. 616; *Regina v. Turner*, 4 F. & F. 339; *Rex v. Hawkins*, 3 C. & P. 392; *Watts v. The State*, 5 W. Va. 532; *Rex v. Howell*, 9 C. & P. 437. Illinois Sup. Ct., Sept., 1880. *Lumb v. People of Illinois*. Opinion by Mulkey, J.

RAPE—CONSENT, EVEN THOUGH EXTORTED, RENDERS COHABITATION NOT RAPE.—Consent by the woman destroys the essential ingredient of the crime of rape. In a prosecution for rape the court instructed the jury as follows: First. The element of force forms a material ingredient of the offense of rape, by which the resistance of the woman violated is overcome, or her consent induced by threats of personal violence, duress or fraud; for unless the consent of the woman to the unlawful intercourse is freely and voluntarily given, the offense of rape is complete. Second. If the circumstances show that the consent was obtained by the use of force, and the woman's will was overcome by fear of personal injury, then the crime is rape. Third. If the woman ultimately consented to the intercourse, such consent not being freely or voluntarily given, but being obtained through fear, threats, duress or fraud, or partly by fear and partly by force, then the offense is rape. *Held*, that such instructions, so far as they related to consent, were calculated to mislead the jury. Where there is physical ability to resist, and freedom of the will to protest or dissent, to say that the act may be rape when committed "with the consent" of the woman, is as erroneous as to say that it need not be committed "against her will." The terms "without her consent," in the Massachusetts statute, are held to apply to a case where the defendant knows that the woman is insensible and incapable of consenting. *Com. v. Burke*, 105 Mass. 376. When the mind is subjugated, as well as the body, so that the power of volition and the mental capacity to either consent or dissent is gone, then the act may be said to be "against the will," and so also it may be said to be "without consent." But when the mind is left free to exercise the will, and to consent or dissent, then by consent responsibility for the act is incurred. Where there is no such mental capacity the quality of the act is indifferent—there can be no consent or dissent, and consequently no responsibility. The physical power may be overcome, and the utmost resistance be unavailing; yet the mind may remain free to approve or disapprove, consent or dissent. The expression of consent may be compelled or coerced by threatened violence, and yet there is no consent of the mind. In this class of cases the authorities seem to be uniform that the act must be committed *against the will* of the woman, and *without her consent*, not technically, but actually and in fact, or it will not be rape. "Any consent of the woman, however reluctant, is fatal to a conviction. The passive policy will not do. There must be no consent. There must be the utmost reluctance and resistance." *State v. Burgdorf*, 53 Mo. 63. "It must appear that she showed the *utmost reluctance*, and used the *utmost resistance*." *Dan Moran v. People*, 25 Mich. 356. "It is a vital question whether the woman ceased resistance because it was useless or dangerous, or because she ultimately *consented*." In the latter case it is not rape. *Rex v. Hallett*, 9 C. & P. 748; *Wright v. State*, 4 Humph. 194; 2 Whart. on Crim. L., § 1142. Acquiescence obtained by mistake, imposition, or artificial stupefaction is the only acquiescence allowable. If not thus obtained it is fatal. Whart. on Crim. L., § 1144. "There should be no doubt of the real absence of assent." *People v. Bunson*, 6 Cal. 221. "There is a difference between consent and submission. Every con-

sent involves a submission, but it by no means follows that submission involves consent." *Regina v. Day*, 9 Carr & P. 722. Wisconsin Sup. Ct., Nov. 30, 1880. *Whittaker v. State of Wisconsin*. Opinion by Orton, J.

RECENT ENGLISH DECISIONS.

BILL OF EXCHANGE—ACCEPTANCE—ENGLISH AND SCOTCH STATUTES—STATUTE OF FRAUDS.—The Mercantile Law Amendment (Scotland) Act 1856 (stat. 19 & 20 Vict., ch. 60), enacts, section 11, "No acceptance of any bill of exchange * * * shall be sufficient to bind or charge any person, unless the same be in writing on such bill * * * and signed by the acceptor, or some person duly authorized by him." Section 6 of the Mercantile Law Amendment (England) Act 1856 (stat. 19 & 20 Vict., ch. 97), is in the same terms. The Bills of Exchange Act 1878 (stat. 41 Vict., ch. 13), enacts, "that an acceptance of a bill of exchange is not, and shall not be deemed to be, insufficient under the provisions of 'these acts' by reason only that such acceptance consists merely of the signature of the drawer written on such bill." *W.*, at the request of *J. M.*, agreed to advance a sum of 1,000*l.* on a bill of exchange at twelve months, to *W. & T. M.*, two sons of *J. M.*, who were trading in partnership. The bill was drawn by *W.* and accepted by *W. & T. M.*; *J. M.* then wrote his own name on the back of it, and returned it to *W.*, who then forwarded the amount to *W. & T. M.* The firm of *W. & T. M.* became insolvent, and the bill was dishonored; *W. & J. M.* were both dead, and *W.*'s trustees sought to recover the amount from *J. M.*'s estate. *Held* (affirming the judgment of the court below, though for different reasons), that *J. M.* was not liable, (1) as an acceptor within the meaning of the above statutes; (2) on a guarantee for the debt or default of his sons, there being no memorandum in writing as required by the statute of frauds, and section 6 of the Mercantile Law Amendment (Scotland) Act 1856. *Held*, further, that the Bills of Exchange Act 1878, is to be dealt with as a declaratory, not as a repealing act. In Scotland, as in England, a bill can only be accepted by the drawer, and no other person can be subject to a joint obligation with him. *Matthews v. Bloxsome* (83 L. J. 209, Q. B.) discussed and questioned. Citations made: *Pothier Contract de Change* No. 79, *Gwinnell v. Herbert*, 5 A & E. 439; *McDonald v. Union B'k of Scotland*, 9 Ct. Sess. Cas. (3d Ser.) 963; *Jackson v. Hudson*, 2 Camp. 447; *Hill v. Ferris*, 1 Sal. 133; *Penny v. Innes*, 1 C. M. & R. 439; 1 Bell's Com. 425 (7th ed); *Don v. Watt*, 16 Fac. Col. 647; *Walters case*, 19 id. 489. House of Lords, June 14, 1880. *Steele v. McKinlay*. Opinions by Lords Blackburn and Watson, 43 L. T. Rep. (N. S.) 358.

INSURANCE—MARINE POLICY—BURSTING OF BOILER FROM NEGLIGENCE.—Plaintiffs' steamer was insured by a time policy against "adventures and perils * * of the seas * * fire * * and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof." The steamer was damaged while at sea by the bursting of the boiler, which took place in consequence of the plates being worn too thin to resist the pressure of the steam. This condition of the plates was due to the negligence of those who had charge of the boiler in omitting to clean and inspect it at proper intervals. In an action against the underwriters, *held* (affirming the judgment of *Baggallay*, L. J.), that the damage caused by the bursting of the boiler was covered by the policy, and plaintiffs were entitled to recover. *Cullen v. Butler*, 5 M. & S. 461; *Devoe v. L'Anson*, 5 Bing. & C. 519; *Dudgeon v. Pembroke*, L. B., 2 Ap. Cas. 324; *Dixon v. Sadler*, 5 M. & W. 406, and 8 id.

835. Ct. of Appeal, Nov. 15, 1880. *West India and Panama Telegraph Co. v. Home and Colonial Marine Insurance Co.* Opinions by Lord Chanc. Selborne and Brett, L. J., 43 L. T. Rep. (N. S.) 420.

MARRIED WOMAN—NOT LIABLE ON CONTRACT WHEN NO SEPARATE ESTATE.—In an action against a husband and wife upon a bill of exchange indorsed by the wife, it appeared that at the time of her indorsing the bill, the wife was entitled to a life interest in certain real and personal estate for her separate use, free from the control of her husband, but over which she and her husband had a joint power of appointment. After action brought, but before issue joined, the husband and wife executed a joint appointment to the wife for her separate use without power of anticipation. *Held*, that a judgment against the husband and wife personally must be set aside, and that there could not be judgment against the wife's separate estate, as she was not shown to have at the time of the trial of the action any separate estate that she had the power of dealing with. Court of Appeal, April 27, 1880. *Barber v. Gregson*. Opinion by Cotton, L. J., 43 L. T. Rep. (N. S.) 428.

NEGLIGENCE—ACT OF GOD—UNPRECEDENTED RAINFALL.—It was stated for the opinion of the court by an official referee that upon the occasion of an universal rainfall, unprecedented in duration and quantity for many years in the district, there was imminent peril of the defendants' canal bursting; and the defendants, in order to prevent it, raised a sluice by which a large quantity of water escaped into a neighboring brook and thence into a colliery. The water, having filled up this colliery, flowed into some collieries of the plaintiffs and destroyed their works. It was found that if relief had not been afforded to the canal banks at this time, an inundation must have very shortly ensued, which would have equally destroyed the plaintiffs' works and also caused far greater devastation to property and probably loss of life throughout a very wide area; that the course adopted by the defendants was prudent and proper, and the only effectual measure which was possible in the emergency. The plaintiffs claimed in this action alternatively damage for the defendants' wrongful acts, or compensation under the Defendants' Acts of Parliament which provided for satisfaction to be made for injury or damage alleged to be sustained by reason of carrying into effect any of the provisions of that act. *Held*, that the plaintiffs' injury was by the finding due not to the defendants' wrongful acts nor to the effect of any of the provisions of the Defendants' Acts of Parliament, but to *vis major* or an act of God, and that as in any event the plaintiffs' works would have been equally destroyed, the immediate damage caused by the defendants' own act in raising the sluice was *injuria absque damno* and irrecoverable. *Nichols v. Marsland*, L. R., 2 Ex. Div. 1. Q. B. Div., June 28, 1879. *Thomas v. Birmingham Canal Navigation Proprietors' Co.* Opinion by Lush, J., 43 L. T. Rep. (N. S.) 435.

PRIVILEGE—LETTERS WRITTEN BY SOLICITOR FOR CLIENT NOT PRIVILEGED.—A letter, written by a solicitor for a client making a claim for a lost parcel alleged to contain valuable articles, is not inadmissible on the ground of privilege in a criminal case. In order to make a client criminally responsible for a letter written by his solicitor, it must be shown that the letter was written in pursuance of the instructions of the client. A letter by a solicitor, written "in consequence" of an interview with his client, is not equivalent to a letter written by the instructions of the client, and is not admissible in a criminal case against the client. Cr. Cas. Res., Nov. 20, 1880. *Regina v. Downer*. Opinion by Cockburn, C. J., 43 L. T. Rep. (N. S.) 445.

SURETYSHIP—POLICY OF GUARANTY OF EMPLOYEE—CONDITION PRECEDENT.—A policy of guarantee on the honesty of an employee was made "subject to the conditions herein contained which shall be conditions precedent to the right of the employer to recover," and went on to provide that the employer shall, if and when required by the company, but at "the expense of the company, if a conviction be obtained, use all diligence in prosecuting the employed to conviction for any fraud or dishonesty which he shall have committed and in consequence of which a claim shall have been made under this policy." Upon demurrer, *held* (reversing the judgment of the court below, Lord Selborne, L. C., dissenting), that it was made a condition precedent to the right to recover under the policy that the employer should prosecute if required to do so. *Worsley v. Wood*, 6 T. R. 710; *Bettini v. Guy*, 34 L. T. Rep. (N. S.) 246. House of Lords, July 27, 1880. *London Guarantee and Accident Co. v. Fearnley*. Opinions by Lords Blackburn and Watson, 43 L. T. Rep. (N. S.) 390.

NEW BOOKS AND NEW EDITIONS.

UNITED STATES DIGEST, VOL. X.

THIS annual digest for 1879 is much later than usual, owing to a change of editors. Mr. Benjamin Vaughan Abbott has retired from the editorial charge, and is succeeded by Messrs. John E. Hudson and Geo. Fred. Williams, in this volume; and hereafter Mr. Williams will have the sole charge, as we learn from the *American Law Review*. The present volume is one of great bulk, containing 838 pages, in finer type than usual. The arrangement in some respects differs from Mr. Abbott's, but is good and suggestive, and although it is not exactly such as we should choose, considered from a scientific point of view, the practitioner will find no difficulty in the use of the volume. As a whole, we think it is the best of the series. The cross-references are particularly full and excellent. The series has become indispensable to every well-equipped lawyer, and hereafter, we are assured, the annual volumes will appear in May or June. The publishers, Little, Brown & Company, of Boston, have issued the volume in excellent typography and binding.

SYMINGTON'S BRYANT.

William Cullen Bryant, a Biographical Sketch, with Selections from his Poems and other writings. By Andrew James Symington. New York: Harper & Bros., 1880. Pp. 226.

This is a very agreeable and intelligent sketch of one of the most eminent literary figures of our country. As a poet Mr. Bryant wrote the best didactic and ethical poems and many of the best lyrics of his time, and made the best translation of Homer ever produced. The newspaper which he so long edited always maintained a prominent authority in letters, and a respectable influence in politics and statesmanship. As a reporter of travels and an occasional orator, he stood in the front rank. Withal, his purity of motives, his dignity of character, and the venerable age to which he attained, obtained for him the reverence of his contemporaries. For all this Mr. Bryant early and wisely exchanged the chance of becoming an average lawyer. More than this he would probably never have been, spite of Mr. John Bigelow's opinion to the contrary, at page 94 of this volume. The biographer tells the story, at page 95, of the misadventure which was the main cause of his quitting the bar. In an action of slander, for saying that one had "burned his own store," he had neglected to insert the proper innuendo that it was done to defraud the insurers. He naturally lost his case, and as amendments were not then in vogue, it was lost irrevocably. The biographer errs in

saying that Chief Justice Parsons gave the opinion. It was Chief Justice Parker. On the whole we are glad Bryant made this mistake. It was a fortunate one for literature. The little biography is heartily to be commended.

SMILES' DUTY.

Duty, with Illustrations of Courage, Patience and Endurance. By Samuel Smiles, LL. D. New York: Harper & Bros., 1881. Pp. x, 418.

Mr. Smiles is favorably known by his *History of the Huguenots*, and perhaps more popularly, by his *Self-Help*. The headings of the chapters will give a sufficient idea of the scope of the present work. Duty—conscience; duty in action; honesty—truth; men who cannot be bought; courage—endurance; endurance to the end—Savonarola; the sailor; the soldier; heroism in well-doing; sympathy; philanthropy; heroism in missions; kindness to animals; humanity to horses—E. F. Flower; responsibility; the last. Under these headings, the author gives a sort of ethical treatise illustrated by anecdotes. Most of his illustrations are well-worn and trite. The book is perhaps a little too "goody." It preaches a little too much, and moralizes in too common-place a manner. Its influence however must be wholesome, especially in the large circle which are apt to buy and read such books. A Puritan might read it on Sunday. The author is candid and impartial. Like a dutiful Briton he worships the Duke of Wellington, and stipules the negative from which he prints his portrait, but he does Washington justice. Mr. Smiles has found the strangest reason for having a large family that ever came to our knowledge. At page 68, in speaking of the effect of liberal education in deterring parents from putting their sons at trades, he says: "A New York clergyman possessing a large family (to correct this spreading influence) recently declared from his pulpit," etc. The book has an index.

LOSSING'S STORY OF THE UNITED STATES NAVY.

The Story of the United States Navy, for Boys. By Benson J. Lossing, LL. D. Illustrated. New York: Harper & Bros., 1881. Pp. viii, 418.

Mr. Lossing, both as artist and author, has made invaluable contributions to American history in his *Illustrated Field Books of the Revolution*, the *War of 1812*, and the *Civil War*. Nothing else can take the place of these works. The present work is on the same plan, and executed with the same admirable accuracy and brightness of narrative, but on a smaller scale. It is a wholesome and useful book for boys, and will interest adults. It is beautifully printed and neatly bound, the cuts are many and excellent, and there is a good index.

CORRESPONDENCE.

ABBOTT'S NEW CASES.

Editor of the Albany Law Journal:

Of thirteen fully reported cases in the fourth number of Vol. 8, Abbott's New Cases, six are from the Court of Appeals, which will undoubtedly appear in the regular series. Every one of the six had already been digested and published in the 10th volume of the *New York Weekly Digest*, and (I think) also in the *ALBANY LAW JOURNAL*. The publishers of Abbott's New Cases started out with their first volume by saying they did not propose to publish those cases which would appear in an official series. (See preface.) But such kind of publication as appears in this fourth number of the eighth volume has been going on for some time, and is not fulfilling the promise first made, but is simply a bare and bold attempt to

make a book without reference to the first and announced purpose of its publication. It is unfair to the legal profession, and makes them pay for two publications of the same case, which is not fair or decent.

Yours,

LAWYER.

OBITUARY.

JAMES NOXON.

THE Hon. James Noxon, Justice of the Supreme Court, Fifth Judicial District, died at his residence in Syracuse, on the 6th inst., after an illness of two years, caused by overwork. He was born at Onondaga Hill, N. Y., in 1817, his father, B. Davis Noxon, being a prominent lawyer. The son entered Hamilton College in 1834, and after graduating and pursuing a course of legal studies, he entered upon the practice of law in Syracuse. He connected himself with the firm of Noxon, Comstock & Leavenworth, and subsequently with that of Noxon & Putnam. In 1843, he and his brother, B. Davis Noxon, Jr., formed a copartnership. Later he was a partner of Sidney T. Fairchild, of Cassanovia, and still later of George D. Cowles. He was elected State Senator from Onondaga in 1855, and re-elected in 1858. As the nominee of the Republican party, in 1875, he was elected Supreme Court judge, to succeed Judge Morgan, for the full term of fifteen years.

NOTES.

AT a meeting of the New York city bar, on the 6th inst., convened in memory of the late Benjamin K. Phelps, the following resolution was adopted: "Resolved, The members of the bar of the city of New York desire to express to the people of the city their sense of the great loss which the profession and the public have suffered by the death of the late District Attorney Benjamin K. Phelps. He discharged for eight consecutive years the duties of that responsible office in a manner at once creditable to himself and useful to the administration of justice. He had many virtues and few faults. He combined rare qualities which go to make a prosecuting officer of the highest order. He was a thorough and discriminating lawyer, and did much to maintain and develop our system of criminal jurisprudence. He was a brilliant and effective advocate. The people, while he was their representative, were never overmatched by even the ablest and most distinguished counsel. He was pure and upright; no shadow or suspicion ever rested upon his motives. He was humane and kind; no undue harshness ever characterized his enforcement of law. He was never swayed by either personal or political considerations from the performance of what he saw to be his duty. He was modest and unassuming; no arrogance of office ever offended the lawyer however unskilled, the citizen however lowly, or the accused however degraded. The people of New York owe honor to his memory as a citizen and a public officer. The bar mourns for a noble and genial associate, and tenders its sympathy to his bereaved family." Remarks were made by Messrs. John McKeon, George Bliss, Stewart L. Woodford, Nelson J. Waterbury, William P. Prentice, J. S. Bennett, Samuel G. Courtney, Edwin W. Stoughton, John R. Fellows, and Presiding Judge Davis, who was chairman of the meeting.

The Chicago Legal News publish "Questions on Kent's Commentaries, with references to Illinois statutes and decisions where the law of the State differs from that laid down in the text; by Reuben N. Benjamin, Professor of Law in the Illinois Wesleyan University." The work seems well done. — The American Law Review for January contains the second part of Mr. James B. Thayer's article on Beddingfield's

Case—Declarations a part of the res gesta; and an article by Mr. George F. Canfield, on the Legal position of the Indian.

The General Term in the Fourth Department opened at Utica on Tuesday, 4th inst., with a calendar of 557 cases, 44 of which are appeals from orders. Of the 513 appeals from judgments, 54 are preferred. Of the appeals from judgments, 240 were brought in 1890, 219 in 1879, 48 in 1878, 4 in 1877, and 2 in 1874. The court decided 408 cases during the last year. — The Governor has appointed Mr. Daniel G. Rollins district attorney of New York, to succeed Mr. Phelps. Mr. Rollins has been an assistant under Mr. Phelps and is an excellent criminal lawyer. No better selection could have been made.

We are sure that the Georgia Reports in the future will be duller reading than when Judge Blackly was on the bench. In the current list volume we find some characteristically wise and witty utterances of the judge. In *Braswell v. Suber*, p. 398, he says: "The wife has been much advanced by the general tenor of legislation of late years, in respect to her own property. She has acquired a pretty independent position as to title, control and disposition, but this relates to her property, not to his. The law has not yet raised her to the station of superintendent of her husband's contracts, and probably never will. He is bound to support her and the children which she bears to him, and in order to fulfill this obligation, he ought to have as much freedom in the management of his business affairs with the world as unmarried men are allowed to exercise. In taking a wife a man does not put himself under an overseer. He is not a subordinate in his own family, but the head of it. The law assigns him this position, not for his own advantage alone, but as much for the real good of his wife and children, and somewhat for the general interest of society. A husband left free to lead and govern in his own family is the most useful husband to all who may be concerned in the results of his conduct. That exceptions to this rule may be pointed out, is no objection to, or disproof of the rule itself. Human institutions are all more or less imperfect, and their complete efficiency in practical working cannot be expected in every instance. It is enough if they produce beneficence to the great mass, and in the great majority of cases. A subjugated husband is a less pleasing and less energetic member of society than one who keeps his true place, yet knows how to temper authority with affection. The law does not discourage conjugal consultations, or free and voluntary co-operation in all transactions which affect, or may affect, the welfare of the family. Perhaps, the true spirit and genius of the law favors nothing more than harmony of will and conduct on the part of husband and wife. But the law does not undertake to secure this delightful harmony by coercion, but leaves it to issue spontaneously from the holy relation of matrimony." And in *Crumbley v. State*, p. 382, he delivers the following, which may be added to our chapter of "Practical Jokes": "There is no dispute that the gun was loaded with powder, and that the prisoner fired at the engineer at the distance of about twenty steps. Grant that it was done only 'to have a little fun out of the engineer,' in the merry season of Christmas, it was an assault. The engineer was not one of the revelers, but was engaged in the earnest and responsible vocation of running a locomotive and train upon a railroad. He had a right to pass on his way without being shot at from the roadside. It is not pretended that he knew with what the gun was charged, or for what purpose it was presented at him and fired. Those who shoot at their friends for amusement ought to warn them first that it is mere sport, and that there is no danger. Fun is rather too energetic, even for Christmas time, when it looks like a disposition to indulge in a little free and easy homicide. Shooting powder-guns at a man as a practical joke is among the forbidden sports."

The Albany Law Journal.

ALBANY, JANUARY 22, 1881.

CURRENT TOPICS.

A CASE comes to us from Canada which may properly be added to our chapter on Limitations of the Privileges of the Clergy, 21 Alb. L. J. 325. It is the case of *Maise v. Robillard*, 4 Can. Leg. News, 10. A Roman Catholic priest espoused the cause of one of the candidates in a public election, and refused the sacraments to those who proposed to vote for his opponent. The court of review set aside the election on the ground of undue influence and intimidation. Quoting from similar cases, it was said: "The Catholic priest has, and he ought to have, great influence. His position, his sacred character, his superior education, and the identity of his interests with his flock insure it to him; and that influence receives tenfold force from the conviction of his people that it is generally exercised for their benefit. In the proper exercise of that influence on electors, the priest may counsel, advise, recommend, entreat, and point out the true line of moral duty, and explain why one candidate should be preferred to another, and may, if he thinks fit, throw the whole weight of his character into the scale; but he may not appeal to the fears or terrors or superstition of those he addresses. He must not hold out hopes of reward here or hereafter, and he must not use threats of temporal injury, or of disadvantage or punishment hereafter. He must not, for instance, threaten to excommunicate, or to withhold the sacraments, or to expose the party to any other religious disability. If he does so with a view to influence a voter, or affect an election, the law considers him guilty of undue influence." Perhaps the doctrine is still better explained as follows: "A priest's true influence ought to be like a landlord's true influence—springing from the same sources, mutual respect and regard, sympathy for troubles or losses, sound advice, generous assistance, and kind remonstrance—and where these exist, a priest can exercise his just influence without denunciation, and the landlord can use his just influence, without threat or violence. A priest is entitled, as well as any other subject, to have his political opinions, and to exercise his legitimate influence legitimately. It is a mistake to suppose that on a man taking holy orders he ceases to be a citizen, or ceases to be clothed with all the privileges and rights of a citizen. But a priest has no privilege to violate or abuse the law. He has no right to interfere with the rights and privileges of other subjects. He may exercise his own privileges, but he must forbear in respect of others. It is also a mistake to suppose that every act of a priest is a spiritual one. An assault by a priest is simply an assault, and not priestly intimidation; and the assault of a priest can and ought to be resented, and prosecuted and punished like any other individual." Of course,

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the doctrine announced in the opening sentences of the first quotation is not accepted in our meridian. We do not believe that a priest of any church ought to have any more influence in an election than any other man—any more than a physician, for example. On the contrary, it is here generally believed that a priest is usually by education and employment peculiarly unfitted to advise on such subjects. And so we strongly dissent from our contemporary's editorial *dictum* that a priest may properly tell his people from the pulpit how they should vote.

The American has apparently retained a lawyer to write for it who proposes to tear things all to pieces. In an article entitled "Are Debts Collectible?" he takes the ground, that while imprisonment for debt is impolitic in general, yet an objection lies against the extreme clemency of the law, in "that the acts of the debtor after obtaining credit have not been made the subject of investigation, as well as those at the time." He quotes the opinion of Daniel Webster, that the burden should always be on the debtor to show his inability, and that his own conduct has been fair and honest. Mr. Webster was also of opinion that no one should be exempt from imprisonment for debt if he had lost money in any species of gaming or in lotteries. Mr. Webster, it would seem, had no objection to making money in the same. But the opinions of this great man on this subject lose something of their natural weight from the fact that the hat was periodically passed around in State street for his relief, and because, as we suppose, he sometimes followed the fashion of his time in playing for money. *The American* inquires: "Does it not appear that the collection of debts is becoming one of the lost arts?" We should say, no. On the contrary, we believe that such laws are more efficient now than in former times. After all, the creditor class are about as much to blame as the debtor. While there is "an apparent growth on the part of some people to obtain excessive credit," there is on the part of the creditor an excessive eagerness to trust, and a carelessness of investigation or a reckless omission to investigate that deserve to recoil on their own heads. But it is so easy to lay the blame of the workings of human nature and the commercial system on the legislators and the lawyers. Just so the doctor is always blamed by some one when anybody dies.

The Legal Education Committee of the Benchers of Canada recommend that for the years 1882, 1883, 1884, and 1885, students at law and articulated clerks shall be primarily examined in Xenophon, Homer, Cæsar, Cicero, Virgil, Ovid, *The Deserted Village*, *The Task*, *Marmion*, and Gray's *Elegy*. This is an eminently respectable course, but very mournful. There is something almost significantly prophetic, in these English titles, of the inevitable course of the average barrister; a deserted village, a hard task, a heroic struggle, a country churchyard. It lacks nothing but the supplement of *Paradise Lost*. Perhaps it was not so intended. There is nothing

in the selected classics to lighten it up much. Ovid's Art of Love is not included. Why have the Benchers omitted the time-honored and generally inevitable Spectator, Course of Time and Essay on Man? We fear these Benchers have shed their intellectual kneepans. If they really want to test the pupil's efficiency, let them set him at Browning's Ring and the Book, Carlyle *passim*, Ruskin of late, or a select sentence of three pages from one of Mr. Evarts' speeches. If they can make head or tail of these they will succeed in their chosen profession.

Mr. Levi Bishop sends us some disheartening criminal statistics from Michigan. He says in eleven months in 1880, there were in that State 104 murders and attempts to murder. In one year from September 19, 1879, there were 50; and in 1879, 97. Total in the three years, 251. This increase he attributes to the abolition of capital punishment. He says: "Such is the abundant and melancholy harvest gathered from the sickly-sentimental humanitarianism in Michigan, in three years, on the subject of capital punishment, which, in the exercise of a false sympathy for a heartless and felonious assassin, forgets and wholly ignores the innocent but murdered victim and the necessary safeguards of society. And the number of these crimes has increased and is increasing, till they now number on an average two for each week." "How long, we may ask, is this distorted feature of the criminal code to continue? And if it does continue, how long will it be before Judge Lynch and disguised executioners will take the place of a mockery of law and justice, and that for the necessary protection of society?" We do not like the suggestion in the last lines. We call Mr. Bishop's attention to the fact of an alarming increase of homicide all over the country, notwithstanding the unprecedented number of capital punishments. Mr. Bishop's figures do not go back far enough to enable us to judge how marked the increase of crime in his State has been, nor to form an idea whether it is probably due to the cause to which he attributes it.

The *Washington Law Reporter* has found a new reason for repealing the Married Women's Enabling Acts. It says: "Separate bank accounts, separate attorneys, separate physicians, separate preachers, churches and friends—it is a divided family." Also the laws are "immoral" and "wicked." This perhaps is what many husbands think; but there are just as many wives and women in the world as husbands and men, and what do they think? Their rights are not subordinate to men's. Why should a husband not only insist on confiscating all his wife's property, but also on compelling her to think and believe as he does?—to take the same physic, to worship God at the same time and place and in the same manner, and to have no other friends? If the husband is to have all the property, it is of course convenient that she be advised by the husband's attorney. It may be galling to the husband's pride to know that the wife keeps a separate purse and

bank account, but it is an unjust pride that is hurt. Our contemporary talks about the "reliance" which is infringed by these laws. Why should the "reliance" be all on one side? The serious truth is that women need laws to protect them from the selfishness, rapacity, and trickery of men. Men do not need such defenses against women. These laws have been in vogue now for a generation, and so far as we know have benefitted women and have not injured men. We have not observed nor heard of any considerable domestic dissension caused by them. They have not led to many divorces except where they ought to have done so. Marriage settlements have long been the approved practice of England, and of other, the oldest countries, and no harm has ensued. Equity has protected the wife, when the law would not. But about once in five years the newspapers trot out the same awful old ghost of "domestic dissension," and try to scare just men into retracting their tardy justice to the weaker sex. When we read such articles, we suspect that somebody's wife has refused to "sign off," and hence these tears.

Mr. James B. Bradwell, at the late meeting of the Illinois State Bar Association, read an interesting paper on the Present State of the Common-Law Practice in England, in which he commends the recent innovations, especially the abolition of the distinction between law and equity, and recommends their adoption in his State. Mr. Bradwell says, among other things: "The experience of England, as well as of several States of the Union, demonstrates that a court having chancery jurisdiction is preferred by suitors to one of common law. The influx of business to the Chancery Division of the High Court, which followed the passing of the Judicature Act, was much greater than was anticipated by any one. The number of actions commenced in the Court of Chancery from 1864 to 1874 was 25,000, or an average of 2,500 a year. In 1875, in anticipation of the Judicature Act taking effect, the number was 3,932; and in the year ending Nov. 1, 1876, the number was 5,111; showing that the number in 1876 had increased to more than double what it was in 1874." Mr. Bradwell however need not have crossed the ocean for his model. If Mr. Bradwell should discover that Bryant wrote two excellent poems called the *Iliad* and the *Odyssey*, or that the "Dutchman's head" cheese on his table is a very appetizing foreign manufacture, we might be surprised at his not resorting to the original sources, and at his attributing to Mr. Bryant what he got from Greece by translation, and to foreign parts what was exported from Orange county in this State, and then imported. So Mr. Bradwell in his paper is simply praising a New York manufacture, as of course he well knows. Perhaps the exportation and importation have given it some additional flavor, but we have not discovered any. The New York Code of Civil Procedure is the parent of about all the law reforms of the last 30 years in every part of the English-speaking world. The English system is

substantially copied from it. Illinois cannot do better than adopt it. Our State has many material claims to be called the "Empire State," but her claim to precedence and intellectual and moral sovereignty in legal reform is fully as well founded, and will outlast and prove more beneficent than many of those material boasts.

NOTES OF CASES.

In *Bank v. Wallace*, Supreme Court of South Carolina, 1880, 11 Rep. 28, it was held that while the general rule requires that where the parties reside in the same city or town, notice of dishonor must be given personally to the indorser, or in his absence, must be left at his residence or place of business, yet where the note is made payable at a bank whose usage it is to give such notices through the post-office, that mode of giving notice will be sufficient. After stating the general rule, the court proceeded: "To this rule there are, however, exceptions, one of which is that where a note is made payable at a particular bank, and it is proved to be the usage of such bank to give notices through the post-office to persons residing in the same town or city, that mode of giving notice will be sufficient. This is upon the ground that persons who become parties to such a note are presumed to have knowledge of the usages of the bank at which they have chosen to make the note payable, and have agreed to be bound by such notice as it is the usage of the bank to give. *Wigglesworth v. Dallison*, 1 Smith Lead. Cas., notes, 416, 417. It would seem necessarily to follow from this that the same principle would apply to the manner of giving notice, and a recent writer, Daniel, in his work on Negotiable Instruments, states that it has been so held in several cases which he cites. Nor is it necessary that knowledge of such usage should be brought home to the person sought to be affected by it." The cases cited by Mr. Daniel are *Guideat v. Mechanics' Bank*, 7 Ala. 324; *Chicopee Bank v. Eager*, 9 Metc. 583. In *Bank v. Pinkers*, to appear in 83 N. C. 377, it was held that the usage of a particular bank, known and acted upon by its customers, to discount bills without presenting them for payment, may be shown to excuse the omission to present. The court remarked: "Proof of usage among banks in a particular locality has been allowed to modify the days of grace, as prescribed by the law-merchant, and to affect those dealing with them, as was decided in *Renner v. Bank*, 9 Wheat. 581, which, with a series of cases in the appended note, may be found in Red. & Big. Lead. Cases on Bills of Exchange, 297." In *Mills v. Bank of U. S.*, 11 Wheat. 431, it was held that parties to paper payable in a city where the invariable usage is to demand payment on the fourth day, are bound by that usage, although ignorant of it.

In *Covington Transfer Company v. Kelly*, Supreme Court of Ohio, October, 1880, 11 Rep. 24, it was held in an action by a railway passenger, not himself negligent, for a personal injury, against a de-

fendant whose negligence directly and proximately concurred with the negligence of the railroad company in producing the injury, that the concurrent negligence of the company cannot be imputed to the plaintiff so as to charge him with contributing to his own injury. The court said: "If the driver could, in any just sense, be regarded as the agent or servant of the passenger, or if the railroad company, whose servant the driver was, had been, under the contract, subject to the direction or control of the passenger, then, with some show of reason, it might be said that the passenger was responsible for the negligence of the driver. But such was not the nature of the contract. The passenger was, it is true, entitled to a seat in the company's car, but was not entitled to direct or control the time or manner of its movement. That the company was bound to exercise the highest degree of care to the end that the passenger might be safely carried is true, but it was not subject to the direction or control of the passenger either as to employment of servants, or as to the manner in which the service should be performed. It seems to us, therefore, that the negligence of the company or of its servants should not be imputed to the passenger, where such negligence contributes to his injury jointly with the negligence of a third party, any more than it should be so imputed, when the negligence of the company, or its servants, was the sole cause of the injury. Indeed, it seems as incredible to my mind that the right of a passenger to redress against a stranger for an injury caused directly and proximately by the latter's negligence, should be denied on the ground that the negligence of his carrier contributed to his injury, he being without fault himself, as it would be to hold such passenger responsible for the negligence of his carrier whereby an injury was inflicted upon a stranger. And of the last proposition, it is enough to say that it is simply absurd." The English doctrine is the contrary; *Thorogood v. Bryan*, 8 C. B. 115; *Armstrong v. Railway Co.*, L. R., 10 Exch. 47; and to the same effect is *Lockhardt v. Lechtenholer*, 46 Penn. St. 151, while the same is held as to the contributory negligence of the driver of a private vehicle, in *Prideaux v. City of Mineral Point*, 43 Wis. 513; S. C., 28 Am. Rep. 558. Agreeing with the principal case, are *Chapman v. R. R. Co.*, 19 N. Y. 341; *Colgrove v. R. R. Co.*, 20 id. 492; *Bennett v. R. R. Co.*, 36 N. J. 225; S. C., 13 Am. Rep. 435; *Robinson v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 1; S. C., 23 Am. Rep. 4. See, also, notes, 23 Am. Rep. 4; 28 id. 563.

In *Hamaker v. Blanchard*, Pennsylvania Supreme Court, June, 1879, a domestic servant in a hotel, while cleaning the public parlor, found a roll of bank notes, which she reported to the proprietor, and upon his stating that he thought they belonged to a guest who had transacted business in the parlor, gave them to him to restore to the supposed owner. The guest had not lost the money, and the owner remained unknown. Held, that the servant could recover the money from her employer. *Trun-*

key, J., dissented. The court said: "An article casually dropped is within the rule. Where one went into a shop and as he was leaving picked up a parcel of bank notes which was lying on the floor, and immediately showed them to the shopman, it was held that the facts did not warrant the supposition that the notes had been deposited there intentionally, they being manifestly lost by some one, and there was no circumstance in the case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner. *Bridges v. Hawkesworth*, 7 Eng. Law & Eq. 424. The decision in *Mathews v. Harsell*, 1 E. D. Smith, 393, is not in conflict with the principle, nor is it an exception. Mrs. Mathews, a domestic in the house of Mrs. Barmore, found some Texas notes which she handed to her mistress to keep for her. Mrs. Barmore afterward intrusted the notes to Harsell for the purpose of ascertaining their value, informing him that she was acting for her servant for whom she held the notes. Harsell sold them and appropriated the proceeds, whereupon Mrs. Mathews sued him and recovered their value with interest from date of sale. Such is that case. True, Woodruff, J., says: 'I am by no means prepared to hold that a house servant who finds lost jewels, money, or chattels, in the house of his or her employer, acquires any title even to retain possession against the will of the employer. It will tend much more to promote honesty and justice to require servants in such cases to deliver the property so found to the employer for the benefit of the true owner.' To that remark, foreign to the case, as understood by himself, he added the antidote: 'And yet the Court of Queen's Bench, in England, have recently decided that the place in which a lost article is found does not form the ground of any exception to the general rule of law, that the finder is entitled to it against all persons except the owner.' His views of what will promote honesty and justice are entitled to respect, yet many may think Mrs. Barmore's method of treating servants far superior." "Many authorities were cited in argument touching the rights, duties, and responsibilities of an innkeeper in relation to his guests. These are so well settled as to be uncontroverted. In respect to other persons than guests, an innkeeper is another man. When money is found in his house, on the floor of a room common to all classes of persons, no presumption of ownership arises—the case is like the finding upon the floor of a shop. The research of counsel failed to discover authority that an innkeeper shall have an article which another finds in a public room of his house, when there is no circumstance pointing to its loss by a guest. In such case the general rule should prevail. If the finder be an honest woman, who immediately informs her employer and gives him the article on his false pretense that he knows the owner and will restore it, she is entitled to have it back, and hold it till the owner comes." Quite similar in circumstances and holding the same doctrine is *Bowen v. Sullivan*, 62 Ind. 281; S. C., 30 Am. Rep. 172. To same effect,

Durfee v. Jones, 11 R. I. 588; S. C., 23 Am. Rep. 528. See, also, notes, 30 Am. Rep. 180; 23 id. 530; 21 id. 187.

LEGAL DEFINITIONS OF COMMON WORDS.

VI.

"TRADE" is not confined to barter, but includes general commerce and traffic. *May v. Sloan*, 101 U. S. 231. This was where a mortgagee agreed "not to interfere with any *bona fide* trades" made by the mortgagor so far as the mortgage was concerned, and the mortgagor sold the lands.

A power to "sell and exchange" lands includes the power to make partition. *Phelps v. Harris*, 101 U. S. 370. But it seems that a power to sell does not imply a power to mortgage. *Stronghill v. Austey*, 1 DeG., M. & G., 635. The authorities on this question however are somewhat conflicting.

"About to sail with cargo," in a charter-party, means about ready to sail with cargo. Therefore, a vessel not more than three-elevenths loaded, and the time of finishing subject to all the contingencies of wind, weather, labor, and boats incident to an open roadstead on the northern coast of Africa, cannot be considered as "about to sail with cargo" within the meaning of the charter-party. *Von Lingen v. Davidson*, U. S. Circ. Court, Maryland, November, 1880, 11 Rep. 4.

"Objects of vertu and taste" do not always include very valuable paintings. *Bridgman v. Lord Fitzgerald*, 43 L. T. (N. S.) 408. This was the case of a bequest of all the testator's "jewels, trinkets, gold and silver plate, ornaments and other china," and the paintings in question were ten in number, valued at £15,000, including a head by Carlo Dolce, Landseer's "Monarch of the Glen," and a portrait of the testator's daughter. The vice-chancellor observed: "Mr. Bristowe says the pictures are of the same nature as the things he has been disposing of; a picture is an object of vertu and taste. So it is, I agree. I do not say by any means that the words are insufficient to pass pictures, but whether they do so or not depends upon the particular circumstances of the case, and therefore inasmuch as it would have been so very easy for the testator to have removed all difficulty on the subject by using the word pictures, I think that mentioning as he does 'gold and silver plate, ornamental or other china,' and then 'all objects of vertu and taste,' he means things *ejusdem generis*, such as painted snuff-boxes and small statuettes, and any thing of that kind about the house. I can hardly think that if he had meant those pictures to pass he would not have used the proper word 'pictures' instead of those doubtful and ambiguous words 'objects of vertu and taste.'" "On the whole, therefore, I come to the conclusion that he considered those words 'vertu and taste' as comprehending every thing else of the same sort, or as we lawyers say, *ejusdem generis* with those before enumerated, and I cannot consider that by such words he

intended to pass a valuable collection of pictures such as he had; and I am therefore of opinion that Lady Londesborough did not take them absolutely, but that she is entitled to the enjoyment during her life, under the next clause, of all the articles which were in the house at the time of the death. It was said that it was very improbable that he could have intended the portrait of his daughter to be sold. I agree that it is very improbable, but he may have forgotten that, or he may have thought the family were sure to buy it; probably it is not very valuable. I cannot think that that circumstance sufficiently controls the construction of the will to make those words have the operation which they otherwise would not have." It does not appear whether paintings would be included in Mrs. Malaprop's "articles of bigotry and virtue."

A man may be a "citizen" of a place without his family's residing in it. *Union Hotel Co. v. Hersel*, 79 N. Y. 454. Here a subscription was conditioned that a certain sum be subscribed by the citizens of B. One of the subscribers was domiciled in A., but boarded, did business, and spent nearly all his time in B. Held, that he was a citizen of B. within the meaning of the subscription. The court said: "By the definition usually given, a citizen is an 'inhabitant of a city, town, or place,' and so would include every person dwelling in the place named; but it is subject to various limitations depending upon the context in which it is found. It may indicate a permanent resident, or one who remains for a time or from time to time." For the object in question, namely, the erection of a hotel, "it would be immaterial whether the subscriber occupied with his family a house within the limits of the city, or outside of them, so long as his place of business was in Buffalo, and he had a permanent pecuniary interest in its welfare and in the success of the new house."

A "jackass" may be a horse. So within an exemption of "a horse, mule, or yoke of oxen." *Richardson v. Duncan*, 2 Heisk. 220. The court observed: "It is clear that this case comes directly within the reason and spirit of the law. The plaintiff was the head of a family, probably a large one. He was engaged in tilling the soil, and his little jackass, worth only twenty dollars, was the sole dependence of his family for ploughing the earth, and making bread for his wife and children." (An ass that could make bread must be a useful domestic animal.) "It is obvious that he is exactly the kind of citizen that the Legislature had in view when they declared that the wives and children of such honest, hard-working tillers of the ground should not be reduced to starvation by allowing the creditor to seize the last horse, mule or ox. The generous object of the Legislature would be defeated if we should 'stick in the bark,' and declare that they intended by their legislation to exclude from its benefits all those heads of families who, either from choice or necessity, plowed jackasses instead of horses, mules or oxen. We are satisfied they intended to make no such invidious distinctions, either between citizens equally deserving, or work

beasts equally useful. Nor are we required to do any great violence to the letter of the statute in holding that the case before us falls within the reason and object of the enactment. It was held by this court, many years ago, that a person guilty of mule-racing along a public road was indictable under the statute against horse-racing. The decision rests upon the solid ground that the two offenses fell alike within the reason of the law. If, in a criminal case, it is allowable to hold that a mule is a horse, if he is used in racing along a big road, much more is it allowable to hold that a jackass, used for farming purposes, is either a horse, or mule, or ox. But we are not without high philological authority for construing the word 'horse,' used in the statute, as including the 'ass.' Mr. Webster, in his unabridged and illustrated dictionary, defines an ass to be 'a quadruped of the genus *equus*—that is, *equus asinus*—having a peculiarly harsh bray, long stretching ears, and being usually of an ash color with a black bar across his shoulders. The tame or domestic ass is patient to stupidity, and slow.' Then the ass is a species of the genus *equus*, or horse. His value for agricultural purposes was one of the lucky developments of the late war. Some who resorted to the services of this species of horse, for such purpose, from dire necessity, continue so to use him, either from choice or continued necessity. We think those heads of families, engaged in agriculture, who use the ass or the jackass for such purposes, and not otherwise, are within both the letter and the spirit of the exemption law."

But a stallion is not a horse, so as to be exempt from execution, when not kept for farm work, but for purposes of equine gallantry and propagation. *Roberts v. Adams*, 38 Cal. 383. And one who steals a mare does not steal a horse, within a statute against stealing "horses, mares, geldings, and colts." *Banks v. State*, 28 Tex. 644. The court there said: "The word 'horse' is a generic term, including ordinarily in its signification the different species of that kind of animals, however diversified by age, sex, use, or artificial means; and if the word 'horse' had been used in this article without specifying the species, we would have been entirely satisfied with the ruling of the court, because the word 'horse' in its generic sense would include a mare, and there would be no variance between the averment and the evidence. It could not be contended successfully that the defendant had been indicted for stealing one thing and convicted for stealing another and different thing. But from precedent and authority we feel constrained to hold that the word 'horse' in the article cited was not intended to be used in its comprehensive and generic sense, and that it was used as synonymous with the word 'stallion,' or at least it was not in that connection intended to include 'gelding, mare, or colt.'"

Flax may be grain. *Hewitt v. Watertown Fire Ins. Co.*, Iowa Supreme Court, December, 1880, 7 N. W. Rep. 596. This was a case of insurance of "grain in stacks and granary on farm." Held, to cover unthreshed flax in stacks, on the farm, that had been raised solely for the seed and not the fiber.

The court said: "The sole question to be determined is whether the word 'grain,' as used by the parties, includes flaxseed. Mr. Webster says: 'Grain signified corn in general, or the fruit of certain plants which constitute the chief food of man and beast, as wheat, rye, barley, oats, and maize.' It does not necessarily follow, from the fact that certain kinds of grain are named, that there may not be others that as clearly come within the definition as those named. Certainly, buckwheat is grain, although not specially named. It is so because it is clearly an article of food when prepared as usually used. But we believe it is seldom if ever used as food in its natural state. Measurably, at least, this can be said as to flaxseed. After it has been ground, and the oil largely extracted, the residuum is the 'oil cake' known to commerce, which is largely if not exclusively used as food for cattle and other beasts, and is regarded as highly nutritious. This being so, flaxseed comes within, to an extent, at least, the definition of grain given by Mr. Webster, that it is an article used as food for man or beast. But if it be conceded flaxseed is not grain, strictly speaking, or is not so regarded in commercial transactions, this cannot be regarded as decisive of the question before us; for the rule is that this contract, 'like other contracts, must receive the construction which is most probable and natural under the circumstances, so as to attain the object which the parties to it had in contemplation in making it.' It was accordingly held in *Decatur Bank v. St. Louis Bank*, 21 Wall. 294, the term 'cattle' included hogs, and in *State v. Williams*, 2 Strobb. 474, that the legislative intent in making it larceny to take cotton, rice, 'corn or other grain' from a field, was to include peas; or in other words, that 'other grain' included peas. In *Holland v. State*, 34 Ga., the statute provided: 'It shall not be lawful for any person in this State to make any spirituous liquors out of any corn, wheat, rye, or other grain, except for medicinal purposes;' and it was held that 'sugar-cane seed' and 'millet' were within the meaning of the words 'other grain;' both being grain, as such word was used by the Legislature. In the case at bar the parties must, we think, have intended the policy to cover whatever was usually and ordinarily stacked on the farm or put into a granary. The term 'grain' was used as being sufficient for this purpose. Wheat, rye, oats, and flax would ordinarily be stacked together, and from the combustible nature thereof, if the wheat caught fire, the flax would ordinarily be burned if the wheat was. The intent of the plaintiff undoubtedly was to insure his crop raised on the farm, and put into stacks or into a granary, and the company must, we think, have so understood, and executed the policy with the intent of insuring the property in question."

One who slaughters and cuts up animals, and sells the meat as food, is not a "dealer" within the meaning of a statute requiring dealers who buy and sell goods, etc., to take out a license. *State v. Yearly*, 82 N. C. 561. The court said: "In the recent case of *State v. Chadbourne*, 80 id. 479; S.

C., 30 Am. Rep. 94, we had occasion to examine and construe a similar provision in the Revenue Act of March, 1877. The defendants in that case were proprietors of a steam saw and planing mill, and their business was to buy timber, and by sawing and planing convert it into lumber and boards which they sold in the market. It was held that their calling was not within the purview of the act. The occupation of a butcher who purchases live animals suitable for food, and after slaughtering and cutting them, sells in pieces at his stall, is not dissimilar. He does not buy and sell the same article and in the same condition as a mere trader. He buys a cow, a hog, or a sheep; he sells beef, pork or mutton. His labor and skill have been employed in making the change, and enhance the price. The reasons assigned for the exemption of the manufacturer of boards apply with equal force to the butcher." See 18 Alb. L. J. 384.

THE NOMINATION OF JUDGES.

THE best possible method of securing an able and honest judiciary is always an interesting subject of discussion in political philosophy, but how best to secure that object under the conditions which exist in this State is a question of practical politics which concerns every man who wishes the government, as it is, administered in the best possible way. Can any thing be done, as the laws now stand, toward bettering the present state of affairs? It is not necessary to admit that at present we are in a bad condition, but the question is, can we get in a better?

In this State judges are elected, indeed, but not chosen by the people. The people merely determine which they prefer of two candidates chosen by the political machines. Yet it is a necessity that some organized body should present a candidate for election to the bench. It would be a useless and indelicate thing for a man to offer himself as a candidate, and no good result would happen if the people were left to scatter their votes according to their individual preferences. I have such confidence left in the shrewdness and honesty of the people as to believe that the difficulty is not to elect a good nominee, but to secure a good nominee.

Theoretically, every citizen has a voice in determining who shall be the candidate of the political party with which he sympathizes. As an actual fact he does not raise his voice. As a practical fact he cannot raise it effectually. The caucus controls the nominations, and men who make politics a business control the caucus. And these men distribute nominations as the rewards for political services and party fidelity. At the best, this principle of distribution is not calculated to secure good judges, but good politicians. At the worst—and that is what you are likely to get—the only standard that the caucus and its managers set up is, how bad a candidate will the people endure?

In offices involving action on political questions only, the methods of the caucus may secure fair results. If you are a Republican, you know your candidate will stand by the Republican party, right or wrong; or if you are a Democrat, you have a candidate who will act with the Democratic party, right or wrong. But that is just the kind of man you do not wish for a judge. It is proper that a judge should have patriotism enough to hold pronounced opinions on political subjects, but it is a misfortune if he feels under obligation to a political party, and a still greater misfortune that he should owe his office to certain individuals, or to a cer-

tain clique of individuals in his party, who control the party caucuses. As a basis for practical action, it may be said that these conditions exist in this State:

1. That the judges must be elected by the popular vote.

2. That they must be nominated by some organized body.

3. That the present party organizations are unfit to make such nominations.

There remains only one method if the above conditions exist, and that is, to secure nominations from some other than the political bodies. That can be done either by the formation of a new organization for the especial purpose of nominating judges or by utilizing some organization, already in existence, which has the qualities necessary to make it reasonably certain that it will make good nominations.

In my opinion, no satisfactory results can be obtained from the formation of a new organization having for its special and only object the nomination of judges. Experience shows that in a very short time such associations come under the control of political partisans or place-seekers who have not ability enough to secure influence in the regular political organizations. Honest men having only a general patriotic interest in the objects of the association give, after a time, no active attention to its affairs—for a virtue that does not bring in dollars is unfortunately short-lived—and they leave its permanent management to those who have a bread-and-butter interest in it. In a temporary gush of enthusiasm for good government, they lend such associations the use of their names and influence, and then grow tired and leave it, strengthened by their connection with it, to those who use it for selfish ends. There is no hope of permanent good results from such organizations. But good, and uniformly good, nominations might be expected from an association entirely non-partisan in its constitution, composed of men of reputable character, having a special and peculiar interest in the selection of good judges, and yet not dependent for its existence on periodical spasms of interest in politics, but existing because it has a permanent and continuous reason for existing outside of politics—a reason which makes its members at all times anxious to preserve a high standard of membership, and to prevent its coming under the control of those who would use it for selfish purposes.

The Bar Associations which have been formed throughout the State are just such bodies, and combine every requisite I have mentioned. The question is, will they do any thing? These associations ask the respect of the community, and claim influence in it, as representing the respectability of the bar. They properly assume to be censors of bench and bar, because one great object of their institution is to elevate the standard at bench and bar.

I do not know how it has been in other parts of the State, but the Bar Association of the city of New York has repeatedly ventured to tell the people of New York city whom it considered the worst of the candidates for judicial position nominated by the political parties. But even that association has contented itself with this veto power. Having a direct and peculiar interest in the selection of good judges, it has been satisfied with being a negative quality in their selection. But the little it has done has been enough to show that it acknowledges its duty to interfere. But if these associations admit that their position imposes upon them the duty of taking any part in the selection of judges, they must go further and acknowledge their duty to do the utmost to secure good judges. If they have the right to interfere at all, they have a duty to interfere in the most efficacious manner. If they find it within their province to recommend one of two evils, it is certainly within their

province to offer an escape from both by making nominations themselves, and at least giving the people an opportunity to elect good judges.

HORACE W. FOWLER.

WHEN OBLIGOR ON BOND ESTOPPED FROM DENYING ITS VALIDITY.

SUPREME COURT OF THE UNITED STATES, DEC. 13, 1880.

DANIELS ET AL., Plaintiffs in Error, v. TEARNEY ET AL.

In an action upon a bond executed under a State statute, defendant claimed that he was not liable, upon the ground that the statute was repugnant to the Federal Constitution. *Held*, that an appeal would lie to the United States Supreme Court from a judgment of the State courts in favor of plaintiff.

A statute passed by the convention of Virginia in furtherance of secession provided that no execution should be issued and no sale made under a decree of court without consent of the parties, and that where an execution was issued the debtor might be relieved from its enforcement by giving a bond for the debt payable when the operation of the ordinance should cease. *Held*, in an action to enforce such a bond, that the obligors were estopped from setting up that it was void as being under a statute repugnant to the Constitution of the United States.

IN error to the Circuit Court of Jefferson county, State of West Virginia. The opinion states the case.

SWAYNE, J. This is a writ of error brought to reverse a judgment of the Supreme Court of Appeals of the State of West Virginia.

The case, as disclosed in the record, may be sufficiently stated for the purposes of this opinion, as follows: On the 18th of April, 1861, a convention of the State of Virginia passed an ordinance of secession; and on the thirtieth of that month a law, entitled "An ordinance to provide against the sacrifice of property and to suspend proceedings in certain cases." This ordinance declared that thereafter no execution (except in favor of the Commonwealth and against non-residents) should be issued, and that no sales should be made under deeds of trust or decrees without the consent of the parties interested, until otherwise provided by law; and that where executions were in the hands of the officer, whether levied or not, if the debtors should offer bond and security for the payment of the debt, interest, and costs, when the operation of the ordinance should cease, the property should be restored, and the bond should be returned as in the case of a forthcoming bond and should be a lien on the realty of the obligors. If the debtor offered no bond his property was to be appraised by three freeholders, at its value, on the 6th of November, 1860, and unless the property would sell for the amount of the valuation, it should be restored to the debtor without lien.

The declaration sets forth that the defendants, on the 1st day of June, 1861, made their joint and several bond, whereby they bound themselves to pay to the plaintiff the sum of \$1,597.18 when thereunto requested, and that there was a condition affixed to the bond which was, "that whereas, on the 25th day of March, 1861, a writ of *fiert facias* was issued from the clerk's office in the name of Colin C. Porter against Benjamin F. Daniels for \$747.92, with interest from the 2d day of January, 1860, until paid, and \$31.97 costs; if therefore the said B. F. Daniels should pay the debt, interest and costs, when the operation of the ordinance before mentioned should cease, then the obligation to be void, otherwise to be in full force." It was averred that the operation of the ordinance had long since ceased, and yet that the defendants, though often requested so to do, had not paid the said sums of money or any part thereof, whereby an action had accrued, etc.

Among other pleas, the defendants filed one *in hæc verba*:

"For further plea to this action the defendants say that the bond in the declaration mentioned was executed by Benjamin F. Daniels, a citizen of the State of Illinois, as principal, and by William B. Daniels and D. M. Daniels, as his securities, in pursuance of the requirements and conditions of a statute passed in violation of the Constitution of the United States heretofore, to wit, on the 30th of April, 1861, by the convention of the State of Virginia, and that said statute was subsidiary to and in aid of and in furtherance of the objects and policy of the ordinance of secession passed theretofore by said convention, to wit, on the — day of April, 1861, in violation of the Constitution of the United States.

"And the defendants say that they rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States for their defense and plea in this case; and that they are unconstitutional the defendants are ready to verify."

The plaintiff demurred. The court sustained the demurrer and the defendants excepted. The parties thereupon waived a jury and submitted the case to the court, and a judgment was entered in favor of the plaintiff.

The defendants removed the case to the Supreme Court of Appeals for review. That court affirmed the judgment of the lower court, and this writ of error was thereupon sued out.

The objection raised as to the jurisdiction of this court is untenable.

In *Home Insurance Co. v. City Council*, 93 U. S. 121, we said: "Where a judgment or decree is brought to this court by a writ of error to a State court for review, the case, to warrant the exercise of jurisdiction on our part, must come within one of three categories—

"1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain.

"2. Or there must have been drawn in question a statute of, or authority exercised under a State, upon the ground of repugnance to the Constitution, or a law or treaty of the United States; and the decision must have been in favor of the validity of the State law or authority in question.

"3. Or a right must have been claimed under the Constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed. *R. S. 132, § 709; Scutler v. Haskell*, 14 Wall. 15; *Weston v. City Council of Charleston*, 2 Pet. 449; *McGwey v. The Commonwealth*, 3 Wall. 385."

The plea is neither full nor technical, but it does aver the invalidity of the statute under which the bond was taken, because it was in violation of the Constitution of the United States, and was passed "in aid and furtherance of the objects and policy of the ordinance of secession," and that the defendants "rely on the fact that said statute and ordinance were in violation of and repugnant to the Constitution of the United States, for their defense and plea in this case." This implies clearly that the defendants claimed, in addition to what was averred, that the bond was void in every aspect, and that they had a right, by reason of the premises, to exemption from liability under it. What is thus averred in a pleading is as effectual as if it were expressed. *Haight v. Holly*, 10 Wend. 218.

It thus appears that there was drawn in question the authority of the sheriff, exercised under a law of the State, in taking the bond, and that the decision was in favor of the validity of that authority; and that there

was also a right of exemption from liability, claimed under the Constitution of the United States, and that the decision was against the right so claimed. These claims give us jurisdiction. Whether they are well founded remains to be considered. Jurisdiction is only "the right to hear and determine." The result of its exercise is the judgment of the court.

That the ordinance of secession was void is a proposition we need not discuss. The affirmative has been settled by the arbitrament of arms and the repeated adjudications of this court. *Texas v. White*, 7 Wall. 709; *Lickman v. Jones*, 9 id. 197; *Dewing v. Perdicaris*, 96 U. S. 193. It was supplemented and complemented by the statute authorizing the bond to be taken. The latter was one of a series of acts passed by the secession convention, all looking to the conflict of arms which was foreseen to be approaching. They were intended to prepare the State for the struggle and were means to that end. The saving in the statute as to executions in favor of the Commonwealth and against non-residents was characteristic. It obviously contemplated the confiscation of the property of the latter as a war measure. We cannot doubt that the statute was invalid by reason of the treasonable motive and purpose by which its authors were animated in passing it. The provision that no executions should issue, and that no sales should be made under decrees or deeds of trust without the consent of the parties interested, "until otherwise provided by law," was clearly in conflict with the contract clause of the National Constitution. *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 208; *Edwards v. Kearsey*, 96 U. S. 93.

The circumstances which surrounded the convention and controlled its action are a part of the history of the times, and we are bound to take judicial notice of them. *Brown v. Piper*, 91 U. S. 37.

We have already pointed out the infirmities of the statute. One of them is expressly embodied in the bond. The condition is that the obligors shall pay when the statute under which it was taken "ceases." That is, that payment was to be made at the time of its cessation and not before. In the meantime the statute was to operate as a stay-law, and the condition of the bond was framed accordingly. This, as we have shown, was directly repugnant to the constitutional provision which forbids the impairment of contracts by State laws. The bond, as a statutory instrument, cannot have more validity than the statute which prescribed it as the means of giving effect to the statute in the way it was intended to operate. To hold the bond valid as a statutory bond, and the statute void would be an inversion of reason. Viewed in this light it is void for exactly the same reasons that the statute is void. They rest on the same basis and must stand or fall together. The creditor was not to be consulted. His assent was not required. So far as he was concerned the sheriff could proceed *in invitum*. The option to give the bond or not was with the debtor. The presence or absence of the creditor, and his assent or dissent were alike material. He was powerless in any event to control the result.

The cases are numerous in which it has been held that where a bond contains conditions, some of which are legal and some illegal, and they are severable and separable, the former may be enforced and the latter disregarded. *United States v. Hodson*, 10 Wall. 408. But this bond does not belong to that class. The condition is a unit and indivisible. There are no separate elements into which it can be resolved. It must be considered as an entirety, and can be viewed in no other light. As a statutory bond, therefore, the instrument is clearly void. Whether it is void also as a voluntary bond is a point upon which the opinions of all the members of the court are not entirely in accord. We pass from the subject without further remark, because, irrespective of that question, there is a

view decisive of the case in regard to which we are unanimous and our minds are free from doubt.

Conceding the bond to have been wholly void in both aspects, it does not by any means follow that it could not thereafter, under any circumstances, be enforced as between the parties, or that there is such error in the judgment that it must necessarily be reversed.

A corporation is liable for negligent and malicious torts, including libel, assault and battery, malicious prosecution and false imprisonment. In such cases the plea of *ultra vires* is unavailing: The corporation is estopped from setting up such a defense. *National Bank v. Graham*, 100 U. S. 702.

The same result is produced in like manner in many instances where a corporation having enjoyed the fruits of a contract fairly made, denies, when called to account, the existence of the corporate power to make it. *Railway Co. v. McCarthy*, 96 U. S. 98.

The principle of estoppel thus applied has its foundation in a wise and salutary policy. It is a means of repose. It promotes fair dealing. It cannot be made an instrument of wrong oppression, and it often gives triumph to right and justice where nothing else known to our jurisprudence can, by its operation, secure those ends. Like the statute of limitations, it is a conservator, and without it society could not well go on.

If parties are *in pari delicto*, the law will help neither, but leaves them as it finds them. But if two persons are *in delicto*, but one less so than the other, the former may, in many cases, maintain an action for his benefit against the latter. *White v. Franklin Bank*, 21 Pick. 181.

It is not necessary here to consider the extent and limitations of the rule. They are fully examined in the authority referred to. In the case in hand the obligee must be deemed wholly innocent, because the contrary is not alleged and it does not appear. *Quod non apparet, non est. De non apparentibus et non estentibus, eadem est ratio.* "If the contract be executed, however, that is, if the wrong be already done, the illegality of the consideration does not confer on the party guilty of the wrong the right to renounce the contract, for the general rule is, that no man can take advantage of his own wrong, and the innocent party, therefore, is alone entitled to such a privilege." 1 Story on Cont., § 610; *Taylor v. Weld* 5 Mass. 118.

It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. *Ferguson v. Landrum*, 6 Bush, 280; see *Same v. Same*, 1 id. 548; *Vanhook v. Whitlock*, 26 Wend. 43; *Lee v. Tillotson*, 24 id. 337; *People v. Murray*, 5 Hill, 468; *Burlington v. Gilbert*, 31 Iowa, 356; *Railway Co. v. Stewart*, 39 id. 548.

In the case first cited, an injunction was applied for to prevent the collection of a tax authorized by an act of the Legislature passed during the late civil war, to enable the people of a county to raise volunteers and thus avoid a draft for soldiers, and that object had been accomplished. In disposing of the case the court well asked: "Upon what principle of exalted equity shall a man be permitted to receive a valuable consideration through a statute, procured by his own consent or subsequently sanctioned by him, or from which he derived an interest and consideration, and then keep the consideration and repudiate the statute?"

In *United States v. Hodson*, *supra*, this court said: "When a bond is voluntarily entered into and the principal enjoys the benefits it was intended to secure,

and a breach occurs, it is then too late to raise the question of its validity. The parties are estopped from availing themselves of such a defense."

Not to apply the principle of estoppel to the bond in this case would, it seems to us, involve a mockery in judicial administration and a violation of the plainest principles of reason and justice. The judgment of the Circuit Court of Jefferson county, West Virginia, affirmed by the Supreme Court of Appeals of that State, is reaffirmed by this court.

MAIL AGENT ON RAILROAD TRAIN NOT A PASSENGER.

PENNSYLVANIA SUPREME COURT, JANUARY 3, 1881.

PENNSYLVANIA RAILROAD Co., Plaintiff in Error, v. PRICE.

A statute in Pennsylvania declares that when any person shall be injured or killed while lawfully engaged or employed in or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which company any such person is not an employee, the right of recovery against the company shall be only such as would exist if such person were an employee. Provided that this section shall apply to passengers. Held, reversing decision of court below, 22 Alb. L. J. 391, that the provision of the statute embraces a United States mail agent travelling in charge of the mails on a railroad train, that he is not a passenger within the meaning of the exception, and the railroad company would not be liable for his death when caused by the negligence of an employee of the company.

ACTION to recover for the death of the husband and father of plaintiffs below, who was killed while travelling as mail route agent upon the railroad of defendants below, in a collision caused by the negligence of defendant's servants. Sufficient facts appear in the opinion. A judgment in favor of the plaintiffs was rendered in the court below, and defendant took a writ of error. For the opinion delivered in the court below, see 22 Alb. L. J. 391.

PAXSON, J. The special verdict finds all the facts necessary to an intelligent consideration of this case. The deceased, A. J. Price, was at the time of the accident resulting in his death a route agent of the United States post-office department duly appointed and commissioned. His route was on the Western Pennsylvania railroad, between Allegheny City and Blairsville. His duties were those incident to the position of mail agents. While engaged in the performance of those duties, on the 23d day of July, 1877, he was killed by a collision on the road. The collision was found to be the result of the employees of the defendant company. The single question to be decided is whether the deceased was a passenger within the meaning of the act of 4th April, 1868, and L. 68.

The first section of said act is as follows: "That when any person shall sustain personal injury or loss of life while lawfully engaged or employed in or about the roads, works, depots and premises of a railroad company or in or about any train or car therein or thereon, of which company any such person is not an employee, the right of action or recovery in all such cases against the company shall be only such as would exist if such person were an employee. Provided, that this section shall not apply to passengers."

It was conceded by the learned judge who ruled the case below, and admitted upon the argument here that the deceased came within the precise terms of the act of 1868. Indeed this is apparent from the facts found by the special verdict. But it is claimed that he comes also within the exception, and was a passenger within the meaning of the act. This position, if not unsound, is certainly paradoxical. To be within the

letter of the act of assembly and at the same time within its exception is a proposition that would hardly be pressed were not the defendant a railroad corporation.

The act of 1868 has been before this court upon several occasions. Its constitutionality was affirmed in *Kirby v. Railroad Co.*, 23 P. F. S. 506. Other questions arising under it were considered in *Mulhorn v. Railroad Co.*, 8 Norris, 198. The point now raised is new and was not considered in either of the cases recited. It involves a construction of the proviso of the act excepting passengers from its operation. Just here it is important to consider the mischief it was intended to remedy. Prior to its passage it had been held in numerous cases in this State that an employee could not recover against the company in whose service he was for personal injuries resulting from the negligence of a fellow servant. This was settled law. But the non-liability for damages on the part of the company ceased there. In the *Catawissa Railroad Co. v. Armstrong*, 13 Wright, 186, it was held, "that where the deceased was in the sole employ of one railroad company, who had the right to run their trains over the other's road, the plaintiff is not precluded from recovering on the ground that her husband was in the same general employment with the defendant's servants. The rule that where several persons are in the same general employment and one is injured from the carelessness of another, the employer is not responsible, is not to be extended beyond the limit of the adjudged cases. At the time this was rendered the law seemed to contemplate but two classes of persons on railroad trains, viz.: First, passengers who paid their fare or who travelled by virtue of a contract relation with the company, and second, employees who were in the service of the company. The act of 1868 was manifestly intended to create a third class who were neither employees nor passengers, namely "persons who are lawfully engaged or employed in or about any train or car therein of which such person is not an employee." This class, prior to the act of 1868 were entitled under the decision in *Catawissa Railroad Co. v. Armstrong*, *supra*, to recover against the company for injuries resulting from the negligence of an employee. But if the employee, if injured by the negligence of those whom I have designated as the third class, had no remedy against the company, he could only recover against the person whose negligence caused the injury and as such persons were generally irresponsible, pecuniarily, the employee had practically no remedy, yet he was in daily peril of injury from the negligence of persons of the third class. The Legislature doubtless saw that it was unjust to give the non-employees such an advantage and also that the company should be held liable in damages to such persons, who, although lawfully upon the road, were not under its control. The act of 1868 places persons in the third class upon the same plane as the employees of the company. There is strict justice in this. No good reason can be shown why the non-employees should have higher rights than employees; their compensation is usually equal, if not greater; they enter upon the same dangerous employment with full knowledge of its perils and of their legal rights in case of injury.

The rule which prevents a recovery by an employee for the negligence of a fellow-servant is based upon the soundest principles of public policy. Railroad accidents are usually the result of carelessness of employees. However perfect the system by which trains are moved, the carelessness of a single man may produce disaster. So long as employees understand that they take their lives in their hands in entering upon their duties and that their own safety as well as the welfare of their families depends upon their care and vigilance, the travelling public will have reasonable assurance of safety. The rule that no recovery can be

had for the negligence of a fellow-servant necessarily tends to increased vigilance on the part of employees and to that extent contributes to the public safety. Properly administered it is wise and just.

Was the deceased a passenger within the meaning of the act of 1868? Looking at the mischief which the act is intended to remedy the answer to this question is not difficult. The deceased was "lawfully employed upon the road." He was therefore within the precise language of the act and must be held to have had the rights only of an employee, unless he comes within the exception. The word "passenger" in the proviso must be understood in its ordinary and popular signification. Had the question been asked of any person intelligent or otherwise upon the train when the accident occurred whether A. J. Price, the deceased, was a passenger upon said train, the answer would have been in the negative; that he was employed upon the train as mail agent. Why then should we give to the proviso a forced construction not warranted by its language and repugnant to our common sense? It was urged that the deceased was a passenger because under the act of Congress (see § 4000) "every railway company carrying the mail shall carry on any train which shall run over its road, and without extra charge therefor all mailable matter directed to be carried thereon with the person in charge of the same." This act makes it the duty of the company to carry the mail agent without extra charge. But it no more makes him a passenger than it does the mail matter of which he has the care. The company have no control of him as they have over passengers, for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner. The mail car, like the baggage car, is a known place of danger. From its position it is exposed to destruction in cases of collision. The effect of the act of Congress is to make his position in the car a lawful one. Being lawfully upon the train, a recovery might possibly have been had for his death upon the duty to carry safely. *Cohell v. Railroad Co.*, 16 Q. B. 992, and *Molton v. Western Railroad Co.*, 15 N. Y. 444, go to this extent. But here the act of 1868 comes in and declares that persons employed upon the road shall have only the rights of employees of the company. *Pennsylvania Railroad Co. v. Henderson*, 1 P. F. S. 315, was decided prior to the passage of the act of 1868, and it is urged that the Legislature had this case in view, when they inserted the proviso in question. Conceding this to be so, it proves nothing. There the plaintiff was a drover transporting his livestock upon the cars of the company. He had paid the freight on his stock and at the same time received a pass for himself. He was travelling with his stock and was as much a passenger as if he had been travelling with his trunk. He had a contract relation with the company. He was under the control of the conductor and was bound to conform to the reasonable rules of the company, the same as other passengers. I see little analogy between such a case and that of a mail agent who has no contract relation with the company and who is not in any sense under its control. It may very well be that *Railroad Co. v. Henderson* belongs to a class of cases intended to be covered by the proviso to the act of 1868. Other cases might be suggested to which it may possibly apply. They will probably come up in due time and we will not anticipate them. It is sufficient to say that the Legislature doubtless considered that there were or might be such cases and therefore added the proviso to save them from the operation of the act. But it would be attributing a want of intelligence to the law-making power to hold that it meant to designate as passengers men who were employed by the year upon the road, as the mail agents of the government. The act of 1868 is very broad in its terms. It

was said by our brother Gordon, in *Richard v. North Penn. R. R. Co.*, supra, "the comprehensive words, 'engaged or employed,' are used to embrace every imaginable manner by which one may or might be brought in, upon or about the roadway, cars or works of a railroad company." Following this sound interpretation of the act, we must regard it as intended to relieve railroad companies from liability for injuries to the class of persons enumerated therein. Yet the construction now claimed for it discriminates in favor of certain persons of this class to the exclusion of all others. That is to say, those persons who by the accident of their position happen to be employed on the trains, may recover for injuries while others equally deserving, who do not ride with the trains, but are "employed or engaged in or about the roads, works, depots and premises of the company," have no such right. To illustrate, suppose the deceased, instead of being employed as mail agent, had been employed by the government to carry the mail from the depot to the post-office, and while so engaged about the depot, had been killed by the negligence of the defendant's servants. In such case he would have been clearly within the act and not within its exception. Can the mere fact that he was upon the train instead of being about the depot make any difference? We are of opinion that the act contemplates no such distinction. The learned judge of the court below places considerable stress upon Webster's definition of the word "passenger" as "one who travels in some conveyance, as a stage-coach or steamboat." The citation from Webster is not strictly accurate. His definition is "a passer or passer-by—one who is making a passage—a traveller especially by some established conveyance—a person conveyed on a journey." Worcester defines the same word as follows: "One who passes or is on his way—a traveller—a wayfarer." It will be seen that the leading idea of these definitions is that a passenger is one who travels from place to place. Mere locomotion is not travel, in the popular use of the term. There are conductors on short lines of railroad in this State who have passed over more miles in the course of their employment than any traveller of ancient or modern times. Yet we would hardly call them travelled men. The same sense given to particular words by our great lexicographers is always entitled to weight, yet where a word is used in an act of Assembly, regard must be had to the circumstances surrounding its use. A more correct definition of the word in its legal sense would be, one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor. A mere trespasser; a person who steals a ride upon a train or who is employed thereon is not a passenger, within the meaning of the act of 1893, nor entitled to protection as such.

We are of opinion that the case comes within the act of 1893, and that the plaintiff is not entitled to recover. The judgment is reversed and judgment is now entered for the defendant *non obstante veredicto*.

LIABILITY FOR DEFICIENCY OF STOCK-HOLDERS OF INSOLVENT NATIONAL BANKS.

SUPREME COURT OF THE UNITED STATES—DECEMBER 30, 1893.

UNITED STATES EX REL. CITIZENS' NATIONAL BANK OF LOUISIANA, Plaintiff in Error, v. KNOX.

Under the National Bank Law (O. S. R. S., § 5151), in case of insolvency of a bank and a deficit, each stockholder may be assessed such sum (not exceeding an amount equal to the par value of his stock) as will bear the same proportion to the whole amount of the deficit as his

stock bears to the whole amount of the capital stock of the bank, at its par value. The inability of some of the stockholders to contribute to the assessment will not increase the amount of his liability.

IN error to the Supreme Court of the District of Columbia. The opinion states the case.

SWAYNE, J. This case is a petition to the Supreme Court of the District of Columbia for a writ of mandamus directed to the comptroller of the currency. It was fully heard in that court upon the merits. The writ was refused and judgment was rendered against the relator for costs. This writ of error was thereupon sued out, and the case is thus brought before us for review. There is no controversy as to the facts. The only question presented for our consideration is a question of law. The case made in the record, so far as it is necessary to be stated for the purposes of this opinion, is as follows:

On the 7th of April, 1874, the Crescent City National Bank of New Orleans was, and for some time had been, insolvent and in the hands of a receiver. On that day the comptroller assessed each shareholder seventy per cent upon the par value of each share of his stock, and ordered the receiver to collect the assessment. This the receiver proceeded to do by filing a bill in equity in the Circuit Court of the United States for the district of Louisiana, against all the shareholders. Thereafter he obtained a decree against all the defendants severally, who were within the jurisdiction of the court, for the amount due from each one according to the assessment, and the cause was thereupon continued to await any further assessment the comptroller might deem it proper to make, and it is still pending.

The capital stock of the bank was \$500,000; seventy per cent, therefore, was \$350,000. This sum, if it could have been collected in full, would have paid all the debts of the bank and left a balance over. But by reason of the insolvency of many of the shareholders, the assessment netted only \$112,658.13, and nothing or very little more will hereafter be realized from it. From the proceeds of the assessment and other assets of the bank, eighty per cent of the principal of its debts have been paid.

The relator being a large creditor of the bank, requested the comptroller to order a further assessment of thirty per cent upon each share of the capital stock, for the discharge of the balance of principal and interest still due to its creditors, and to direct the receiver to proceed as before to collect the amount of the new assessment. The comptroller refused, because the enforcement of such an assessment would compel the solvent shareholders to pay the sums and proportions due from the shareholders who are insolvent. He holds that no such liability is imposed on the solvent shareholders, and that he has therefore no right or power to make the assessment as requested. The point to be decided is whether he is clothed with this power and duty, and whether the shareholders are thus liable.

The first bank law was passed February 25, 1863, chapter 58, 12 Stat. 608. The last clause of section 12 is as follows: "For all debts contracted by such association for circulation, deposits, or otherwise, each shareholder shall be liable to the amount of the par value of the shares held by him, in addition to the amount invested in such shares."

This provision was changed in 1864, and has been since, and is now in force in these terms: "The shareholders of every National banking association shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." R. S. U. S., § 5151.

The act of 1893 made no provision for enforcing the

personal liability of shareholders, while that of 1864 provided that it might be done through a receiver appointed by the comptroller and acting under his direction. Id., § 5234.

The difference between the clause creating the individual liability as it was originally, and as it was after it was amended and altered, is obvious and striking. The change was plainly made *ex industria*, to prevent the possibility of doubt as to the meaning of Congress. What the effect of the clause would have been without the change is a point we are not called upon to consider. The charter of a private corporation is a contract between the law-making power and the corporations, and the rights and obligations of the latter are to be measured accordingly.

By the common law the individual property of the stockholders was not liable for the debts of the corporation under any circumstances. Here the liability exists by virtue of the statute and the assent of the corporations to its provisions, given by the contract which they entered into with Congress in accepting the charter. With respect to the character of that liability, it is entirely clear from the language employed in creating it, that it is several and cannot be made joint, and that the shareholders were not intended to be put in the relation of guarantors or sureties, "one for another," as to the amount which each might be required to pay.

In the process to be pursued to fix the amount of the separate liability of each of the shareholders, it is necessary to ascertain (1) the whole amount of the par value of all the stock held by *all the shareholders*; (2) the amount of the deficit to be paid after exhausting all the assets of the bank; (3) then to apply the rule that each shareholder shall contribute such sum as will bear the same proportion to the whole amount of the deficit as his stock bears to the whole amount of the capital stock of the bank at its par value. There is a limitation of this liability. It cannot in the aggregate exceed the entire amount of the par value of all the stock.

The insolvency of one stockholder, or his being beyond the jurisdiction of the court, does not in anywise affect the liability of another; and if the bank itself, in such case, holds any of its stock, it is regarded in all respects as if such stock were in the hands of a natural person, and the extent of the several liability of the other stockholders is computed accordingly. *Crease v. Babcock*, 10 Metc. (Mass.) 525.

These rules have been applied in several well-considered judgments of other courts, where the words we have italicised were not in the statutes upon which they proceeded. We have found no case in conflict with them. See *Crease v. Babcock*, *supra*; *Atwood v. R. I. Agricultural Bank*, 1 R. I. 376; *In the Matter of the Hollister Bank*, 27 N. Y. 393; *Adkins v. Thornton*, 19 Ga. 325; *Robinson v. Lane*, 19 id. 337; *Wiswell v. Starr*, 48 Me. 401. See, also, *Morse on Banking*, 503.

Although assessments made by the comptroller, under the circumstances of the first assessment in this case, and all other assessments, successive or otherwise, not exceeding the par value of all the stock of the bank, are conclusive upon the stockholders, yet if he were to attempt to enforce one made, clearly and palpably, contrary to the views we have expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction.

Nothing in this opinion is intended in anywise to affect the authority of *Kennedy v. Gibson*, 8 Wall. 498, and *Casey v. Galli*, 94 U. S. 673. On the contrary, we approve and reaffirm the rule laid down in those cases.

The comptroller decided correctly as to his duty in this case.

The judgment of the Supreme Court of the District of Columbia is therefore affirmed.

NEGLIGENCE—BY RAILWAY COMPANY IN NOT MAINTAINING WATCHMAN AT LEVEL CROSSING.

ENGLISH HIGH COURT OF JUSTICE, EXCHEQUER
DIVISION, JUNE 12, 1880.

CLARKE V. MIDLAND RAILWAY COMPANY.

The defendants' railway crossed a level crossing which was some twenty yards distant from a foot-bridge. Both the crossing and the bridge were private crossings intended for the use of persons employed in a neighboring manufactory. About thirty yards from the crossing was a box where a railway man was commonly stationed, who was sometimes shouted to by persons wishing to pass the level crossing with carts, and answered "All right." The plaintiff, a boy of eleven years of age, who was employed at the manufactory, having occasion to go over the line, was waiting at the level crossing until one train had passed, but was knocked down and severely injured when in the act of crossing by another train, which he had not observed, and which was passing in the opposite direction immediately afterward. At the trial there was evidence that the bridge was dirty and not lighted at the time of the accident; that the train did not whistle; that the plaintiff knew the bridge, having crossed it several times; and that the man at the box used to bring out a stick to stop him from going over the bridge, but that when the accident happened he was not present. There was no evidence to show what the man's special duties were, or whether he had any duties in respect to foot-passengers.

Upon this evidence the judge was asked to nonsuit the plaintiff, but *held*, on further consideration, that there was evidence of negligence to go to the jury, and that the conduct of the railway man was a distinct breach of duty which amounted to negligence and contributed to the accident.

THIS case, which was tried before Stephen, J., and a jury, was reserved for further consideration upon the question as to whether or not the plaintiff ought to have been nonsuited at the trial on the ground that there was no evidence to go to the jury of negligence on the part of the defendants, and was argued on the 10th May by Harris and Stanger, for the plaintiff, and by Mellor, Q. C., and Carter, on behalf of the defendants. The facts of the case fully appear in the written judgment which was now (June 12) delivered by

STEPHEN, J. This was an action for personal injury caused to the plaintiff by the alleged negligence of the defendants. The plaintiff was a little boy in the employ of Mr. Cox, a manufacturer near Nottingham. The Midland Railway ran in the neighborhood of Mr. Cox's manufactory, and upon it were a level crossing and a foot-bridge at a distance of twenty-nine yards from each other, both being private crossings intended for the use of the persons employed in Mr. Cox's manufactory. At the time of the accident the bridge was in a dirty state, and was not lighted. There was a box thirty yards from the gate, but it did not appear how far it was from the bridge. A man was commonly stationed there, who, when a cart had to pass at the level crossing, was sometimes shouted to by the carters, and replied "All right." There was no evidence to show what his special duties were, or whether he had any duties with respect to foot-passengers, but there was evidence that at the time of the accident he was not there. The plaintiff was sent by a carter, also in Mr. Cox's service, and who had first crossed the line, to look for some sacks which had dropped from the cart on the other side of the line. He crossed at the level crossing and was returning by it. As he came back he saw a train coming, and waited until it had passed. He then went on to the line and was knocked

down and severely injured by another train which he had not observed, and which was coming from the other direction. There was some evidence that the train did not whistle. The boy said: "I know the bridge; I had been across the bridge several times. A railway man in the box sent us back. I don't know his name; he used to bring a stick out." In cross-examination he said: "It was to stop us from going over the bridge, not to stop us from playing on the line, that he brought the stick out." No witnesses were called on behalf of the railway company. Upon this evidence I was asked to nonsuit the plaintiff, and I reserved for further consideration the question whether I ought to do so, but at the request of the plaintiff's counsel, I asked the jury the following questions, and received from them the following answers: 1. Was there negligence on the part of the railway in not whistling and not lighting the lamps on the bridge, and by the man's neglecting duty specially imposed on him? Answer—Yes. 2. Was there contributory negligence on the part of the boy in going on the line rashly? Answer—No. 3. Could the railway company have avoided the accident which happened by the exercise of ordinary care and diligence? Answer—Yes. 4. What are the damages? Answer—300*l*. The question is whether I was warranted in leaving these questions to the jury by the evidence in the case, or whether I ought to have decided myself that there were no facts in the case from which they could properly infer negligence. This I think is the effect of *Bridges v. The North London Railway Company*, L. Rep., 7 H. L. 213; 30 L. T. Rep. (N. S.) 844. Many cases were referred to in the course of the argument before me. Nearly all that bear upon the subject are cited in *The Dublin, Wicklow and Wexford Railway Company v. Slattery*, 3 App. Cas. 1155; 39 L. T. Rep. (N. S.) 365. I do not think it necessary to say more on the subject than that the cases of *Stubley v. London and North-western Railway Company*, L. Rep., 1 Ex. 13; 13 L. T. Rep. (N. S.) 376; *Walker v. Midland Railway Company*, 14 L. T. Rep. (N. S.) 796; *Cliff v. Midland Railway Company*, L. Rep., 5 Q. B. 258; 22 L. T. Rep. (N. S.) 382, and *Ellis v. Great Western Railway Company*, L. Rep., 9 C. P. 551; 30 L. T. Rep. (N. S.) 874, seem to me to establish that mere absence of warning at a level crossing, whether in the shape of the presence of a watchman or in the shape of whistling, are not in themselves either negligence or evidence of negligence, unless there are circumstances of special danger, as in the case of *Bilbee v. London and Brighton Railway Company*, 18 C. B. (N. S.) 554; 13 L. T. Rep. (N. S.) 146, or in the case of *The Dublin, Wicklow and Wexford Railway Company v. Slattery* (*sup.*). If, therefore, the absence of whistling and the absence of the watchman were the only points in the case, I think the plaintiff ought to be nonsuited. I am of the same opinion as to the absence of lights from the bridge. I see no evidence that either that fact or the dirty condition of the bridge in any way contributed to the accident, nor do I see that any means were suggested by which the railway might, by the exercise of ordinary care, have avoided the accident. The only point on which I think the verdict can be supported is the evidence that the man at the box frightened the boys away from the bridge. This would amount to a distinct breach of duty, that is to say, to negligence and something more; and though it is true that I did not put, and was not asked to put, to the jury any specific questions on the subject, I think that as it was uncontradicted, the jury might reasonably infer from it that the man had misconducted himself, and did contribute to the accident by frightening the little boy (who was only eleven years old) into crossing the railway at a dangerous place. There will, therefore, be judgment for the plaintiff for 300*l*. damages, with costs.

Judgment for the plaintiff.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION—BY MORTGAGOR ON CONTRACT BY VENDEE ASSUMING MORTGAGE—IS ACTION AT LAW—WAIVER—OF RIGHT TO JURY TRIAL BY NOT EXCEPTING TO RESERVATION OF DECISION.—(1) A deed, executed by W. to defendants, recited that the parties thereto had become jointly interested in the purchase of certain lands from plaintiff and from others; that for the convenience of the parties the title had been taken in the name of W., to be held for the use and benefit of all the purchasers, in the proportions named; that the grantees had agreed to assume and pay their proportions of the mortgages executed by W. for portions of the purchase-money of the lands, and that it was deemed proper and expedient for W. to convey to the grantees their interest in such lands. The deed conveyed so much of the lands as had not been sold by the purchasers, and the conveyance was subject to a mortgage held by plaintiff, and other mortgages which the grantees in certain proportions assumed and agreed to pay as part of the consideration or purchase-money. *Held*, that this agreement in the deed could be enforced by plaintiff as mortgagee, upon the principles laid down in *Lawrence v. Fox*, 20 N. Y. 268; *Burr v. Beers*, 24 id. 178; *Thorp v. Keokuk Coal Co.*, 48 id. 253; *Campbell v. Smith*, 71 id. 28. (2) *Held*, also, that the right of action of plaintiff upon the agreement in the deed was an action at law. (3) The case was noticed and moved for trial at a Special Term, before a judge without a jury. Before plaintiff opened his case defendants "objected to the jurisdiction of the court and demanded a jury trial." The court did not pass upon the question raised, but reserved its decision. Both parties then proceeded with the trial; both gave evidence and the case was submitted to the trial judge. Neither party asked the judge to decide the question submitted, or objected to finishing the trial before him. *Held*, that there was a waiver of a jury trial. The defendants should have insisted upon a ruling by the judge upon their right to a jury trial, and if he decided against them should have taken an exception. If he declined to rule at all, or decided to reserve his decision, they should have excepted, or as soon as the case was developed by the opening or the evidence they should have insisted upon a ruling and taken their exceptions. *Sharpe v. Freeman*, 45 N. Y. 802. An exception filed by the defendants after the decision of a case, that the judge "did not determine as a conclusion of law that he had no jurisdiction to hear or determine" the action, was not available to defendants to present the question that they should have had a jury trial. Judgment affirmed. *Hand v. Kennedy et al.*, appellants. Opinion by Earl, J. [Decided Dec. 7, 1880.]

CORPORATION—RAILROAD ACT—LIABILITY OF STOCKHOLDER FOR UNPAID STOCK—EVIDENCE.—In an action to enforce the liability of a stockholder under the provisions of the general railroad act (Laws 1850, ch. 140, § 10, as amended, Laws 1854, ch. 282), that "each stockholder of any company, formed under this act, shall be individually liable to the creditors of such company in an amount equal to the amount unpaid on the stock held by him, for all the debts and liabilities of such company, until the whole amount of the capital stock so held by him shall have been paid to the company," a judgment recovered against the company is competent evidence of the plaintiff's status as a creditor of the company and of the amount due him. Section 10 does not impose a penalty, but simply gives the creditor the right to pursue the indebtedness of the stockholder for unpaid stocks, for the satisfaction of his claim. *Mills v. Stewart*, 41 N. Y. 389. If the creditor shows that he is a creditor, by evidence which is binding and competent against the corporation, such evidence should be competent against the stockholder

to establish the creditor's title to succeed to the right of the corporation, and a judgment is the highest evidence against the corporation and should be as effectual to pass its title to the fund as a deed or any other form of transfer. The cases, *Miller v. White*, 50 N. Y. 137, and *McMahon v. Macy*, 51 id. 155, depend upon an entirely different principle. The case at bar depends upon the same principle as *Hastings v. Drew*, 76 N. Y. 9. Judgment affirmed. *Stephens v. Fox*, appellant. Opinion by Rapallo, J. [Decided Jan. 18, 1881.]

CRIMINAL LAW — PLEADING — ABORTION.—The statute relating to abortions (3 R. S. [6th ed.] 932, § 11) provides for the punishment of every person who shall administer to "any pregnant woman" any medicine, or shall use or employ an instrument or other means to produce the miscarriage of such woman. An indictment thereunder charged that the prisoner used and employed an instrument upon the body of a woman named, "she being then a woman with child," with intent to produce a miscarriage, etc. Held, that the indictment was sufficient. In an indictment for a statutory offense, all the facts constituting the offense must be set forth, so as to bring the accused precisely within the provisions of the statute. *People v. Allen*, 5 Den. 79; *People v. Taylor*, 3 id. 83. But the pleader need not employ the identical words; he may, if he choose, use words which are their equivalent in meaning. 1 Bish. (Crim. Prac. 612 [2d ed.]). In this case the words used in the indictment are synonymous with the words of the statute. Judgment affirmed. *Eckhart*, plaintiff in error, v. *People of New York*. Opinion by Rapallo, J. [Decided Jan. 18, 1881.]

FRAUD — FALSE REPRESENTATIONS TO MERCANTILE AGENCY AS TO MEANS, GIVE RIGHT OF ACTION TO CUSTOMER OF AGENCY DECEIVED BY THEM.—(1) In an action for deceit in obtaining the sale and delivery of goods on credit, to a firm of which defendant was a member, by means of false representations made by defendant as to the pecuniary condition of such firm, the representations charged were not made directly by defendant to plaintiffs, but to the agent of a mercantile agency (Dun, Barlow & Co.), who applied to defendant for information as to the pecuniary condition of the firm, and were by the agency communicated to plaintiffs. The court at trial charged that if the defendant, when he was called upon by the agent of Dun, Barlow & Co., made the statements alleged in the complaint as to the capital of the firm, and they were false and so known to be by the defendant, and were made with the intent that they should be communicated to, and believed by persons interested in ascertaining the pecuniary responsibility of the firm, and with intent to procure credit and defraud such persons thereby, and such statements were communicated to the plaintiffs and relied upon by them and the alleged sale was procured, then the plaintiffs were entitled to recover. Held, that this was correct and in accordance with the principle of adjudications in analogous cases in which it has been held that it is not essential that a representation should be addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof. *Cazeaux v. Mali*, 25 Barb. 578; *Newberry v. Garland*, 81 id. 121; *Bruff v. Muhl*, 30 N. Y. 200; *Morgan v. Skiddy*, 62 id. 319; *Commonwealth v. Call*, 21 Pick. 515; *Commonwealth v. Harley*, 7 Met. 462. The principle of these cases is peculiarly applicable to the case of statements made to a mercantile agency. The business of these agencies is so well known that the courts can take judicial notice of it. A person furnishing information to such an agency in relation to his own circumstances, means and pecuniary responsibility, can have no other motive in so doing than to enable the

agency to communicate such information to persons who may be interested in obtaining it for guidance in giving credit. He is therefore liable to any one defrauded by such false information. Judgment affirmed. *Eaton, Cole & Burnham Co. v. Avery*, appellant. Opinion by Rapallo, J. [Decided Nov. 30, 1880.]

MARINE INSURANCE — CONDITIONS AS TO LAYING UP OF BOAT.—An insurance policy upon a canal boat contained this printed warranty: "Also warranted to be securely moored in a safe place, satisfactory to this company," between December 10 and April 1, "and the company to be duly notified of the time and place of laying up." Following this in writing was "Privilege to lighter in New York harbor during the winter." The boat did not lighter during the winter but was laid up at a place about twenty miles from New York from December 25th to May 12th, when she was destroyed by fire caused by the boiling over of pitch which the captain was heating in the cabin. No notice of the laying up was given to the company. Held, that there was a breach of the warranty contained in the policy, and the policy was by reason thereof forfeited. The privilege to lighter did not justify the boat owner in failing to notify the insurance company of the time and place of mooring the boat. The contract required that the boat should be moored and notice given unless plaintiff elected to use it in lightering. Judgment reversed and new trial granted. *Devens v. Mechanics' and Traders' Insurance Co.*, appellant. Opinion by Andrews, J. [Decided Dec. 14, 1880.]

PRACTICE — APPEAL DOES NOT LIE FROM A REVERSAL OF AN ORDER OF ARREST GRANTED AS A MATTER OF FAVOR.—An order of arrest showed on its face that it was granted by the Special Term, not as a matter of right but as a matter of favor, for it was available to the defendant only upon his complying with certain substantial conditions thereby imposed. Held, that as the order was reviewable by the General Term Code § 1347, subd. 1, *Col. Ins. Co. v. Force*, 8 How. Pr. 353, and if that court came to the conclusion that the case was not sufficient to warrant an order of arrest, this court is bound by its conclusion as the relief sought was within the discretionary power of the Supreme Court. Appeal dismissed. *Douglas v. Haberstro*, appellant. Opinion by Danforth, J. [Decided Nov. 18, 1880.]

— APPEAL DOES NOT LIE FROM REFUSAL OF ORDER OF ARREST.—No appeal lies from an order of the General Term affirming an order of the Special Term vacating an order of arrest where upon any view of the facts such decision can be upheld. An order of arrest is a provisional remedy which the court may grant or refuse in a proper case within its discretion. The exercise of such discretion is not the subject of review in this court. *Liddell v. Paton*, 67 N. Y. 393; *Allen v. Meyer*, 73 id. 1; *Whittaker v. Imp. S. M. Co.*, 73 id. 621. The opinion of this court cannot be resorted to to determine the reason on which the order was based, and unless the contrary appears it must be assumed that the order was made in the exercise of the discretion of the court which granted it. *Hewlett v. Wood*, 67 N. Y. 304; *Snebley v. Connor*, 73 id. 218. Appeal dismissed. *Clarke*, appellant, v. *Lourie*. Opinion per Curiam. [Decided Nov. 18, 1880.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ASSESSMENT FOR DRAINING SWAMP LANDS — CONSTRUCTION OF STATE LAW — SOURCE OF TITLE TO LANDS

* Appearing in 4 Federal Reporter.

DOES NOT AFFECT RIGHT TO CROSS—IMPAIRING CONTRACT.—(1) Whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for public uses, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. *Davidson v. New Orleans*, 96 U. S. 97, 105. A statute of California, relating to the reclamation of swamp lands, provided that commissioners should "jointly view and assess, upon each and every acre to be reclaimed or benefited thereby, a tax proportionate to the whole expense, and to the benefit which would result from such works." *Held*, that this provision certainly seemed to require an apportionment of assessments according to benefits. (2) *Held, further*, that the question was one of constitutional law, arising wholly under the State Constitution, and therefore concluded by the decisions of the Supreme Court of the State. *Hawes v. Contra Costa Water Co.*, 5 Sawy. 287; *Walker v. State Harbor Co.*, 17 Wall. 650; *Bailey v. Magwire*, 22 Wall. 230; *South Ottawa v. Perkins*, 94 U. S. 260; *State R. Tax cases*, 92 Id. 575; *Fairfield v. Gallatin Co.*, 100 Id. 47. See as to the construction of the act by the State courts in *Hager v. Sup'rs of Yolo Co.*, 47 Cal. 234-5; *Burnett v. Mayor of Sacramento*, 12 Id. 76; *Emery v. S. F. Gas. Co.*, 28 Id. 345. *Held, further*, that the statute authorizing the assessment in question did not violate the obligation of any contract between the United States and California, or the United States and her patentees or grantees, or between the State of California and purchasers from her, or grantees of the United States, or any contract found in the charter of the plaintiff. *Held, further*, that the authorizing the assessments to be collected in gold coin did not impair the obligation of any contract. *Lane Co. v. Oregon*, 7 Wall. 73. The power of the Legislature of the State of California to authorize the formation of districts for the reclamation of swamp lands within the State at the expense of the lands so reclaimed, is not dependent upon the source or channel through which the title to such lands came. U. S. Cir. Ct., California, Nov. 8, 1890. *Reclamation District No. 105 v. Hager*. Opinion by Sawyer, C. J.

REMOVAL OF CAUSE—CONDITIONS OF—DIFFERENT CONTROVERSIES.—PARTIAL.—The first clause of the second section of the Removal Act of March 3, 1875, relates only to cases in which there is a single, indivisible controversy, and in which all the individuals upon the moving side are necessary parties to such controversy. In such case all of the individuals upon such side must unite in the petition for removal. The second clause contemplates cases in which there are persons whose presence is not necessary to the determination of the main controversy; in which case either one or more of their co-parties may petition for removal, though all be citizens of the same State. Hence, where A, a citizen of New York, sued B, C, D, E, and F, citizens of Michigan, and B filed a petition for removal, alleging that the controversy was wholly between the plaintiff and B, C, D, and E, and that F was not a necessary party to the trial of such controversy, *held*, that the case was properly removed. Removal cases, 100 U. S. 457; *Chicago, etc., R. Co. v. Macomb*, 9 Rep. 569; *Ruckman v. Palisade Land Co.*, 1 Fed. Rep. 337; *In re Fraser's Estate*, 6 Rep. 337; *National Bank v. Dodge*, 26 Int. Rev. Rec. 304; *Smith v. Rines*, 3 Sum. 333; *Beardley v. Torrey*, 4 Wash. 286; *Ward v. Arredondo*, 1 Paine, 412. U. S. Cir. Ct.,

E. D. Michigan, Nov. 2, 1890. *Smith v. McKay*. Opinion by Brown, D. J.

— ASSIGNMENT OF CLAIMS.—A defendant cannot acquire the right to have his cause removed to the Federal courts by the purchase of the interests of his co-defendants. U. S. Cir. Ct., Nebraska, Nov. 11, 1890. *Temple v. Smith*. Opinion by McCrary, C. J.

— WANT OF CONTROVERSY.—In a controversy between a railroad and its stockholders, as to the validity of certain shares of the railroad stock, the cause cannot be removed to the Federal court upon the application of the holder of such stock, where there is no controversy as to its ownership. U. S. Cir. Ct., Illinois, July, 1890. *Shumway v. Chicago & Iowa Railroad Co.* Opinion by Drummond, C. J.

IOWA SUPREME COURT ABSTRACT.

CERTIORARI—VALIDITY OF MUNICIPAL ORDINANCE AS TO SALE OF LIQUORS CANNOT BE TESTED BY.—A city ordinance prohibited the keeping of beer or wine for sale, and provided for a search warrant and for the destruction of the liquors if found. *Held*, that the action of the city in passing the ordinance was legislative rather than judicial, and that its validity could not be examined upon proceedings by certiorari. Many of the cases relied upon as holding that the proceedings of a municipal corporation may be examined upon certiorari, are cases where the regularity of the proceedings is drawn in issue in respect to the establishment of a street. *Stone v. City of Boston*, 2 Mete. 220; *Dwight v. City of Springfield*, 4 Gray, 107; *Swan v. City of Cumberland*, 8 Gil. (Md.) 150. But in *Parks v. City of Boston*, 8 Pick. 218, the court said: "We cannot doubt that the power thus conferred is judicial, for before the mayor and aldermen can proceed to lay out a new street, or to widen an old one, they are required to adjudicate upon the question whether the safety or convenience of the citizens requires such a laying out or alteration." See, also, *Stubenraugh v. Nerfenesch*, 7 N. W. Rep. 1. The passage of ordinances like the one in question, as may readily be seen, is something essentially different. Such ordinances are by-laws. They prescribe a rule of conduct. In their character and purpose, and necessarily for enforcement through the courts and officers of the government, they do not differ in any essential respect from an act of a Legislature. The action, therefore, of a city council in passing such an ordinance, appears to us to be in its nature legislative. It differs materially from an adjudication. The latter assumes an existing rule, and operates upon specific property or persons by an application of the rule. *Ike v. City of Newton*. Opinion by Adams, C. J. [Decided Oct. 20, 1890.]

CHATTEL MORTGAGE—ON STOCK OF MERCHANDISE KEPT FOR SALE, VALID—CERTAINTY REQUIRED IN DESCRIPTION OF DEBT.—(1) A chattel mortgage upon a stock of merchandise in a store, accompanied with an arrangement for sales of such merchandise in the usual course of trade, *held*, valid. *Hughes v. Corry*, 20 Iowa, 399. And this would not be different even if there was no agreement to account for the proceeds of the sales. *Tobert v. Hayden*, 11 Iowa, 435; *Adler v. Clafflin*, 17 Id. 89. (2) The debt secured by the mortgage was described as follows: "Upon condition, however, that if the said Ike Hyman shall pay to the said Joseph Hyman, his heirs, assigns, etc., the said sum of \$3,500, for and on account of advances made and money loaned by the party of the second part to him, the said Ike Hyman, together with interest at the rate of 10 per cent. per annum from the date of each several sum at divers times heretofore advanced by the said party on or before January 1, 1879, then these presents to be void." *Held*, a sufficient description of the indebted-

ness. The cases *Pettibone v. Griswold*, 4 Conn. 158; *North v. Belden*, 13 id. 376; *Hart v. Chalken*, 14 id. 77; *Sanford v. Wheeler*, 13 id. 185; *Jewett v. Preston*, 27 Me. 400; *Follett v. Heath*, 15 Wis. 301; and *Bramhall v. Flood*, 41 Conn. 68, distinguished or criticised. In *Hurd v. Robinson*, 11 Ohio St. 232, a mortgage was held valid as to third persons in which the condition was as follows: "Provided, always, and these presents are upon these conditions that, whereas, the said Robinson is indebted to said bank for moneys loaned and for his liability on divers bills of exchange and promissory notes, now, if said Robinson shall discharge his said several liabilities in six months from this date, then these presents shall become void, otherwise to remain in full force and virtue." In *Michigan Ins. Co. v. Brown*, 11 Mich. 206, a mortgage condition for the payment of all sums now due or hereafter to become due but without specifying any amount, was held valid. The same doctrine was announced in *Machette v. Wauless*, 1 Col. 225. See, also, *Gill v. Pinney's Adm'rs.*, 12 Ohio St. 38, 48; *Webb v. Stone*, 24 N. H. 282. *Clark v. Hyman*. Opinion by Day, J. [Decided Dec. 7, 1890.]

MUNICIPAL CORPORATION—NOT LIABLE FOR CONDITION OF PRIVATE WAY USED BY PUBLIC.—In an action for personal injury against a city, plaintiff in her petition alleged that she was injured while passing along a way in the city which "was generally used and by a great many people." Held, that this was not equivalent to an allegation that said way was a public way so as to make the city liable for its unsafe condition. It must have been a private way, passing from private property into the street. This fact distinguishes this case from the following: *Burnham v. City of Boston*, 10 Allen, 250. In this case the plaintiff entered the street from a private way, and was thereafter injured. In *City of Covington v. Bryant*, 7 Bush, 248, the plaintiff, while passing along a street, fell into an excavation therein. In *Oliver v. Worcester*, 102 Mass. 489, the plaintiff was walking along a public foot-path and fell into an excavation dangerously near it. In *Young v. Harvey*, 16 Ind. 314, a well was dug on ground used in common, and by reason thereof the damages occurred. The city has full and complete control of the streets, and may excavate or fill up the same at its pleasure; but in doing so it cannot encroach on private property for the purpose of erecting barriers, or any other purpose. Nor is it bound to provide a safe or any way by which the streets may be entered from private property. The citizens or travelers must get into the public ways of a city as best they can. *Goodwin v. City of Des Moines*. Opinion by Seevera, J. [Decided Dec. 8, 1890.]

RESCISSON OF CONTRACT—WHERE PARTY SEEKING RELIEF WEAK MINDED—RULE AS TO PARTIES IN PART DELICTO DOES NOT APPLY.—That a party who is in part delicto cannot make his illegal act the basis of a recovery has been definitely settled. But where a stronger mind takes advantage of a weaker, and by persuasion and influence procures the unlawful act, this rule ceases to be applicable. The wrong then rests chiefly, if not solely, on the person by whom it was contrived, and his confederate is regarded as the mere instrument for accomplishing an end not his own. If a party should be allowed immunity under such circumstances, he would be permitted to take advantage of his own wrong and reap a benefit from his fraud. The principle which denies relief to a party in part delicto, is not applicable to such a case. See *Cook v. Colyer*, 2 B. Monr. 71; *Ford v. Harrington*, 16 N. Y. 285; *Smith v. Bromley*, 2 Doug. 696; *Long v. Long*, 9 Md. 348; *Horton v. Riley*, 11 M. & W. 492; *Smith v. Cuff*, 6 M. & S. 180. *Davidson v. Carter*. Opinion by Day, J. [Decided Dec. 10, 1890.]

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

SEPTEMBER, 1890.

CORPORATION—TRANSFER OF STOCK IN—PLEDGE OF STOCK—FRAUD.—P., who was the owner of ten shares in the defendant bank, and a director in the bank, to secure a note held by C., delivered to C. the certificate of the shares and a power of attorney, to transfer the same. P. after this became bankrupt. Thereafter, the note not being paid, C., upon proper notice to P., sold the shares at auction to L., to whom they were subsequently transferred by the bank, which had at this time notice of the bankruptcy of P. and had received a demand for the transfer of the stock, from plaintiff, his assignee in bankruptcy. In an action against the bank for a conversion of the stock, held, that plaintiff was not entitled to recover, and that evidence was not admissible to show that the fact of the delivery of the certificate to C., etc., was under an agreement between him and P. kept secret, the bank not having knowledge of this. In the absence of any rule to be found in the general laws, or in some express provision of the charter, determining what shall constitute an actual transfer of shares in a corporation, the rules which govern the transfer of similar property at common law must be applied. See *Fisher v. Essex Bank*, 5 Gray, 378; *Sargeant v. Essex Marine Railway*, 9 Pick. 201. It is enough in the present case for the defendant bank to show that the certificate for P.'s stock was issued to one who had become the owner of the shares by an equitable title, good against P.'s assignee in bankruptcy. As between P. and C., the delivery of the certificate, as collateral security for a debt due the latter, with the power of attorney, conveyed an equitable interest and gave to any one claiming under an execution of the power a right to demand of the defendant a certificate of the stock. The subsequent bankruptcy of P. did not operate to vest in the plaintiff as his assignee a right to the shares as against the equitable owner, or give him a right to prohibit the bank, upon the surrender of the old certificate, from issuing a new certificate to the person to whom they were transferred under the power of attorney. The delivery of the stock as security for a debt, with the execution of the power of attorney, gave to C. a power coupled with an interest, which was not revoked by the bankruptcy of P. and could only be revoked by the payment of the debt. *Hunt v. Rousmanier*, 8 Wheat. 174; *Story on Agen.*, § 477, 482. The only right which the plaintiff as assignee took in these shares was the right to redeem them by paying the debt which they were pledged to secure, and that right was foreclosed by sale of the same at public auction after notice. *Gen. Stats.*, ch. 151, § 9. The evidence offered was properly excluded. It is not shown that the bank had any knowledge or notice of such corrupt agreement as the evidence tended to show, and without such knowledge the defendant cannot be charged with a conversion of the property because it has delivered a new certificate to one who had an apparently good title. *Dickinson v. Central National Bank*. Opinion by Colt, J.

MISSOURI SUPREME COURT ABSTRACT.*

LEASE—RENEWAL OF, WHAT CONSTITUTES.—A lease for a term of years contained a covenant for the payment of double rent for every day the tenant might hold over after the expiration of the term, with a further covenant that after such expiration the tenant should have the privilege of renewal for a further term at the same rent as that reserved for the first.

* To appear in 71 Missouri Reports.

The tenant held over for a number of years, paying rent at the old rate. No new lease was executed, neither party requiring it. *Held*, that inasmuch as the tenant had paid the single and not the double rent, he must be taken to have held over under the covenant for a renewal, and his liability was the same as if a new lease had actually been executed. *Ranlet v. Cook*, 44 N. H. 512. *Insurance and Loan Building Co. v. National Bank of Missouri*. Opinion by Hough, J.

MUNICIPAL CORPORATION—LIABLE FOR INJURY TO HOUSE—NEGLIGENCE OF RAILROAD COMPANY AUTHORIZED TO CONSTRUCT TUNNEL IN STREETS.—The charter of the city of St. Louis conferred upon the city exclusive control over its own sewers. The general law authorized any railroad company to construct its road along any street of any city in the State, provided the assent of the city was first obtained. The city of St. Louis, by ordinance, gave its assent to the construction of a subterranean railroad along and under one of its streets, but reserved the right in case it became necessary in the progress of the work to remove any sewer, to supervise and control the work of removal and reconstruction. It did become necessary to remove one of the sewers, which was accordingly removed and reconstructed outside the line of the tunnel, which was built for the use of the railroad. Owing to the negligence of the company's contractor in the reconstruction of this sewer, the foundation of a house fronting on the street gave way. In an action against the city to recover damages for the injury, thus sustained, *held*, that the city was liable, and the fact that its officers failed to exercise any supervision or control over the work was no defense. It was their duty to have done so. *Frank v. City of St. Louis*. Opinion by Napton, J.

OFFICER—OF PUBLIC CORPORATION ACTING UNDER INNOCENT MISTAKE—WHEN NOT LIABLE.—Where the officers of a public or municipal corporation, acting officially, enter into a contract under an innocent mistake of law, in which the other contracting party equally participates, with equal opportunities of knowledge, neither party at the time looking to personal liability, the officers are not personally liable; and the same rule applies to the officers of a public body which is not a corporation. Defendant executed a note as director of a public school district, for the benefit of the district, in good faith, believing himself authorized to bind the district, and intending to bind it and not himself. The other parties to the note, before it was executed, concluded from an examination of the school law that the district could be so bound. This proving to be an erroneous conclusion, this action was brought to charge the defendant as maker. *Held*, that he was not bound. *Humphrey v. Jones*. Opinion by Sherwood, C. J.

FINANCIAL LAW.

ALTERATION—INSERTION OF PLACE OF PAYMENT IN NOTE MATERIAL.—The insertion of a place of payment in a promissory note, after its execution, is a material alteration, which will discharge an indorser. In *Brown v. Straw*, 6 Neb. 536, this court has laid down the rule: "After an instrument is completed and delivered no alteration can be made therein, except by the consent of the parties." This, of course, means a material alteration, and that is material which may become material. But as to whether the insertion of a place of payment, where none was contained in the note when executed and delivered, is such a material alteration as will vitiate the note, was settled by the Court of Errors of New York in 1821, in *Woodworth v. Bank of America*, 19 Johns. 302, where it said: "The rule that a man is not to be held to a con-

tract which has been varied without his assent is perfectly well settled; and if an instance can occur where it ought to be applied with peculiar strictness, it is that of a surety, in which favorable light the plaintiff in error is entitled to be viewed (10 Johns. 538), and in my view it is wholly immaterial whether the indorsee has been prejudiced by the alteration or not. The case of *Ludlow v. Simms*, in this court (3 Cal. Cas.), confirms this proposition, and is not less conformable to strict justice than to the rules of law. It was there held, by the unanimous opinion of this court, that a surety was not bound beyond the strict terms of his contract, and although in that case the deviation from those terms was not shown to be injurious, but on the contrary, was probably beneficial to the surety, yet he was discharged by it." *Noborska Supreme Ct.*, Nov. 10, 1880. *Townsend v. Star Wagon Co.* Opinion by Cobb, J.

BANK—INSOLVENT—DEPOSIT UNDER ORDER OF COURT, WHEN NOT PREFERRED—GENERAL AND SPECIAL DEPOSIT FUNDS IN RECEIVER'S HANDS.—Where the clerk of a court, under an order of the court, making a bank a depository of court funds, and of its officers, makes a deposit of funds belonging to the court in such bank, which afterward becomes insolvent, and the deposit was not a special one, or a mere naked bailment, and there is no means of identifying the money deposited, even if in the hands of the receiver, it is error to require the receiver to pay such deposit in full, and the clerk must share *pro rata* with other depositors and creditors of the bank. When moneys deposited in a commercial savings bank were not kept separate from the general funds of the bank, or distinguished therefrom, and the entries of the same upon the bank books and upon the deposit book of the clerk were the same as with all other depositors, except that no interest was to be paid thereon, it was *held*, that the deposit, though made under a general order of the court, was not a special one, or a mere bailment, and that the money so deposited became that of the bank, which was liable for its repayment the same as to any other depositor or creditor. When the court places the assets of an insolvent bank in the hands of a receiver, it is for the benefit of all the creditors of the corporation, to be administered, distributed and paid according to the equitable claims of all such creditors, and such act cannot affect or change in the slightest degree the rights of a single creditor, and the fact that the court has acquired possession of the assets and funds confers no legal right to retain its deposits, which are general, in full, when the money deposited under its direction with the bank cannot be identified. *Illinois Supreme Ct.*, Nov. 20, 1880. *Otis v. Gross*. Opinion by Walker, J.

NEGOTIABLE INSTRUMENT—BILL OF EXCHANGE—ACCEPTANCE—DUTY OF AGENT.—An agent for the collection of a bill of exchange is liable, if he fails to notify his principal when such bill has been duly presented and acceptance according to its tenor refused. Certain bills of exchange, addressed to "Walter M. Conger, secretary Newark Tea-Tray Company, Newark, N. J.," were forwarded to the defendant bank for collection, without special instructions from its principal, or any information which might qualify or explain the import of the bills upon their face. The bills were duly presented to Walter M. Conger, and were accepted in writing across their face, as follows: "Accepted. Payable at the Newark National Banking Company. Walter M. Conger." *Held*, in view of the facts, and in view of the decisions of the courts of the State in which the drawees of the bills resided, and where they were to be accepted and paid, and of concurrent decisions elsewhere, that the defendant did not commit any breach of duty in taking the acceptance in this form. *Walker v. Bank of New York*, 9

N. Y. 582; *Bank of Washington v. Triplett*, 1 Pet. 25; *Kean v. Davis*, 1 Zab. 683; *Moss v. Livingston*, 4 N. Y. 208; 1 Dan. on Neg. Instr., § 455d; *Burlingame v. Brewster*, 79 Ill. 515; 22 Am. Rep. 177, and note. *United States Cir. Ct., New Jersey. Exchange National Bank of Pittsburgh v. Third National Bank of New York.* Opinion by McKennan, C. J., 4 Fed. Rep. 20.

—RECITALS IN—OMISSION OF NEGOTIABLE WORDS—
—DECISIONS OF STATE COURTS ON COMMERCIAL LAW—
BONA FIDE HOLDER.—(1) Neither the fact that a note is payable to an administrator, nor that it recites that it was for value received, "belong for a part of the third payment on the Goree plantation, as per agreement of the fourteenth February, 1874," destroys its negotiability, or subjects it to the conditions of that agreement. It is well settled that a note omitting the word "or order," is not negotiable unless it contains other words of like import; but this has been changed in Tennessee by statute, and neither those nor any equivalent words are necessary. (2) While no decision or statute of a State restricting or impairing the rights and remedies secured to the citizens of the several States under the general commercial law, or divesting the Federal courts of their cognizance of those rights and remedies, is binding on those courts, statutes which enlarge the commercial law will be enforced. They are not confined to the commercial law as it exists outside such statutes. (3) Nothing less than actual knowledge of the facts relied on to establish the defense of a failure of consideration, or bad faith, can defeat the right of a bona fide holder for value to recover on a negotiable note. Mere knowledge of suspicious circumstances, which, if followed up by inquiry, would develop the fact, is not sufficient in the Federal courts, although the rule is otherwise in Tennessee. The facts in this case would not, it seems, defeat the recovery in the Tennessee State courts; certainly not in this court. *Burrett v. Stoeck*, 2 Ld. Raym. 1545; *Bailey v. Rawley*, 1 Swan, 295; *Baxter v. Stewart*, 4 Sneed, 213; *Ryland v. Brown*, 2 Head, 270; *Merritt v. Duncan*, 7 Heisk. 156; *Goodman v. Simonds*, 20 How. 343; *Murray v. Lardner*, 2 Wall. —; *Wolf v. Tyler*, 1 Heisk. 313; *Mulr v. Jenkins*, 2 Cranch's C. C. 18; *Gerard v. La Corte*, 1 Dall. 194; *Swift v. Tyson*, 16 Pet. 1; *Keary v. Farmers' & Merchants' Bank*, id. 69; *Watson v. Tarpley*, 18 How. 517; *Dromgoole v. Farmers & Merchants' Bank*, 2 id. 241; 1 Am. Law Rev. (N. S.) 211, 226; *Gregg v. Weston*, 7 Biss. 309; *Oates v. Nat. Bk.*, 100 U. S. 239; *Broderick's Will*, 21 Wall. 503; *Gaines v. Fuentes*, 92 U. S. 10. *United States Cir. Ct., W. D. Tennessee*, Oct. 13, 1880. *Bank of Sherman v. Apperson & Co.* Opinion by Hammond, D. J., 4 Fed. Rep. 26.

INSURANCE LAW.

FIRE INSURANCE—DIRECTION IN POLICY TO PAY TO THIRD PARTY DOES NOT ALTER CONTRACT.—The rule of law is settled that a direction in the policy that the money, if it becomes due, is to be paid to a designated person, does not alter the agreement of insurance in any respect, except in the one particular of appointing a denominated person to receive such payment. It is still the owner of the premises who is insured, and the continued validity of the policy is dependent upon the performance by him of the conditions embraced in it. *Martin v. Franklin Insurance Co.*, 9 Vroom, 140. *New Jersey Supreme Court*, June term, 1880. *Warbasse v. Sussex County Mutual Insurance Co.* Opinion by Beasley, C. J.

—CONDITIONS AS TO ALIENATION AND OTHER INSURANCE.—Assumpsit on a policy of insurance against fire, issued in 1871. The policy provided, in accordance with defendant's charter and by-laws, that if the assured should convey the property without giving de-

fendant notice thereof in writing, the policy should be void, but that if the alienation should be approved by defendant the policy should be thereby confirmed. In 1872, H., the assured and owner of the premises, sold and conveyed the same to R. The deed contained the usual covenants, and provided that if R. should fail to pay H. \$1,500, with interest, as soon as he should dispose of the premises, or at all events within five years, the deed should become void; and that H. should retain the insurance as security, and should take well-secured notes at not exceeding five years, or the time of the notes that R. might take when he should sell in payment of said sum. H. then assigned the policy to R., and defendant approved the assignment, but H. retained the policy in accordance with the condition of said deed. In 1873, H. conveyed the premises by quit-claim deed to the plaintiff, and H. and R. assigned the policy to him to be held as collateral security for the performance of said condition, and defendant approved of the assignment. Afterward R. sold and conveyed the premises and assigned his interest in the policy to A. and D., and defendant approved thereof. A. and D. sold and conveyed to P., who conveyed to J. H., who conveyed to M., after which the buildings were burned. Of the conveyance to P. and the conveyances subsequent thereto, so far as appeared, the defendant did not have the required notice. Held, that the deed to R. gave him a defeasible title, in legal effect, such as he would have had if he had taken a deed in common form and executed a mortgage back; and that therefore the alienation from A. and D. to P., and the alienations subsequent thereto, avoided the policy, not only as to the holders of the title thereby aliened, but also as to the plaintiff, who was only collaterally interested. (2) The policy provided also that if the assured procured other insurance without consent of defendant, the policy should be void. M. procured other insurance without defendant's consent. Held, that under the circumstances of the case, *q. v.*, the procurement of such further insurance would have avoided the policy, if it had not been already avoided by alienation of the premises. *Vermont Supreme Court*, October term, 1878. *Moulthrop v. Farmers' Mutual Insurance Co.* Opinion by Redfield, J.

LIFE INSURANCE—DECLARATIONS OF INSURED TO CONTRADICT REPRESENTATIONS.—A policy of insurance upon the life of C. was issued on joint application of himself and wife for her sole benefit. In answer to a question in the application, C. stated that he had had no sickness or disease during the seven years then last past. It was stipulated in the policy that if the statements in the application were not in all respects true, the policy should become void. Held, in an action by the wife upon the policy, the declarations of C. made prior to the application, and tending to show that said statement was, to his knowledge, untrue, are incompetent. *Ohio Supreme Court*, Nov. 30, 1880. *Union Central Life Insurance Co. v. Cheever.* Opinion by Boynton, J.

RECENT ENGLISH DECISIONS.

COPYRIGHT—TITLE USED SIMILAR TO ONE OF OLD BOOK OUT OF CIRCULATION.—The Copyright Act (5 & 6 Vict. ch. 45), protects the property in the title of a book as being its distinctive part. Consequently, where a novel had been published in weekly parts in the plaintiff's serial, under the title of "Splendid Misery," the publication commencing in 1874, it was held, that the subsequent publication of another novel under the same title in the defendant's weekly paper of a different class, ought to be restrained by injunction. The fact that the same title had been used for a novel published in 1801, but long since gone out of ordinary circulation, was held not to constitute a bar to the relief prayed for. *Kelley v. Byles*, 42 L. T. Rep. (N. S.) 467.

distinguished, Ch. Div. Nov. 9, 1890. *Dicks v. Yates*. Opinion by Boem, V. C., 43 L. T. Rep. (N. S.) 470.

INSURANCE—ACCIDENT POLICY—DEATH BY DROWNING WHILE IN FIT OF APOPLEXY—By a policy of insurance, defendants agreed to pay to the representatives of W. 1000L. If "the insured shall sustain any personal injury caused by accidental, external, and visible means within the intention of this policy and the provisions and conditions thereof, and the direct effect of such injury shall occasion the death of the insured * * * *". The policy provided "that the insured shall not be entitled to make any claim under this policy for any injury by any accident unless such injury shall be caused by some outward and visible means, of which proof satisfactory to the directors can be furnished; and that this insurance shall not extend * * * to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease * * * or to any death arising from disease, although such death may have been accelerated by accident." The insured, whilst crossing a stream, was seized with an epileptic fit, fell and was drowned. He did not sustain any personal injury to occasion death other than drowning. In an action by his executrix on the policy, held (affirming the judgment of the Exchequer Division), that the death was within the words of the policy, and that defendants were not protected by the proviso, and therefore were liable. *Max v. Railway Ass. Co.*, 4 L. T. Rep. (N. S.), 833, Ct. of Appeal Nov. 29, 1890. *Wingspear v. Accident Insurance Co., Limited*. Opinion by Lord Coleridge, C. J., 43 L. T. Rep. (N. S.), 450.

WILL—WHEN GIFT INVALID FOR UNCERTAINTY OF BENEFICIARIES—A will must be construed according to its natural meaning, without any regard to the effect which that meaning may have according to the law of perpetuities, and afterward that law must be applied. If a gift be to a class, an unascertained number of whom are beyond the limits in the way of remoteness, the whole is void. A testator gave a fund in trust for W. M. for life, and after his death in trust for all his children who should attain twenty-one, and the issue of such of them as should die under that age leaving issue, "which issue should afterward attain the age of twenty-one or die under that age leaving issue living at his, her, or their decease or deceases respectively." Held (affirming the judgment of the court below), that these words were words of description, describing the issue who were to take, and that the whole bequest was void for remoteness, the gift to the children not being capable of being severed from that to the remoter issue. *Smith v. Smith* L. Rep. 5, ch. 342, and *Hale v. Hale*, 3 Ch. Div. 643; 35 L. T. Rep. (N. S.) 933, approved and followed. *Re Moseley's Trusts*, L. Rep. 11 Eq. 499; 24 L. T. Rep. (N. S.) 260, disapproved. Cases referred to *Riley v. Garnett*, 3 De G. & Sm. 620; *Muskett v. Eaton*, L. R., 1 Ch. Div. 435; *Doe v. Nowell*, 1 M. & S. 327; *Bosaston's case*, 3 Rep. 19; *Edwards v. Hammond*, 3 Lev. 182; *Broomfield v. Crowder*, 1 B. & P. (N. R.) 813; *Catlin v. Browne*, 11 Hare, 372; *Jee v. Audley*, 1 Cox, 324; *Bentick v. Duke of Portland*, L. R., 7 Ch. Div. 693; *Dungannon v. Smith* 12 Cl. & F. 546; *Fetling v. Allen*, 12 M. & W. 279; *House of Lords*, July 8, 1880. *Pearks v. Moseley*. Opinions by Lord Ch. Selborne and Lords Penzance and Blackburn, 43 L. T. Rep. (N. S.) 449.

NEW BOOKS AND NEW EDITIONS.

101st UNITED STATES REPORTS.

THIS volume, the 10th of Otto, published by Little, Brown and Company, of Boston, contains the following cases of general interest: *National Bank v.*

United States, p. 1.—The provision in the National Bank Act, that all banks shall be taxed on the amount of the notes of any municipal corporation paid out by them, is constitutional. *Borditch v. Boston*, p. 16.—A statute and ordinance make a city liable for the value of any building destroyed to prevent the spreading of a fire, if a joint order for such destruction is signed by the chief engineer of the fire department and two other engineers, all present. *Held*, that the city was not liable on an order signed only by the chief engineer, when absent. *Missouri v. Lewis*, p. 22.—The act giving the St. Louis Court of Appeals exclusive jurisdiction of appeals in certain counties, to the exclusion of the Supreme Court, is constitutional. *The Florida*, p. 37.—A Confederate steamer, captured by a United States vessel in a neutral port, where she had resorted for provisions and repair, and afterwards sunk and lost by accident, is not subject to libel by the captain of the captor as prize of war. *National Bank v. Hall*, p. 43.—B. authorized a bank to cash his agent's drafts on him for live stock sold by him on commission. Subsequently B. wrote the bank that he would pay drafts only on actual consignments in transit to arrive with the drafts, and cancelled the agent's former letters of credit. The cashier wrote in reply that the bank had never knowingly advanced on stock to come in, and thereafter would exact a bill of lading. Without requiring bills of lading, the bank in good faith continued to cash the agent's drafts, which B. paid. The agent absconding with the proceeds of such drafts, B. sued the bank for the money. *Held*, that he could not recover, the letters constituting no contract. *Manufacturing Co. v. Trainer*, p. 81.—Letters or figures, denoting quality only, are not a trade-mark. *Baker v. Selden*, p. 99.—A system of book-keeping cannot be copyright. See 21 Alb. L. J. 168. *Meguire v. Corneine*, p. 108.—A. agreed that if B. would procure his appointment as special counsel for the government in certain causes against them, and aid him in the defense, he would pay him one-half the fee which he should receive from the government. *Held*, void as against public policy. *Pelton v. National Bank*, p. 143.—The systematic and international valuation by State taxing officers of all moneyed capital, except shares of National Banks, far below its true value, while such shares are assessed at their full value, is a violation of the National Banking Act. See 21 Alb. L. J. 232. *Cummings v. National Bank*, p. 153.—To the like effect, See 21 Alb. L. J. 238. *People's Bank v. National Bank*, p. 181.—A National bank may guarantee a note, and is estopped to deny such guaranty by its vice-president, when it retains and enjoys the proceeds. *Terry v. Little*, p. 218.—The proper remedy to enforce the individual liability of stockholders of a bank is a suit in equity by or for all the creditors. *May v. Sloan*, p. 231.—"Trade" is not limited to barter, but includes general commerce and traffic. *Bank of America v. Banks*, p. 240.—A married woman is not estopped to deny a recital, in a deed of trust of her separate estate, that it is given to secure her indebtedness. *Phelps v. Harris*, p. 370.—A power to sell and exchange lands includes the power of partition. *Baker v. Humphrey*, p. 494.—An attorney employed by both parties to an agreement for purchase of lands for \$5,000, discovered a defect in the title, concealed it from one, and secretly agreeing with the other, procured a quit-claim to his own brother for \$25. *Held*, that the grantee must convey to the injured party on receiving his purchase-money. See 22 Alb. L. J. 51. *Shaw v. Railroad Co.*, p. 557.—A bona fide purchaser of a lost or stolen bill of lading, regularly indorsed, is not protected. *Stone v. Mississippi*, p. 814.—A lottery company's charter is subject to be rescinded by a subsequent constitutional prohibition of the lottery business. See 23 Alb. L. J. 8. The cases are all of October term, 1879. There are a considerable number of town bond cases.

83D NORTH CAROLINA REPORTS.

From advance sheets sent us by Mr. Keenan, the reporter, we find that the 83d North Carolina Reports will contain the following cases of general interest: *Nicholson v. Cox*, p. 44.—Jurisdiction of the person of a married woman is acquired by her written admission of service of the summons. *Gooch v. McGee*, p. 59.—Where a public corporation, in exercise of a delegated right of eminent domain, acquires real estate necessary for its use, such real estate can only be sold on execution against the corporation, subject to the performance of the duties and obligations of the corporation. *Davis v. Davis*, p. 71.—A tenant in possession cannot resist an action for recovery of the premises after the termination of the lease, by showing superior title in himself or another. *Collen v. Willoughby*, p. 75.—A mortgage of a growing crop is valid. *Simmons v. Taylor*, p. 148.—In an action for trespass on land, a non-resident defendant, sued with residents, may remove the cause to the Federal court so far as he is concerned. *Howard v. Steamship Co.*, p. 158.—Plaintiff consigned freight by defendant's boats to W. at G. By arrangement between W.'s agent and defendant, of which plaintiff was ignorant, defendant landed the freight on the river bank near W.'s house, and not at G. W. refused to pay charges and take the freight, and defendant subsequently permitted another, unauthorized by W., to take it on paying charges. The plaintiff had no notice of the disposition of the freight. *Held*, that plaintiff could recover the value. *Turner v. Gatlher*, p. 357.—An infant may avoid his bond for money's loaned him by his father's administrator, to enable him to acquire a professional education, and his mere acknowledgment of the debt, after majority, without an express promise to pay, will not amount to ratification. *Bank v. Perkins*, p. 377.—The usage of a particular bank, known and acted upon by its customers, to discount bills without presenting them for payment, may be shown to excuse the omission to present. *Green v. Greensboro Female College*, p. 449.—Payment of interest on a note by the principal maker, before maturity, takes the note out of the operation of the statute of limitations as to a surety upon the note. *State v. Jones*, p. 605.—A woman, aiding and abetting a man in an attempt to commit a rape, is guilty as a principal. *State v. Holland*, p. 624.—A conviction may be maintained upon the unsupported testimony of an accomplice. All the decisions in this volume are of June Term, 1880.

NEW YORK COURT OF APPEALS DECISIONS

THE following decisions were handed down, Tuesday, January 18, 1881:

Judgment affirmed with costs—*Hazard v. Fiske*; *Stephens v. Fox*; *Riskey v. Phoenix National Bank of New York*; *The Merchants' National Bank of Whitehall v. Hall*; *Van Giesse v. Bridgford* (Anneko Jantz title); *Rowland v. The Mayor, etc., of New York*; *Kidd v. McCormick*; *Garwood v. The New York Central & Hudson River Railroad Co.*; *Ford v. Provident Savings Life Society of New York*; *Douglass v. Knickerbocker Life Insurance Co.*; *Henry v. Brady*; *Johnson v. Grove and Bailey*; *Mintick v. City of Troy*; *Clark v. Woodruff*.—Judgment affirmed—*McCarney v. The People*; *Hope v. The People*; *People ex rel. Phelps v. Court of Oyer and Terminer of New York*; *Cowley v. The People*; *Eckhart v. The People*.—Judgment reversed and new trial granted, costs to abide event—*Scheffer v. Dietz*; *Guilernan v. The Liverpool, New York & Philadelphia Steamship Co.*; *Sibbard v. The Bethlehem Iron Co.*; *Alexander v. Caldwell*; *Byrne v. The New York Central & Hudson River Railroad Co.*—Order affirmed with costs—*In re Marsh*; *Wiggin v. Howard*; *Schenck v. Sewell*.—Order affirmed and

judgment absolute for respondents on stipulation, with costs—*Pont v. Campbell*; *Duncan v. Brennan*.—Order reversed and judgment on report of referee affirmed, with costs—*Lockwood v. Underwood*.—Judgment modified by dividing the proceeds of 269 acres into three parts, one to be given to Sylvia D. Newhouse and one to Jeremiah Vincent, and one to the children of Sumner Doll, and as so modified judgment affirmed, without costs to either party in this court—*Vincent v. Newhouse*.

NOTES.

THE current number of the *Journal du Droit International Privé* contains the following articles: International private law, or the conflict of law from the historical point of view, particularly in England, by Prof. F. Harrison; the Legal condition of strangers in Sweden, by P. Dareste; the Stock exchange of London (legislation, rules, and jurisprudence), by E. Guillard; the Execution in France of judgments rendered by mixed tribunals of Egypt, by P. Fanchille; Divorce in Switzerland, by Prof. E. Sehr. — We have received advance sheets of Dr. Wharton's introductory chapter of the second edition of his *Conflict of Laws*. Also Judge Westbrook's opinion as to the right of the People to restrain the Long Island and Atlantic Avenue Railroad Companies from the use of steam on Atlantic avenue, Brooklyn. Also the Manufacturing Corporation Act of 1848, with all the amendments, together with notes and forms, by John F. Baker, published by Dossy & Co. of New York city.

The December number of the *American Law Register* has an article on Liability of quasi and municipal corporation and their officers for negligence; the case of *Roussillon v. Roussillon* concerning contracts in restraint of trade, with a note by Edmund H. Bennett; the case of *Covington St. Ry. Co. v. Covington & Cincinnati Ry. Co.*, concerning the occupation of streets and highways by a horse railway, with a note by A. G. Simrall; and the case of *Bradley v. Bauder*, concerning taxation of shares of a foreign corporation, with a note by A. J. Marvin. — With this year the *Canada Law Journal* has commenced the publication of a new series, fortnightly instead of monthly, and materially enlarged in size and number of pages, and improved in appearance and in quality and variety of contents. — We also remark the first number of a new-comer, the *Canadian Law Times*, a neatly printed monthly of octavo size. The new enterprise starts off well, with intelligent articles on the Law of Allegiance, and Does a power of sale imply a power to mortgage? and a copious digest of recent criminal cases. *The Times* is welcome, although Mr. Vennor did not predict it.

The *London Law Journal*, under the title of "Atmospheric Influence," says: "Mr. John T. Wheelwright, a rising young lawyer of Boston, says of Chief Justice Gray, 'his head rises above perpetual hair.'—*Albany Law Journal*." Our contemporary has evidently read "air" for "hair." We think the baldness may fairly be attributed to atmospheric pressure.—Prof. Amos' new book on Remedies for Warfare, is dedicated to his wife. We asked a high and presumably grave judge of this State if he thought there was a covert satire in this dedication. "Yes," he replied, "feme covert." Let no one after this revile us for punning.—Judge Ames, of the Massachusetts Supreme Court has resigned, and it is rumored that Judge Soule will soon follow. The President has been dining the Supreme Bench. All concurred; at least, no dissent is recorded, which is something remarkable in them.—The Hon. George Brent, Associate Judge of the Court of Appeals of Maryland, died on the 6th inst. at his residence in Charles county, Maryland.

The Albany Law Journal.

ALBANY, JANUARY 29, 1881.

CURRENT TOPICS.

OUR esteemed and able contemporary, the *Virginia Law Journal*, replying to our remarks on the policy of Virginia and the views of our contemporary in respect to the property of married women, the right of the accused to testify in his own behalf, and the Codes of Civil Procedure, explains that its strictures in regard to the first matter were based on the peculiar imperfections of the Virginia acts. It says they "were drawn by one who was never either married or had studied law," and that it is almost impossible to find out what they mean. The two latter are solid objections, certainly, but as to the first it is not so clear. Would it for instance be any objection to a law permitting the accused to testify in his own behalf, that it was drawn by one who had never been on trial for crime? Our contemporary continues: "But apart from our own statutes, we do not hesitate to express our utter repugnance to *all such acts*. Revelation teaches us that God made man and wife *one*. Revelation is always 'abreast of the times;' and whenever legislation attempts to step beyond the boundary lines defined by it (as we think the tendency of all these acts is), it must be pernicious in its effects on society." We believe revelation nowhere says the husband shall absorb the wife's property, or be responsible for her ante-nuptial debts. And if they are "one," why give the male component any superior right of property?—why not let the wife hold the purse-strings, if she desires, as she generally does in France, the thriftiest of nations? Or why not let the "one" hold the property in common? Or why not let each component hold its own? The trouble with our friend's unit is that it leans always and decidedly toward the husband, and the wife is left a cipher. Marriage unity in regard to property means that the husband shall have it all. The writer in the *Journal* also says that he is convinced, by presiding three years over a criminal court, of the impolicy of the statutes allowing the accused to testify. We think his experience differs from that of the majority of magistrates of criminal courts. We should like to poll the bench on this subject. Our good friend concludes: "We are gratified at the pleasant manner in which our contemporary is always pleased to refer to us, and we assure it of our very highest appreciation and consideration. But we do not think it has the right to draw the conclusion, that 'Virginia is not abreast of the times in matters of law reform,' from any thing expressed in the articles above referred to. We are satisfied, that if our friend would come here and live, as we have all our lives, he would be convinced that the state of society here is as good as it is *anywhere*; and that it would *not* be improved by many of the (so-called) 'law reforms' which have been

enacted elsewhere." Our community used to think like our contemporary in these matters, but believe they have improved the old state of affairs. Doubtless we should enjoy living in Virginia, on some accounts, but as, unlike the draftsman of the Virginia Married Woman's Act, we have studied law, we think we should prefer the New York legal practice and procedure, especially so if we should chance to be accused of crime. Again, unlike the draftsman of the Virginia Married Woman's Act, we are married, and we fear that our partner would justly object to our friend's views of marriage unity in respect to property.

The Kentucky *Law Reporter* says: "It is almost needless to say that we place a high estimate on the ALBANY LAW JOURNAL. Every one does who is acquainted with it. Yet it is sometimes caught napping. It failed, for instance, to perceive the good-natured sarcasm couched in our late note on the jury system of the present day. It declares our suggestion impracticable and that is decidedly our own opinion of it. It then sets forth its own theory thus: 'We simply need greater intelligence in jurors, and a less arbitrary demand for unanimity.' Perhaps so; but is not the demand for 'greater intelligence' as 'impolitic' as any suggestion can be? In fact, we believe in the abolition of the jury system altogether as a remediless absurdity. When judges were arbitrarily appointed by arbitrary tyrants and courts were organized purposely to convict all persons under accusation by the crown, it meant something to be tried by one's peers and not exclusively by the mere tools of irresponsible power. In our country all judges are peers of even the humblest citizen. And we can secure the 'greater intelligence' needed, on the bench, but not otherwise." We are glad to learn that our friend was joking when he suggested the employment of a permanent, expert, and peregrinatory jury. But as that suggestion was not more absurd than the idea of abolishing the jury, we did not recognize the jest. Our friend thinks it is more difficult to get intelligent laymen to determine facts than intelligent judges to pronounce the law. We do not think so. We believe the juries are intelligent enough as they are, on the average, but we suggested that it is possible to get a greater degree of intelligence by the system of struck juries. Our friend's idea that there is no present need of the jury system because the judges are elected by the people, seems fallacious. But as we are not sure that our friend is not joking *in toto*, we will argue the matter no longer, but simply give him this proposition, which we have often repeated, to reflect on: the jury system is capable of improvement; particular suitors are at liberty to waive a jury trial; but the general right to a jury trial, if the suitor wants it, is inestimable and indispensable.

Mr. Bergh is really trying to re-establish the whipping-post. He has introduced a bill in the Legislature, providing that any male person who

shall willfully beat, bruise or mutilate his wife or any other female human being, shall himself be beaten with *not less* than twenty-five lashes, "sturdily laid on, upon the bare back." He carefully provides that no female shall be whipped under the provisions of the act. This is almost as careful as the prisoners' commutation act, providing for shortening of term of sentence for good behavior, which also enacts that it shall not apply to any prisoner sentenced for life! At the same time he introduces a bill against vivisection. Mr. Bergh is a fanatic. While doing good in his sphere, he is apparently wont to be busy and mischievous outside of it. He would degrade justice to the brutal level of those who break the laws, and make a man-beater of the State. The whipping-post perhaps is not too good for the law-breakers in question, but it is too bad for a government to use. It is a species of torture, no more defensible than the rack and thumb-screw. It is a cruel and unusual punishment, within the meaning of our Constitution. We hope the Legislature will dismiss his bill with the contempt it deserves.

A bill has been introduced in our Legislature to amend the Constitution, in accordance with the recommendation of the Bar Committee, *ante*, p. 22, by increasing the number of judges and erecting a new General Term of the Supreme Court, in order to give that court the power of discharging their business. The recommendation and the bill seem to us, from our present reflection, to be quite proper. At the same time, the idea of utilizing our county courts, as suggested by a correspondent in another column, and as we have repeatedly suggested, by compelling or persuading business into those courts, seems to us worthy of consideration, not as a substitute for, but as an accompaniment to the other. Merely making the costs the same in both courts will not effect the purpose. To compel business into the county courts, costs must be denied in certain actions in the Supreme Court. We need both to strengthen our Supreme Court and to utilize our county courts.

In the Assembly, Mr. Waring has introduced a bill to provide for detailing judges of the Brooklyn City Court to hold Special Terms and Circuits of the Supreme Court in Kings county. — Mr. Patterson proposes to repeal the Code of Civil Procedure. It is too late. The tree is too big, and it would lacerate the soil too much to pull it up. He also proposes to amend section 190, subdiv. 3, by allowing an appeal to the Court of Appeals from an order sustaining or overruling a demurrer.

In the Senate, Mr. Roberts proposes to amend section 791, subdiv. 5, of the Code of Civil Procedure, by adding to the class of preferred causes those in which an infant is sole plaintiff or sole defendant. We cannot conceive any reason for such an extension. He also proposes to amend section 830, by adding to the class of excluded witnesses the hus-

band or wife of an excluded witness. This is a step backward, and in the wrong direction. He also proposes to add to section 2544 a provision that sections 834 and 835 shall not apply to actions or proceedings concerning wills, and that attorneys and physicians shall not be excused from testifying, in such cases, to information acquired while acting professionally for the decedent. He also proposes a large number of minor amendments.

From the report of Attorney-General McCormick, of Texas, we learn that from Nov. 30, 1879, to Dec. 1, 1880, there were 3,525 indictments for felony in the District Courts of that State, of which 906 resulted in conviction. These indictments and convictions were as follows:

	Indictments.	Convictions.
Embezzlement	78	8
Murder	259	88
Rape	44	9
Perjury	74	5
Forgery	131	36
Burglary.....	204	94
Arson	23	5
Robbery	99	18
Theft	1,758	483
Other felonies.....	855	180
Total.....	3,525	906

During the same period in the same courts there were 4,945 indictments and 399 convictions for less offenses. Most of the latter are tried in the county courts. The Attorney-General presents the following comparative tables of indictments and convictions for the last four years:

INDICTMENTS.				
	1877.	1878.	1879.	1880.
Murder	338	549	344	259
Theft	2,280	2,371	2,081	1,758
Arson	26	24	19	23
Perjury	82	90	79	74
Rape	58	53	34	44
Robbery	51	49	47	99
Forgery	85	258	155	131
Burglary.....	175	154	183	204
Total ..	3,130	3,548	2,943	2,528

CONVICTIONS.				
	1877.	1878	1879.	1880.
Murder	71	122	115	88
Theft	471	558	651	483
Arson	5	7	5	5
Perjury	3	1	10	5
Rape.....	11	9	16	9
Robbery	13	24	9	18
Forgery.....	9	17	19	36
Burglary.....	58	61	82	94
Total.....	641	799	907	738

Considering the recent enormous increase of population in Texas, we think the Attorney-General is justified in asserting that crime is decreasing in that State, and we think that the officers of criminal justice in that State are entitled to warm praise for their efficient administration.

NOTES OF CASES.

IT should be remarked, of the case of *Pennsylvania Railroad Company v. Price*, ante, p. 69, that it is strictly a case of definition rather than of principle, that it simply decides that a government mail agent is not a railway "passenger," within the meaning of a statute, and not that a railway company, in the absence of statutory provision to the contrary, is not bound safely to carry such a mail agent. The decision below, 22 Alb. L. J. 391, was grounded on the consideration of this principle rather than on the strict definition. A railway company is bound safely to carry a government mail agent, who pays no fare; *Hammond v. North-east R. Co.*, 6 S. C. 130; S. C., 24 Am. Rep. 467; an express messenger, *Blair v. Erie Ry. Co.*, 66 N. Y. 313; S. C., 23 Am. Rep. 55; *Nolton v. West. Ry. Co.*, 15 N. Y. 444; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71; *Cobwell v. Ry. Co.*, 16 Q. B. 984; one who for a gross compensation and his agreement to water the passengers is allowed to sell popcorn on the trains, *Com. v. Vt. & Mass. R. Co.*, 108 Mass. 7; S. C., 11 Am. Rep. 301; but not one whom an express messenger invites, *Union Pac. Ry. Co. v. Nichols*, 8 Kans. 505; S. C., 12 Am. Rep. 475; nor one who rides in a "caboose," or on a freight train, against the rules and without paying fare, *Eaton v. Delaware, etc., R. Co.*, 57 N. Y. 382; S. C., 15 Am. Rep. 513; *Creed v. Penn. R. Co.*, 86 Penn. St. 139; S. C., 27 Am. Rep. 693; *Houston & Tex. Cent. Ry. Co. v. Moore*, 49 Tex. 31; S. C., 30 Am. Rep. 98; nor one who is ordered off, but not ejected, for not paying fare, *Higley v. Gilmer*, 3 Mont. 90. The doctrine of drovers' passes, so much mooted, involves the question of contract.

In connection with Mr. Weightman's article in another column on the Law of Domicile as Affecting Marriage and Divorce, we give the following synopsis, from the *Solicitors' Journal*, of the case of *Harvey v. Farnie*, to which he refers: "In *Harvey v. Farnie* a marriage was, in 1861, solemnized in England between a domiciled Scotchman and an Englishwoman who at that time was domiciled in England. Immediately after the marriage, the wife went with the husband to Scotland, where they lived together until the year 1863, when the wife obtained in a Scotch court a decree for a divorce *a vinculo matrimonii*, on the ground of the husband's simple adultery—a ground upon which a divorce could not have been obtained in England. In the year 1865, the husband was married in England a second time to another English lady. The petition was presented by the second wife, claiming a declaration of nullity of marriage, on the ground that the Scotch divorce was inoperative in England, and that consequently the husband had a wife living at the time when the second marriage was solemnized. It was contended on behalf of the petitioner that because the marriage was celebrated in England it was indissoluble in Scotland, or indissoluble except for some cause for which it could be dissolved

in England, reliance being placed on *Lolley's case* (Russ. & Ryan, 237), in which it was said 'that no sentence or act of any foreign State could dissolve an English marriage *a vinculo matrimonii* for grounds on which it was not liable to be dissolved a *vinculo matrimonii* in England.' In that case, however, the marriage which was in question had been contracted between two persons domiciled in England, and had been solemnized in England, and a divorce on the ground of the husband's adultery was decreed by a Scotch court on the application of the wife during a temporary residence in Scotland, where the parties were not domiciled. Sir James Hannen held (L. R., 5 P. D. 153) that *Lolley's case* was distinguishable from, and did not govern, the present case, and that the decree of divorce by the Scotch court was valid in England as well as in Scotland, and consequently that the second marriage was valid. The decision was affirmed by the Court of Appeal (James, Cotton, and Lush, L. J.). James, L. J., said that the judgment in *Lolley's case* must be construed with reference to the particular facts which were then before the court for its determination—viz., a case in which the parties were domiciled in England at the time when the *status* of husband and wife was originally constituted, and continued domiciled there at the time when it was sought to dissolve the *status*." "On principle, James, L. J., said that he could not doubt that Sir James Hannen's decision was right. If a foreigner domiciled in his own country came to this country for the purpose of taking an English wife, the moment the *vinculum* of marriage existed the wife acquired the domicile of the husband, and all the rights and consequences arising out of the *status* would have to be determined by the law of that domicile which became the domicile of both husband and wife—assuming, of course, that the domicile was a real *bona fide* domicile, and not a fictitious one, resorted to for the sole purpose of altering the *status*. When the domicile was the natural *bona fide* domicile of husband and wife, the *forum* of the domicile must determine whether the *status* was originally properly constituted, and whether any ground had since arisen for dissolving it. Cotton, L. J., said that a great deal of the difficulty had arisen from the use of the word 'marriage' in two senses, as meaning the solemnity, and also the *status*. The validity of the solemnity must depend on the law of the place where the marriage was celebrated. The country of domicile always (i. e., in the case of Christian countries) recognized the parties as married if they had followed the forms prescribed by the law of the country in which the marriage was solemnized. But the *status* must be determined by the law of the actual domicile, and the domicile of a wife was always that of her husband. Divorce was not an incident of the marriage contract, in the sense that the *lex loci contractus* governed it; it was an incident of the *status*, and was to be determined by the law of the domicile. In the present case there was throughout a real domicile in Scotland, and the Scotch court had jurisdiction to determine the *status* of the parties, not only in Scotland, but in every other country.

The decision of the Court of Appeal in *Niboyet v. Niboyet*, L. R., 4 P. D. 1, did not conflict with this view, for it turned entirely on the construction of the English Divorce Act. Lush, L. J., said that in *Lolley's* case the marriage in question was called an 'English marriage.' But that term might refer, either to the place where the marriage was solemnized, or to a marriage between persons who were domiciled in England. In that case the marriage was an English one in both senses; in the present case it was English only in the sense of having been solemnized in England. The decision under the circumstances of the present case, that the divorce by the Scotch court was valid in England, seemed to be a logical sequence of the decision of the House of Lords in *Warrender v. Warrender*, 2 C. & F. 488. There a domiciled Scotchman was married in England to an English lady, and his Scotch domicile continued, and it was held by the House of Lords that a Scotch court could dissolve the marriage in Scotland. To hold that the dissolution extended to Scotland only, and that the divorced husband could, if he married again, be indicted in England for bigamy, would be a shocking thing. No doubt that consequence followed in *Lolley's* case. But that decision ought not to be extended. There were anomalies enough already in the law of marriage, and the court ought not to create another. The observations of Lord Brougham in *McCarthy v. De Cair*, 3 B. & M. 617, had been shown to be *obiter dicta*, and the decision of Lord Chancellor Blackburne, in *Maghee v. McAllister*, 3 Ir. Ch. Rep. 604, commended itself to one's sense of what was right and just."

In *Godeau v. Blood*, to appear in 53 Vt. 251, it was held that in an action for the bite of a dog it need not be proved that the dog had previously bitten mankind, but it is sufficient to prove that the dog was of a ferocious nature, had bitten dogs and horses, and that its keeper had been told by his neighbors that it was unsafe to allow it to run at large, and had kept it confined a part of the time, and muzzled a part of the time when he had allowed it to run at large. Also, held, in regard to the measure of damages, that solicitude and fear of hydrophobia was proper matter for consideration, although there was no proof that the dog was rabid. The court said: "The duty which the law casts upon the keeper of a malicious and dangerous domestic animal, is but the enforcement of a common moral duty, binding upon all men, that a man should so keep and use his own property as not to wrong and injure others. The formula used in text-books and in forms given for pleadings in such cases, 'accustomed to bite,' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would, under some circumstances, bite a person, then the duty

of restraint attached; and to omit it was negligence." *Shearm. & Redf. on Neg.* 281, 284; *Buckley v. Leonard*, 4 Den. 500. In a populous place like Burlington, where the streets are full of all kinds of people—children sent on errands, going and returning from school or church, or playing by the wayside—it is not a light thing that they are in danger of being torn to pieces, as was this plaintiff. Dogs have their rights; but if the jury found this dog to be, as described by one witness, 'the most wickedest kind of a dog,' as we think is most probable, from the perusal of the evidence, then his right was accurately defined by Chief Justice Lee, in *Smith v. Pelah*, 2 Str. 1246: 'Such a dog should have been hanged on the first notice; the safety of the king's subjects ought not afterward to be endangered.'" See, to same effect, *Muller v. McKesson*, 73 N. Y. 195; S. C., 29 Am. Rep. 123. Speaking of dogs, Judge Beckley says, in *Cranston v. Mayor*, 61 Ga. 578, they "have not had their exact legal relations adjusted in this State, and they and their owners are destined, perhaps, to a career of trouble for some years to come."

CONTRACTS FOR LOCATION OF RAILWAYS AND STATIONS.

IN a new country like ours, in which railways are every day being constructed, it is a very common thing for an individual to offer a company, projecting a new railway, a grant of land or a donation of money to induce a particular location of the route or of a station, and for the railway to accept the benefit subject to the condition. The public policy of such contracts has been considerably discussed in the courts. These contracts sometimes contain a condition prohibiting the company from erecting any other station within certain limits. The decisions are therefore to be ranked under two heads, first, those containing such restriction, and second, those not containing it.

In regard to the first we are not aware that there is any conflict of opinion. In *Marsh v. Fairbury & North-western Ry. Co.*, 64 Ill. 414; S. C., 16 Am. Rep. 564, A. D. 1872, it was held that specific performance of a contract to locate a railway depot on plaintiff's land and at no other point in the town, would not be enforced. The court said: "The location of railroad depots has much to do with the accommodation of the wants of the public. And when once established, a change of affairs may require a change of location, in order to suit public convenience. We cannot admit that an individual is entitled to call for the interference of a court of equity to compel a railroad company to locate unchangeably its depot at a particular spot to subserve the private advantage of such individual. Railroad companies, in order to fulfill one of the ends of their creation—the promotion of the public welfare—should be left free to establish and re-establish their depots wheresoever the accommodation of the wants of the public may require." The plaintiff "must

be left, for whatever remedy he may have, to his suit at law for damages."

In *St. Louis, Jacksonville & Chicago Railroad Co. v. Mathers*, 71 Ill. 592; S. C., 22 Am. Rep. 122, A. D. 1874, the same doctrine was applied in a suit to compel the reconveyance of land granted on condition that no stations should be built within three miles of a certain place.

In *St. Joseph & Denver City Railroad Co. v. Ryan*, 11 Kans. 603; S. C., 15 Am. Rep. 357, A. D. 1873, the agreement was to construct and maintain a station on the granted lands, and not have any other within three miles. It was held that an action for breach of this contract would not lie. The court say, among other things: "The public have a right to say that railroad companies shall not be permitted, though private corporations, to make any contracts which would prevent them from accommodating the public in the matter of transportation and travel. * * * Railroad corporations are, as we have seen, public agencies and perform a public duty. They are agencies created by the public with certain privileges and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty and cannot be enforced. * * * The number and location of the depots, so as to constitute reasonable depot facilities, vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is, in contravention of this duty." *State v. Hartford & N. H. R. Co.*, 29 Conn. 538, cited in this case, is not in point, for that was a case where the road had been constructed to the terminus directed by the charter, namely, the navigable waters of New Haven harbor, and subsequently by agreement with another road its terminus had been removed from those waters and located a mile and a half distant at the station of the other road in New Haven. *Mandamus* issued to compel the running of trains to the original terminus.

The doctrine of the *Ryan* case was held, in such an action, in *Williamson v. Chicago, Rock Island & Pacific Ry. Co.*, Iowa Supreme Court, March, 1880, 22 Alb. L. J. 29.

Second: But some courts have gone much beyond the doctrine of these cases, and have held that an agreement between an individual and a railroad company for the location of a depot at a particular place, in consideration of money or property, and without any restrictive provision, is against public policy, and void. *Pacific R. Co. v. Seeley*, 45 Mo. 212; *Bestor v. Wathen*, 60 Ill. 138; *Fuller v. Dame*, 18 Pick. 472.

The leading case seems to be *Fuller v. Dame*, 18 Pick. 472. This was an action on a note, given in consideration of an agreement to locate a station on certain lands of the payee. The station was built accordingly, but the court held the note not enforceable because the agreement was against public policy. The court, by Shaw, C. J., said: "The work is a public work, and the public accommodation is the ultimate object. In doing this a confidence was reposed in them, acting as agents for the public—

a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried—that is with the public interest. This confidence, however, could only be safely so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to the public interests to be affected and controlled by considerations having no regard to such interests. * * * It is obvious that if one large land-holder may make a valid conditional promise to pay a large sum of money to a stockholder, or influential citizen, on condition that a work of great public improvement may be so fixed as to enhance the value of his estate, all other great land-holders may make like promises, on similar conditions, and great public works, which should be conducted with a view to the public interest, and to the just rights of those who make advances for the public benefit, would be in danger of being overlooked and sacrificed in a mercenary conflict of separate local and private interests."

In *Bestor v. Wathen*, 60 Ill. 138, the agreement was to build a station on some vacant lots, where there was no town, with a view to building up a town there. The court said: "Rendered into plain English, the contract in this case was a bribe on the part of Wathen and Gibson to the president and other officers of the railway company, and to the contractors who were building the road, of an undivided half of one hundred and sixty acres of land, in consideration of which the road was to be constructed on a certain line and a depot built at a certain point. Now, if this was the best line for crossing the Illinois Central, considered with reference to the interests of the stockholders and of the public, then it was the duty of the officers of the company to establish it there; and if they intended so to do because it was the proper line, but professed to be hesitating between this and another line in order to secure for themselves the contract under consideration, as is somewhat indicated by the evidence, then they were practicing a species of fraud upon the defendants and using a false pretext in order to acquire defendants' property without consideration. If, on the other hand, this line was not the best, but was adopted because of this contract, the case is still stronger against complainants. If such was the fact, they are asking the court to enforce the payment of a bribe, the promise of which induced them to sacrifice their official duty to their private gain. If, as a third contingency, the choice lay between this line and another equally good, but not better, and they were influenced by this con-

tract to adopt this line, then, although neither the company nor the public has been injured, yet the defendants have made their official power an instrument of private emolument in a manner which no court of equity can sanction. In this particular case no wrong may have been done, and yet public policy plainly forbids the sanction of such contracts because of the great temptation they would offer to official faithlessness and corruption." "The defendants in the court below filed a cross-bill, asking the court to cancel this contract as a cloud upon their title, and this was done. In the view we have taken of the case, the contract should be regarded as so far against public policy that neither party is entitled to the aid of the court. The defendants have entered into a contract, the effect, or at least the tendency of which, was to induce the complainants to commit a breach of duty." And it was held that it made no difference that a town was subsequently built up there.

In *Pacific R. Co. v. Seeley*, 45 Mo. 212, Seeley agreed with the Pacific Railroad Company to deed it a certain lot of ground for purposes of speculation in consideration that the company would locate a freight and passenger depot on his land. The Massachusetts case was approved, and the court held that although in one sense the company was a private corporation, yet its chartered privileges were granted, in part, to subserve the public interests; that such an agreement might be superinduced by a prospect of mere gain, and thus the general welfare and good of the public might be sacrificed to subserve mere private interests; that for this reason such an agreement was against public policy and void.

Up to this point we conceive that there can be no difference of opinion. The first class of cases are clearly impolitic, and the second hardly less so. Indeed, the Massachusetts case is cited and approved in the Kansas case in the first class.

But there is a third class of cases, of which we have not spoken, namely, where a grant or donation is made to induce the location of the route or station at a particular city, town, or village, with no restriction, of course, against running to other like places. This is said by some to be distinguishable from the subservience of mere private and individual interests. Accordingly contracts involving such circumstances have sometimes been upheld.

Thus, in *C. B. R. Co. v. Baab*, 9 Watts, 458, it was held that "an agreement to pay an incorporated railway company a certain sum to induce the location of their route at a particular place is valid and binding, and may be enforced by action." The court there said: "To be allowed to do the best for the company's welfare by the use of every means not expressly interdicted is one of the conditions on which the stockholders subscribed their money, and it is one by which the public will not be found to suffer, for managers will doubtless have sufficient sagacity to see that the location which best serves the public is that which will give the company the greatest run of customers. It is most politic therefore to let such a company manage its

affairs according to the dictates of its interest." The action was on a subscription paper signed by many inhabitants of Harrisburg to induce the company to cross the river at a certain part of the town.

In *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499, the action was on a subscription of stock conditioned that the railway should be located through Lafayette, and cross the Wabash river north of Brown street in that town. This was held valid.

In *Jewett v. Lawrenceburgh, etc., R. Co.*, 10 Ind. 539, there was a subscription of stock conditioned that the road should be located within twenty rods of St. Omer. The subscription having been paid, and the condition not complied with, it was held that the money might be recovered.

In *First National Bank of Cedar Rapids v. Hendrie*, 49 Iowa, 402; S. C., 31 Am. Rep. 153, it was held that notes given in consideration that a projected railroad should be built to Council Bluffs, rather than another place, were enforceable. The court said: "This court has sustained statutes authorizing taxes in aid of railroad corporations to be voted by the people, on condition that their roads were built through the town or township where the vote was had. Notes and contracts conditioned for the payment of money upon the completion of railroads to points indicated have been held to be supported by sufficient consideration." Citing two Iowa cases. This case was distinguished in the *Williamson* case, *supra*. The court admit that *Holladay v. Davis*, 5 Or. 40, is opposed to their view, but they are mistaken in the concession, for the court in that case expressly declined to give any opinion on the question, and based their decision on another point, namely, that the consideration moved to an agent and not to the principal.

We are inclined to think that the third class of contracts are not against public policy. They involve no sacrifice of public to private interests as do the first two classes. They simply involve a choice between two or more rival or conflicting public interests, and in making such a choice we can see no immorality in the acceptance of a benefit as the consideration of the decision.

THE LAW OF DOMICILE AS AFFECTING MARRIAGE AND DIVORCE.

AN important decision has just been rendered by the English Court of Appeal in the *Farine* case. The decision unanimously confirms the decision of the court below, viz., that the *domicile* of the husband and not the *locus contractus*, must determine the nationality of the marriage. The contract may be effected in a foreign country, but the incidents that attach are those of the country of the domicile. The nationality of the individuals does not affect the question, but their domicile, which may be in any country other than that of their nativity, determines the law by which the incidents, such as divorce, the most important of all, are to be governed. Premising that the wife acquires the husband's domicile the moment the status of marriage is effected, a curious case, involving the principle thus enunciated, has not long since occurred in the diplomatic circles of Washington society. In the case referred to the lady, an American we pre-

sume, though her nationality does not affect the question, married an Englishman of the name of Haggard, an *attaché* of the British Legation at the above-named city. Within two years they separated at the husband's dictation, and, as he subsequently declared in writing, "for ever," he having accepted a diplomatic appointment at the court of Persia. The lady who had returned to her friends at Washington at her husband's direction, after having accompanied him to England, obtained last July a divorce absolute from the court at Washington sitting in equity, on the ground of willful deliberate desertion by her husband. As her husband's domicile was England, although he was temporarily residing officially at Washington at the time of the marriage (*Attorney-General v. Kent*, 31 L. J. Ex. 391; 10 W. R. 722; 6 L. T. [N.S.] 864; and *Attorney-General v. Pottinger*, 6 H. & N. 733), the marriage was an English one though solemnized at Washington, and as by the law of England desertion is not a ground for an absolute divorce but only for a judicial separation—this divorce would not be recognized in England, and either of the parties contracting another marriage in England might be indicted for bigamy (see *Lolley's case*, Russ & Ryan's C. C. 237) and the subsequent offspring would be spurious; in one word, all the disabilities and privileges of the original marriage would remain in full force. The original marriage remains valid and undissolved in England, and as the law of the domicile regulates the distribution of personal property (*Somerville v. Somerville*, 5 Ves. 754; *Gambier v. Gambier*, 7 Sim. 263) as well as the *lex loci rei sitæ* that of real estate (*Doe d. Birtwhistle v. Vardill*, 5 B. & C. 438; 8 D. & R. 185; *Kent's Com. L. 37, § 4*) it is obvious that complications might arise, if not in this particular case, involving questions of dower, curtesy and intestate distribution. Now, as the wife's domicile as well as nationality is that of her husband (*Dig. 50, I 37*; *Code, XII, 1, 13*; and *33 and 34 Vict., ch. 14, § 10*, based upon a treaty with the United States) and indeed she cannot acquire a domicile for herself notwithstanding any misconduct of his (*Yelverton v. Yelverton*, 1 Tw. & Tr. 585; *Whitcombe v. Whitcombe*, 2 Curtis, 351; *Warrender v. Warrender*, 2 Cl. & Fin. 488; *In re Daly*, 27 L. J. Chanc. 751; *Dolphin v. Robins*, 29 L. J., P. M. & A. 11) although this presumption fails after a judicial separation (*Williams v. Dormer*, 2 Robert, 505) which in the case before us does not exist, what is the solution to the perplexity thus created? The *ius gentium* must be respected, even though an individual hardship should result—and the unity of nations demands a reciprocal recognition. The European and American law is agreed that a "man can have but one domicile for the purpose of succession." *Kent's Com., supra*. He may have many residences in different countries, but he can have but one domicile. Has the Washington court erred then in granting the divorce in this case without sufficiently reflecting that this was an English not an American marriage, and should therefore be governed by English rules?

Strange that such a precedent, if not immediate prospect, of confusion should have originated with a member of the family of such a celebrated ecclesiastical lawyer as the author of Dr. Haggard's Ecclesiastical Reports!

HUGH WRIGHTMAN.

THE CASE OF MIRZAN.

THE aim of the present article is to maintain that the conviction of *Mirzan* was entirely unlawful, and in so doing I will refer to two able articles upon this subject, one by Judge Batchelder who acted as prosecuting attorney, appearing in the *Daily Saratogian* of September 27, 1880, and noticed in this JOURNAL under date of October 9, and one by Mr. Kopelke in this

JOURNAL under date of January 8. I have the great pleasure of agreeing with Mr. Kopelke in all respects excepting the two points of difference hereafter indicated.

The criminal jurisdiction of the United States presents shades of difference according as the offense is alleged to have been committed in a State, upon the high seas, within the territory of the United States, or without that territory. Congress cannot define and punish a crime such as the Ruloff murder, *e. g.* committed in a State; it has power to define and punish piracies and felonies committed upon the high seas; it may make all needful rules and regulations, so far as not prohibited by the Constitution, respecting the territory or other property belonging to the United States. The need of the United States having jurisdiction in a case like that of *Mirzan* was not contemplated when the Constitution was framed, but for some time now it has been felt that it is due to Americans, when in foreign countries, and to the dignity of our government, that they should be protected there; and their best protection is, that when accused of offenses, they shall not be tried after the primitive methods of certain governments but by our own laws.

Accordingly by treaty of May 7, 1830, with Turkey, it is provided, "citizens of the United States of America guiltlessly pursuing their commerce and not being charged or convicted of any crime or offense, shall not be molested; and even when they shall have committed some offense, they shall not be arrested and put in prison by the local authorities, but shall be tried by their minister or consul and punished according to the offense, following in this respect the usage observed toward other Franks." Similar provisions are contained in treaties with many other nations. Independently of these treaties, the United States could not exercise jurisdiction in any of those countries. Its right is increased by treaty to that extent.

But it is said, the powers of our government emanate from the people and are defined in the Constitution, and how can a foreign nation increase them? It cannot, unless the Constitution gives the government a right to receive the offered power, in which case it will be received and exercised under the Constitution. I admit that the power of our government to receive from Turkey jurisdiction to try in that country Americans accused of having committed crimes there, is not entirely clear. If prohibited by any other clause of the Constitution, it cannot be obtained under the treaty-making power. That power "is necessarily and obviously subordinate to the fundamental laws and Constitution." Story on the Const. V, § 1502. But inasmuch as Turkey might cede to us all her possessions, why may not we lawfully receive that portion which consists in the territorial right of jurisdiction to try and punish in that country offenses there committed by American citizens? This being the only argument which can be offered, will, I think, in view of the apparent necessity of the case, be ultimately adopted. I answer then that the jurisdiction ceded becomes a part of the territorial property of the United States, over which we may make regulations by virtue of the same right by which we make regulations for Alaska. If this is so, the argument of Mr. Kopelke fails, for notwithstanding the *Dred Scott* decision, the United States can punish crimes such as murder committed either in its original or its subsequently acquired territory. *Cf. Ins. Co. v. Canter*, 1 Pet. 511; *Dred Scott v. Sandford*, 19 How. 432-444.

Having received jurisdiction, must Congress make its regulations in accordance with the Constitution, or may it make them contrary to the Constitution? We shall agree that a regulation made contrary to the Constitution is no law. But supposing the treaty itself says that the regulation when made shall be contrary to the Constitution, or that by virtue of the treaty, a

prohibition of the Constitution shall be deemed abrogated? This is already answered; both the treaty-making power and the treaty must bend to the other provisions of the Constitution, and so far as contrary to them, there is no treaty and no law. This at once brings us to an application. The Constitution says that the judicial power of the United States shall be vested in courts, the judges of which shall hold office during good behavior, and receive a compensation which shall not be diminished during their term of office. Section 4083 of the Revised Statutes says that the "judicial authority herein described shall appertain to the office of minister and consul," who do not hold their office during good behavior. This section therefore must be held to be inoperative, because Congress has not as yet invested our ministers and consuls with the constitutional attributes of judges. Every trial which has taken place or is taking place before a minister or consul, under this section, is as clearly void as if it took place before the collector of the port of New York. Congress has, however, assumed to define the jurisdiction and to regulate the procedure of our ministers and consuls upon the trial of offenders, and the provisions affecting the Mirzan case will be found under sections 4125, 4083, 4084, 4086, 4090 and 4091 of the Revised Statutes.

Mr. Kopelke, however, maintains that the trial and conviction of Mirzan can be sustained as that of a Turkish subject before a Turkish judge, and a matter with which we have no concern, yet it is for us and not for Turkey to say whether Mirzan shall be hung or shall not be hung. The facts of the case itself are the best answer to his suggestion.

Stephen P. Mirzan was born in Smyrna, of American parents, and was naturalized at Boston, July 17, 1879. He was a resident of Alexandria, in Egypt, and editor of the *Bulletin Financier*. Upon that day, he is alleged to have murdered Dehan Bey, an attorney-general of the Egyptian government. He was taken into the custody of the United States and tried at Alexandria, by our minister to the Ottoman Empire, Mr. Maynard, who, acting under instructions from Washington, followed closely the statutes which are above cited. He was not presented or indicted by a grand jury, as required by the fifth amendment to the Constitution, nor allowed the trial by jury, required by article 3, section 2 of the Constitution, and the sixth amendment, but was convicted and sentenced to death by the minister sitting alone. The process, except as to foreign witnesses, was in the name of the United States. The accused had since been detained in the custody of the United States, and if executed, it will be by its power, and if not executed it will be on the sole ground that the trial was not in accordance with the laws of the United States. The United States obtained leave by treaty, not that its citizens in Turkey should be tried by a private person acting without responsibility to either government, but by one of its officers, accountable to our government for a misuse of his power. The trial was then an attempted trial of an American citizen before an American judge, and as such is entirely void, being in contravention of at least four different provisions of the Constitution.

The arguments by which the prosecution attempted to justify their procedure are peculiar. If the statement of Judge Batchelder is carefully read, it will be seen that he recognizes the power of Congress to regulate these proceedings, and desires improved laws, which shall provide that in future the trial shall be before the consul and four associates, with right of appeal to the minister and then to the Circuit Court. He escapes the difficulty about the Constitution by the statement that that instrument "is in fact a 'dead letter' in all other countries." "Instead of the American Constitution extending to Egypt, or other Turkish domains, it is the Sublime Porte which accords the grace

to our citizens, committing crimes within his dominions, of being tried before such a tribunal as our government may have created there for such purpose." (The italics are my own.)

The United States court, upon appeal, will hardly hold that "the laws made in pursuance thereof" can extend where the Constitution which upholds them cannot extend. The minister assumed to try Mirzan according to American law, and followed the statutes; I think he should have followed the Constitution and that if the United States had several kinds of law, yet he should have allowed a man on trial for his life to have the very best kind. He could not very consistently say, your oath of allegiance remains in force to give me jurisdiction to try and to hang you, but the Constitution itself and its guaranties, by virtue of which you took that oath, are a "dead letter."

This case, we are informed, has excited much unfavorable comment in European journals, which have been asking, with some show of solicitude, whether American citizens have any rights when abroad, or are subject to the despotic caprices of a single man. As for Mirzan himself, I think all honest men will heartily rejoice whenever he can lawfully be hanged, but the next man may be innocent. His conviction is absolutely void in law and should be denounced as a disgrace to our system of jurisprudence.

J. B. GLEASON.

DELHI, N. Y., Jan. 21, 1881.

FRAUDULENT CONVEYANCE BY CORPORATION.

SUPREME COURT OF THE UNITED STATES, NOV. 15, 1880.

GRAHAM ET AL., Appellants, v. LA CROSSE AND MILWAUKEE RAILROAD COMPANY ET AL.

The disposal by a corporation of any of its property for an insufficient consideration cannot be questioned by subsequent creditors of the corporation any more than a like disposal by an individual of his property can be questioned by his subsequent creditors.

It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, dispose of property for an inadequate consideration or even make a voluntary conveyance of it, subsequent creditors cannot question the transaction. A railroad company sold and conveyed real estate not then wanted by it to N., who sold and conveyed the same to a director of the company at whose instance N. had made the purchase. The consideration for each conveyance was the same, \$25,000. The director afterward disposed of a part of his interest in the property to other directors. The sale to N. was subsequently ratified by the board of directors of the company. At the time of the sale the company was not indebted to any considerable amount and was perfectly solvent. Held, that the sale would not be set aside as fraudulent on the ground that the corporation was defrauded of its property by the directors, it appearing that the property was sold for a fair value at the time and no loss accrued to the company's estate.

APPPEAL from the Circuit Court of the United States for the Eastern District of Wisconsin. The action was brought by Laurence G. Graham and Donald D. Scott, against The La Crosse and Milwaukee Railroad Company, The Milwaukee and Saint Paul Railway Company, James Luddington, Ephraim Mariner, James Kneeland, administrator, etc., of Moses Kneeland, and others, to set aside certain conveyances. The opinion states the case.

BRADLEY, J. In September, 1855, the La Crosse and Milwaukee Railroad Company, not being at that time, so far as appears, indebted in any considerable amount, sold certain real estate in the city of Milwaukee not then wanted for railroad purposes, to Charles D. Nash

for the sum of \$25,000. The officers of the company who took a leading part in negotiating the sale are charged to have been interested in the purchase, and to have furnished Nash the means for effecting it. At all events, shortly after it was made, Nash conveyed the property for the original consideration to Moses Kneeland one of the officers referred to, and Kneeland, retaining one-third part, subsequently conveyed the other two-third parts to Luddington and Kilbourn, they all being directors of the company and members of the executive committee. The company itself never questioned the fairness of this transaction; on the contrary the sale was subsequently (in March, 1858) expressly confirmed by the board of directors; and a further quit-claim deed executed by the company in confirmation thereof. In September and November, 1858, the appellants, Graham and Scott, recovered two judgments against the company for indebtedness on contract, arising after the sale of the lands, and issued executions thereon, under which levies were made on said lands as lands of the company. In January, 1860, the appellants, having sued these judgments in the United States court, recovered a second judgment for upwards of forty thousand dollars, issued execution thereon, and made another levy on the lands. Being unwilling to attempt a sale under their said execution in consequence of the deeds for the lands being recorded, the appellants, in June, 1860, filed the bill in this case in the Circuit Court of the United States for the Eastern District of Wisconsin, against Kneeland, Kilbourn, Luddington and the railroad company, setting forth their said judgments, executions and levies, stating the fact of the said sale to Nash and his conveyance to Kneeland, and the latter's conveyance to the other parties; alleging that the transaction was a fraud against the corporation and its creditors, and complaining that the said conveyances of the lands were a cloud upon their right to sell the lands under execution, and an impediment in the way of the execution of their writ of *fiert facias*; and prayed that the lands might be decreed subject to the lien of their judgment; that they might be decreed to be authorized to sell the same, or so much as might be necessary for the purpose of satisfying their judgment; and that Kneeland, Kilbourn and Luddington might join in the conveyance, and might be enjoined from claiming the land; and that the conveyances to them might be declared null and void. The bill, amongst other things, averred that the lands were sold to Nash for much less than their real value; but it contained no allegation that the company was insolvent, or that it had not other assets available under an execution; nor was any offer made to repay the consideration which the purchaser had given for the lands.

To this bill the defendants severally filed answers, denying that the lands were worth more than \$25,000 at the time of sale; averring that the sale was made in good faith and with the company's concurrence, and setting forth in detail many circumstances tending to show that the title was involved and embarrassed; that they required large outlays of money to render them available; that the company had offered them for sale in the market and was unable to get from any other person the price paid for them by Nash; that although Nash was requested to purchase the lands by Kneeland, and was aided by him in paying therefor, yet Nash had the option to keep them; but after making the purchase and inquiring into the title and situation of the lands, he asked to be relieved from the purchase and that thereupon Kneeland, Kilbourn and Luddington took them off his hands.

The parties went into proofs, and it does appear that the company had, for months prior to the sale, been endeavoring to dispose of the lands, and could get no purchaser at the price offered by Nash; and the leading statements of the answer as to the title and situa-

tion of the lands was verified. It also appeared that the railroad company never objected to the sale; but that it was expressly confirmed in March, 1858, by a resolution of the board of directors as before noticed.

Various transactions subsequently took place by which other parties became interested in the lands, and in the affairs and property of the railroad company, which are fully developed in the supplemental proceedings and proofs; but it is unnecessary to notice them further. The foregoing statement exhibits the leading features of the case as presented for our consideration.

The main question is, whether the sale to Nash, made before the railroad company became indebted to the appellants, and when, for all that appears, it was perfectly solvent, even though made for the use and benefit of the officers referred to, can be set aside at the instance of the complainants, for the purpose of subjecting the lands to sale under their execution. And this question, we think, must be answered in the negative.

It is a well-settled rule of law that if an individual, being solvent at the time, without any actual intent to defraud creditors, dispose of property for an inadequate consideration, or even make a voluntary conveyance of it, subsequent creditors cannot question the transaction. They are not injured. They gave credit to the debtor in the status which he had after the voluntary conveyance was made.

The authorities on this subject are fully collected in the notes to *Sexton v. Wheaton*, 1 Am. Lead. Cas. 1, and in the opinion of Chief Justice Marshall in that case, and the general doctrine is affirmed in the case of *Mattingly v. Nye*, 8 Wall. 370.

It is true that if a debtor dispose of his property with intent to defraud those to whom he expects to become immediately or soon indebted, this may be a fraud against them which they may have a right to unravel. But that is a special case to which the present bears no resemblance. It is not pretended that the railroad company disposed of the property in question for the purpose of defrauding creditors, much less for the purpose of defrauding those who afterward in due course of business might become its creditors.

But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right and one that inures to the benefit of creditors.

Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred — and cases to that effect have been cited — the question still remains whether, the debtor being unwilling to disturb the transaction, subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case going as far as this can be found. No such case has been cited in the argument. Dicta of judges to that effect may undoubtedly be produced, but they are not supported by the facts of the cases under consideration.

It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud which he has acquiesced in, and which he has manifested no desire to disturb. Yet in such a case, subsequent purchasers have no such right. In the case of *French v. Shotwell*, 5 Johns. Ch. 555, Chancellor Kent decided, upon full consideration, that when a party to a judgment, entered upon a warrant of attorney, voluntarily waives his defense or remedy on the ground of fraud or usury, and releases the other party, a subsequent purchaser under him, with notice of the judgment, will not be allowed to impeach it or to investigate the merits of

the original transaction between the original parties; and he dismissed a bill filed by the subsequent purchaser for relief in such a case. The chancellor said: "If the party himself, who is the victim of fraud or usury, chooses to waive his remedy and release the party, it does not belong to a subsequent purchaser under him to recall and assume the remedy for him. If a judgment was fraudulent by collusion between the parties to it on purpose to defraud a subsequent purchaser, the case would present a very different question. But if the judgment was fraudulent only between the parties, it is for the injured party alone to apply the remedy. If he chooses to waive it and discharge the party, it cannot consist in justice or sound policy that a subsequent voluntary purchaser, knowing of that judgment, should be competent to investigate the merits of the original transaction as between the original parties. *Quisque potest renunciare juri pro se introducto.* * * It is stated to have been a principle of the common law, that a fraud could only be avoided by him who had a prior interest in the estate affected by the fraud, and not by him who subsequently to the fraud acquired an interest in the estate. *Cro. Eliz. 445; 3 Co. 83a.*"

This decision of Chancellor Kent was afterward nearly unanimously affirmed by the Court of Errors of New York, 20 Johns. 668.

When the question of the right of a creditor to set aside a conveyance procured from the debtor by fraud first came before the courts in England, it was held that the debtor's own right was merely the right to file a bill in equity against the fraudulent grantee adversely; and if he did not see fit to take such a proceeding, his creditor had no such privity with the transaction as to enable him to obtain relief, even though the debtor should assign his supposed right to the creditor; that the transaction savored of champerty, and was opposed, at least, to the spirit of the law against champerty and maintenance. This was the substance of the decision by the Court of Exchequer in *Prosser v. Edmonds*, in 1835. 1 Young & Coll. Exch. Eq. 481. Lord Abinger treated the case as a new one and at the close of the argument remarked that his impression was that such a claim could not be sustained in equity, unless the party who made the assignment joined in the prayer to set it aside. He afterward gave a deliberate opinion upon the point. In that case an executor and trustee had fraudulently procured an assignment of his brother-in-law's interest in the estate, knowing its value, which was unknown to the assignor. A subsequent creditor of the assignor, to whom he assigned his whole interest in the estate, filed a bill to set aside the assignment to the trustee. Lord Abinger distinguished the case from that of an assignment of a chose in action, as a note not negotiable, or a bond, or mortgage or equity of redemption, where possession of the thing assigned is delivered to the assignee; and treated it as an assignment of a mere naked right to file a bill in equity, in which the last assignee purchased nothing but a hostile right to bring parties into a court of equity as defendants to a bill filed for the purpose of obtaining the fruits of his purchase. "What is this," says the lord chief baron, "but the purchase of a mere right to recover? It is a rule—not of our law alone, but of that of all countries,* that the mere right of purchase shall not give a man a right to legal remedies. The contrary doctrine is nowhere tolerated, and is against good policy. All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce. There are many cases where the acts charged may not amount properly to maintenance

or champerty, yet to which, upon general principles, and by analogy to such acts, a court of equity will discourage the practice." "Robert Todd, when he assigned, was in possession of nothing but a mere naked right. He could obtain nothing without filing a bill. No case can be found which decides that such a right can be the subject of assignment, either at law or in equity." These remarks are very broad and would apply to the case of existing as well as subsequent creditors; though the case itself was that of a subsequent creditor. It forms the subject of a section in Story's Commentaries on Equity (§1040h), where, in a note, Lord Abinger's opinion is extensively quoted; and it has been followed by other very respectable authorities, and as applied to subsequent creditors, at least, we think that the reasoning is sound.

The principle established in *Prosser v. Edmonds* has been adopted by the Supreme Court of Wisconsin, in which State the lands in question are situated. In *Crocker v. Bellangee et al.*, 8 Wis. 645, decided in 1858, it was held that a deed obtained from the grantor through fraudulent representations made by the grantee is not void, but voidable only, at the election of the grantor; and that the conveyance of the same land by the grantor to another person is not the exercise of such election, and does not avoid the former deed; that in order to avoid such former deed, some proceeding must be had by the grantor to which the grantee is a party; and that a subsequent purchaser from the grantor cannot set up the alleged fraud of the first grantee to defeat his title; the court holding that the right of a vendor to avoid a sale or deed on the ground of fraud practiced by the vendee is not a right or interest capable of sale and transfer, so as to enable a subsequent vendee of such right, for such cause, to attack the title of the first vendee; that it is a mere personal right, incapable of sale or transfer.

In *Milwaukee & Minnesota R. Co. v. Milwaukee & Western R. Co.*, 20 Wis. 174, the latter company had covenanted to pay a certain portion of an incumbrance on railroad property afterward purchased by the complainant company under a subsequent mortgage. A release of the obligation had been fraudulently, as alleged, procured from the original mortgagor company owning the road. The complainant purchased under a mortgage which conveyed "all causes of action, demands, and choses in action, of whatever nature," of the mortgagors; and claimed to have purchased the right to set aside the alleged fraudulent release, and filed a bill for that purpose; but the bill was dismissed on the ground that such a right of action could not be thus assigned. The court say: "Admitting that the facts alleged present a case which would entitle the La Crosse & Milwaukee company [the mortgagor] to have the release set aside on account of these acts of fraudulent concealment by one of its directors of his interest in the defendant company, and assuming that the further fact appears that this right of action has been assigned by the La Crosse & Milwaukee company to the plaintiff, the question would then arise, whether the release could be avoided on the application of such plaintiff, the La Crosse & Milwaukee company making no complaint of the fraud whatever. In other words, is this mere right to litigate the question, and to set aside the deed of release on account of fraud practiced upon the assignor, a subject of assignment and transfer, and will a court of equity allow the assignee to stand in the shoes of the assignor in respect to the remedies?" And then referring to the previous case of *Crocker v. Bellangee*, and to *Prosser v. Edmonds*, the court expresses its approbation of those decisions, and adds: "A reference to these authorities is all which probably need be said at this time in regard to the allegations above cited [referring to the contention of counsel], and upon the point whether the plaintiff company could

* Voet ad Pandect, Lib. 41, tit. 1, § 83.

avoid the release for the alleged fraudulent act of concealment, even if this right of action had been assigned to it by the La Crosse & Milwaukee company."

It seems to us that those cases which, so far as it appears, declare the settled law of Wisconsin, are conclusive of the present case.

It is contended on the part of the appellants, that the case of *Prosser v. Edmonds* has been overruled by the subsequent cases of *Dickinson v. Burrill*, L. R., 1 Eq. 337, and *McMahon v. Allen*, 35 N. Y. 405. We have examined these cases, and others which are supposed to be in conflict with *Prosser v. Edmonds*. In *Dickinson v. Burrill*, the Master of the Rolls, Lord Romilly, expressly disavows any intention to overrule the former case. He says: "The demurrer is mainly supported on the case of *Prosser v. Edmonds*, which was decided, after long deliberation, by Lord Abinger; but I am of opinion that the case before me does not fall within the rule established by that decision." The case then before the court was, that a conveyance of an interest in an estate had been fraudulently procured from Dickinson, by his own solicitor, to a third party for the solicitor's benefit, and for a very inadequate consideration. Dickinson, ascertaining the fraud, by a conveyance which recited the facts, and that he disputed the validity of the first conveyance, transferred all his share in the estate to trustees for the benefit of himself and his children. The trustees filed a bill to set aside the fraudulent conveyance upon repayment of the consideration-money and interest, and to establish the trust. The Master of the Rolls sustained the bill, observing: "The distinction is this: if James Dickinson had sold or conveyed the right to sue to set aside the indenture of December, 1860, without conveying the property, or his interest in the property, which is the subject of that indenture, that would not have enabled the grantee, A B, to maintain this bill; but if A B had bought the whole interest of James Dickinson in the property, then it would. The right of suit is a right incidental to the property conveyed." "I think that the distinction between the conveyance of the property itself and the conveyance of a mere right to sue, or what in substance is a right to sue, is taken by Lord Abinger, in the case of *Prosser v. Edmonds*. The distinction is also taken in *Cockell v. Taylor*, 15 Beav. 103, and in *Anderson v. Radcliffe*, Ellis, B. & E. 806, and has been adopted and approved in many other cases; and it is, I think, founded in reason and good sense."

Surely, there is here no overruling of *Prosser v. Edmonds*, even if such overruling could avail against the Wisconsin decisions. It leaves that case in full force as to assignments of the mere right to sue. In the case before us there is not even that. The railroad corporation acquiesced in the sale and confirmed it. The conveyance which perhaps might have been set aside had the company seen fit, became absolute as between the parties and carried the title. It is as valid between the parties as if the corporation had conveyed to a stranger. The appellant then becomes a creditor, and afterward obtains judgment, and simply makes a levy; and then comes into court and asks its aid to remove a cloud from his title. What title? Has he acquired any title? Was there any title for him to acquire? There had been a right to file a bill in equity, and that right had been remitted by the company's acquiescence in the sale—probably for the reason that it obtained all that the property was worth at the time. The contrary, at least, is not established. And if it were established, it would only make out a case of voluntary conveyance as against a subsequent creditor, which has already been considered. We think that there is nothing in the case of *Dickinson v. Burrill* to overrule the effect of *Prosser v. Edmonds*, so far as the present case is concerned.

Then, as to the case of *McMahon v. Allen*, 35 N. Y.

403, decided in 1868. One Harrison, in March, 1852, being in debt, was induced by the fraudulent contrivance of his agent and attorney, and to the prejudice of his creditors, to convey to said agent for a very inadequate consideration, his interest in his mother's estate and in certain other property, he being ignorant of the fraud practiced upon him. In August, 1852, Harrison made a general assignment for the benefit of his creditors of all his property and rights of action, with full power to sue for and collect the same. The assignee filed a bill to set aside the conveyance to the agent. The bill was sustained. The court, Mr. Justice Hunt delivering the opinion, relied on *Dickinson v. Burrill*, saying: "In the recent case of *Dickinson v. Burrill*, this precise question was presented;" and after quoting largely from the opinion in that case, added: "This was a well-considered case, is of high authority, and in my opinion, is an accurate exposition of the law. I think it should control the present case." In the New York case, it is true, there was no express repudiation of the fraudulent conveyance, as in *Dickinson v. Burrill*, but there was a conveyance of the estate to the assignee, with a power to sue for the benefit of creditors; and those creditors had been directly defrauded. Without further comment, it seems to us clear, that *McMahon v. Allen* cannot control the present case.

The principle that subsequent creditors cannot question a voluntary or fraudulent disposition of property by their debtor, not intended as a fraud against them, is especially applicable in cases of constructive fraud, like that charged in the present bill. Suppose it be true that the purchase of the lands in question, by or for the benefit of officers of the company, actively concerned in the transaction, could be set aside at the instance of the company as a constructive fraud; yet if there was no actual fraud; if the company received full consideration for the property sold, how can it be said that subsequent creditors of the company are injured?

In the present case we are satisfied from the evidence that the property was sold for its fair value at the time, and that no actual loss accrued to the railroad company's estate.

It would be unjust and a great hardship, therefore, on the mere ground of the constructive fraud, to allow creditors, who had no interest at the time, to seize and dispose of the property sold.

It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; that whilst the latter has supreme dominion over his own property, a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors, and that if it fail to pursue its rights against third persons, whether arising out of fraud or otherwise, it is a breach of trust, and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but in law it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

When a corporation becomes insolvent, it is so far civilly dead that its property may be administered as

a trust-fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust-funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. We see no reason why the disposal by a corporation of any of its property should be questioned by subsequent creditors of the corporation, any more than a like disposal by an individual of his property should be so. The same principles of law apply to each.

We think that the present bill cannot be maintained, and that the decree of the Circuit Court must be affirmed.

DISCRIMINATION AGAINST PRODUCTS OF OTHER STATES IN STATE TAX LAW.

SUPREME COURT OF THE UNITED STATES, NOVEMBER, 15, 1880.

TIERNAN ET AL., Plaintiffs in Error, v. RINKER.

A statute of Texas provides for a tax "for selling spirituous, vinous, malt and other intoxicating liquors, in quantities less than one quart, two hundred dollars, etc., provided that this section shall not be so construed as to include any wines or beer manufactured in this State," etc. Held, that this statute is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately from other liquors, but not so when the occupation is the sale of any of the other liquors mentioned.

In error to the Supreme Court of the State of Texas. Action by Barney Tiernan and others against Selim Rinker, as county treasurer of the county of Galveston, Texas, to enjoin the enforcement of a State tax law. The facts appear in the opinion.

FIELD, J. A statute of Texas regulating taxation, passed in June, 1873, in its third section enacts: "That there shall be levied on and collected from every person, firm or association of persons, pursuing any of the following named occupations, an annual tax, — as follows: For selling spirituous, vinous, malt, and other intoxicating liquors, in quantities less than one quart, two hundred dollars; in quantities of a quart and less than ten gallons, one hundred dollars; provided, that this section shall not be so construed as to include any wines or beer manufactured in this State, or when sold by druggists for medicinal purposes."

In the succeeding section the statute authorizes the county courts of the several counties of the State to levy taxes upon the same parties equal to one-half the amount of the State tax. In pursuance of this authority the county court of Galveston county, in March, 1876, levied a tax upon the parties engaged in the occupations mentioned in the third section, equal to one-half the tax levied by the State.

The petitioners in the court below, the plaintiffs in error here, are engaged in the county of Galveston in the occupation of "selling spirituous, vinous, malt, and other intoxicating liquors," some of them in quantities less than one quart, and others in quantities of one quart and less than ten gallons; and the wines and beers which they sell are not of the manufacture of the State. They therefore seek to enjoin the enforcement of the tax against them, on the alleged ground that the statute is invalid in that it discriminates in favor of wines and beer manufactured in the State against those which are manufactured elsewhere, and they commenced the present suit for that purpose. The District Court of the State sustained a demurrer to their petition and dismissed the case. The Supreme Court of the State affirmed the decision, and hence the appeal to this court.

The petitioners rely upon the ruling of this court in

the case of *Welton v. Missouri* to sustain their position. There the State had exacted the payment of a license-tax from travelling peddlers who dealt in the sale of goods, wares and merchandise, which were not the growth, product or manufacture of the State, and required no such license-tax from similar traders selling goods which were the growth, product or manufacture of the State. And this court held, following in that respect the ruling in *Brown v. Maryland*, that the tax exacted from dealers in goods before they could be sold was in effect a tax upon the goods themselves, and that the legislation which thus discriminated against the products of other States in the conditions upon which they could be sold by a certain class of dealers was in conflict with the commercial clause of the Constitution.

In deciding the case, the court observed that the power conferred by this clause to regulate commerce with foreign nations and among the several States is without limitation; and that to regulate commerce is to prescribe the conditions upon which it shall be conducted; to determine how far it shall be free from restrictions; how far it shall be subjected to duties and imposts, and how far it shall be prohibited; that when the subject to which the power applies is National in its character or of such a nature as to admit of uniformity of regulation, the power is exclusive of State authority; that the portion of commerce with foreign countries or between the States, which consists in the transportation and exchange of commodities, is of National importance and admits and requires uniformity of regulation; that the object of vesting this power in the general government was to insure this uniformity against discriminating State legislation; and that to that end this power must cover the property which is the subject of trade from hostile or interfering legislation until it has become a part of the general property of the country and subject to similar protection and to no greater burdens. If, before that time, the property can become subject to any restriction by State legislation, the object of vesting the control in Congress may be defeated. If the State can exact a license-tax from one class of traders for the sale of goods which are the growth, product or manufacture of other States, it can exact the license from all traders in such goods and the amount of the tax will rest in its discretion. "Imposts," the court said, "operating as an absolute exclusion of the goods, would be possible, and all the evils of discriminating State legislation favorable to the interests of one State and injurious to the interests of other States and countries, which existed previous to the adoption of the Constitution, might follow, and the experience of the last fifteen years shows would follow, from the action of some of the States." The court therefore held that the commercial power of the Federal government over a commodity continued until the commodity had ceased to be the subject of discriminating legislation in any State by reason of its foreign character, and that this power protects it after it has entered the State from any burdens imposed by reason of its foreign origin. The court also held that the inaction of Congress to prescribe any specific rules to govern inter-State commerce, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled, and that this policy would be defeated by discriminating legislation like that of Missouri.

The doctrine of this case has never been questioned; it has been uniformly recognized and approved, and expresses now the settled judgment of the court.

According to it the statute of Texas is inoperative, so far as it makes a discrimination against wines and beer imported from other States, when sold separately

from other liquors. A tax cannot be exacted for the sale of beer and wines when a foreign manufacture, if not exacted from their sale when of home manufacture. If a party be engaged exclusively in the sale of these liquors, or in any business for which a tax is levied because it embraces a sale of them, he may justly object to the discriminating character of the act, and on that account challenge its validity, under the decision in question; but if engaged in the sale of other liquors than beer or wines, he cannot complain of the State tax on that ground. The statute makes no discrimination in favor of other liquors of home manufacture. Whilst it groups the sale of several kinds of liquors as one occupation, it evidently intends that the occupation which consists in the sale of any one of the several liquors named, in the quantities mentioned, shall be subject to taxation, as though it read, "for selling spirituous, or vinous, or malt, or other intoxicating liquors." It does not require, to justify the tax, that a party shall be engaged in the sale of all the liquors mentioned, as well as other liquors. This being the true construction of the act, there can be no objection to its enforcement where the tax is levied for occupations for the sale of other liquors than wines and beers. In the present case the petitioners described themselves as engaged in the occupation of selling spirituous, vinous, malt and other intoxicating liquors, that is, in all the liquors mentioned and others not mentioned. There is no reason why they should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks, in the quantities mentioned, because they could not be thus taxed if their occupation was limited to the sale of wines and beer.

We see therefore no error in the ruling of the Supreme Court of Texas, and its judgment is accordingly affirmed.

RIGHTS OF SUPERVISORS UNDER FEDERAL ELECTION LAW.

UNITED STATES CIRCUIT COURT, N. D. ILLINOIS,
OCTOBER 30, 1880.

EX PARTE GEISSLER.

Under the authority of the acts of Congress relating to elections, a Federal supervisor has, in the absence of a marshal or deputy, a right to arrest without process one interfering with him in the exercise of his duties as supervisor. And opprobrious language addressed to the supervisor may be an interference with his duties.

The United States has a right to interfere in all cases where there is a registration of voters for an election of members of Congress, and the Federal statute regulating elections is paramount to State law, and no State authority may interfere with a supervisor appointed under such statute, in the exercise of his right as supervisor.

PROCEEDINGS by *habeas corpus* to procure the discharge of petitioner, Geissler, from custody. Sufficient facts appear in the opinion.

DRUMMOND, C. J. The only question in the case is whether the petitioner was legally arrested, fined and imprisoned for the act which was done by him, as it appears from the evidence before the court. The facts seem to be substantially these: That the relator was appointed by this court a supervisor of election under the acts of Congress, and qualified as such, and went before one of the boards of registration in the first ward of the city of Chicago, to discharge his duty as such, and remained there during the most of the day on the twenty-sixth of October. The registration took place in the usual way under the laws of the State, and about eight or half-past eight o'clock in the evening, a man, who called himself Miller, presented himself for registration, and some questions were put to him by

the judges and answers made, which threw some doubt upon his right to registration. They were of such a character as to induce the relator, as supervisor, to object to his registration, and in consequence of that an altercation arose between the supervisor and Dwyer, who came with Miller, as to his right to vote. Dwyer claimed to vouch for Miller, and that he was entitled to registration. The supervisor insisted, on the other hand, that he was not.

There seems to be but little doubt that prior to the act of violence which is complained of, there was offensive language used by both parties. The supervisor, while insisting that Miller should not be registered as entitled to vote, may have and perhaps did act in a manner somewhat offensive. He is obviously a man of quite excitable temperament—he showed that as a witness on the stand—and it is possible, therefore, he did not act in as discreet and prudent a way as a man of different temperament would have done. It is also true, I think, that Dwyer became excited and used improper and perhaps opprobrious language to the supervisor; but it is to be recollected that while we can consider, for the purpose of determining what color is to be given to a transaction, the language which is used, we have to look at the acts themselves, in order to determine whether they are legal. And we must consider the different relations of these two persons, who have both used violent language to each other, and the circumstances of the case. Dwyer was a volunteer there. He was, so to speak, an outsider. He may have had the right to come in and give his testimony in favor of the person who was presenting his claims for registration; but Geissler was there, clothed with the authority of law, and entitled to the protection of the law, as an officer of the United States. They therefore occupied entirely different positions.

I can have no doubt that under the authority of the acts of Congress, Mr. Geissler had the right, in the absence of the marshal and his deputies, as was the case here, to preserve order, and to arrest, without warrant or process, any person who interfered with him in the discharge of his duty as a supervisor. It was his right, among other things, to see that no person was improperly registered. He could therefore object, if the circumstances warranted it, to the registration of a person offering himself for registration; and that the circumstances did warrant it, is clear, because some of the judges themselves were in doubt as to his right, and therefore the objection of the supervisor was properly made.

There can be no doubt, either, that no person had a right to molest or interfere with the supervisor in the discharge of his duty, even by the use of offensive and opprobrious language. That, without any overt act, might be a molestation and interference with the supervisor in the discharge of his duty. Neither can there be any doubt that there was more or less disturbance and disorder, which followed the use of excited language. According to the weight of the evidence, as I understand it, the supervisor did tell Mr. Dwyer not to interfere, or "to stop," or "shut up," or that he would be put out; to which Dwyer returned opprobrious language, threatening to strike the supervisor; and thereupon the supervisor, having insisted he should be removed or turned out, and saying that if no one else would do it he would himself, seized Mr. Dwyer, as some of the witnesses say, by the throat, and others say by the collar, or by the breast. It does not, perhaps, matter in what particular way. He did not strike Dwyer, and was himself immediately struck by Dwyer. The question is whether what was done by the supervisor was in pursuance of his authority as an officer of the United States there present under the law.

I do not justify in all respects the manner of the action of the supervisor. It would have been much

more creditable to him if he had shown more equanimity of temper; if he had not become so excited, and if he had not returned sharp, bad language to the same kind of language. But we must make allowance for the infirmities of human nature; and we cannot suppose that a man will always be unruffled when he is attacked, and when opprobrious language is used toward him. The question is, after all, had he the right to do what he did?

Had he the right to preserve order? Had he the right to arrest Dwyer? And was he in the discharge of his duty as a supervisor? And the fact that he may not have done it in such a quiet, smooth, regular sort of way as other men of a different temperament, does not render the principal act illegal. In other words, if a man, in arresting another, where he has the right to arrest him, pushes him with more force than perhaps may be necessary, it cannot, in general, affect the question of the legality of the arrest. So here it may be that the supervisor did not act as other men of a cooler temperament might have acted under the circumstances; but he had the right, I think, to arrest Dwyer, and to preserve order by removing him from the room. The difference between the two men, as I have stated, is that the one was an outsider and the other was clothed with the authority of the law.

There seems to be some misapprehension in the public mind as to the rights of the officers of the United States in cases of this kind, as though they were interfering with the rights of the State or of the city. It is not so. The United States has the undoubted right to interfere in all cases where there is a registration of voters for an election of members of Congress, and where that interference occurs under the authority of a statute of the United States there can be no law which is paramount to it; and as the Supreme Court of the United States has said, there is nothing in derogation of the rights of the States in this. *Ex parte Siebold*, 100 U. S. 371. We should move on harmoniously in the one case as in the other—each within its respective sphere—the United States as a National government, and the State as a government clothed with all the powers which affect us as individuals—our lives, our liberties, our property, our relations to each other as citizens of the State. But when the question of nationality and of the rights of the United States as a nation arises and has to be decided, then the National power and sovereignty override what is sometimes called the sovereignty of the State. Undoubtedly, therefore, the National government has the right to prescribe in what manner representatives in Congress shall be elected, and how security is to be given to the rights of electors, in order to ascertain who are legally elected. So that while I have criticised the action of the supervisor in the performance of his duty, as I think the circumstances warrant, and also the conduct of those who interfered with him, still I must hold, under the law, that he was acting in the line of his duty, and that it was not competent for any State authority to interfere with him in the exercise of his right as a supervisor.

The only question about which I have had any doubt since hearing the testimony in the case is whether what the supervisor did could be treated as in the nature of a mere assault upon Dwyer, and not as an arrest. If it had been done without the prior words and acts proved; if, for example, the circumstances which occurred prior to the seizure of Dwyer had not been as they were, namely, that he had requested Dwyer, no matter in what form of language, not to interfere in any way; that he had called upon others to put him out, or to arrest him, then it would have been different; but having done that—having said what he did—I must hold that the act, which otherwise might have been merely an assault, must be regarded simply as a seizure, with perhaps more vio-

lence than was necessary, to remove the man from the room, because he said, "if no one else will remove him I will do it." The prisoner, therefore, will be discharged from custody.

MICHIGAN SUPREME COURT ABSTRACT.

NOVEMBER 10, 1880.

AMENDMENT—CHANGING BILL TO DECLARE LIEN TO ONE FOR FORECLOSURE—WHEN AMENDMENTS ALLOWED—LIMIT TO ALLOWANCE.—A bill in equity was filed for the purpose of establishing a lien upon lands for moneys loaned upon mortgages thereon, assumed to be void. The court held the mortgages to be valid. *Held*, that an amendment to the bill, praying for the foreclosure of the mortgages, was proper. The rules for amendment are exceedingly liberal when justice will thereby be done and wrong prevented. A necessary party is often permitted to be added at the hearing; and even on appeal the case may be remanded for the purpose. *Lewis v. Darling*, 18 How. 1; *Palmer v. Rich*, 12 Mich. 414. A bill for specific performance is sometimes permitted to be converted into a bill to rescind when it is manifest from the evidence that such should have been the relief prayed for. *Parill v. McKinley*, 9 Gratt. 1; *Hewitt v. Adams*, 50 Me. 271. See *Whalan v. Sullivan*, 102 Mass. 204; *Neale v. Neales*, 9 Wall. 1. In *Sanborne v. Sanborne*, 7 Gray, 142, leave to change a bill for specific performance into a bill for relief on the ground of fraud seems to have been denied only because jurisdiction in cases of fraud had been conferred on the court since suit was brought. An amendment to bring new transactions into an accounting in a partnership case was allowed at the hearing in *Drew v. Beard*, 107 Mass. 64; and one quite as radical was permitted in *Darlington's Appeal*, 86 Penn. St. 512, in the appellate court. In *Tremolo Patent*, 23 Wall. 518, an amendment was allowed after decree, which changed the character of the bill from one relying on a patent to one based on a reissue; it being manifest that the merits had been fully gone into. The limit to amendments is this: They must not be allowed to prejudice the substantial rights of the defendant; but observing due caution in that regard, the time and the extent of change are in the discretion of the court. *Hewitt v. Dement*, 57 Ill. 500; *Munch v. Shabel*, 37 Mich. 186; *Codington v. Mott*, 1 McCarter (N. J.), 430; *Camp v. Waring*, 25 Conn. 520. A plain case for refusing amendment at the hearing is where the case, after amendment, would be defective on the proofs. *Curtis v. Goodenow*, 24 Mich. 18. *Church v. Holcomb*. Opinion by Cooley, J.

COMMON CARRIER—GOODS INJURED WHILE IN TRANSIT THROUGH SUCCESSIVE CARRIERS, NOT PRESUMED INJURED BY LAST ONE.—Two marble fountains were packed and shipped at New York for stations on the M. railroad. They were forwarded by the New York Central & Hudson River railroad to Buffalo. From there they were taken by the Lake Superior Transit Company to Marquette, and at that place delivered to defendant, the M. Railroad Company, which carried them to their destinations. On arriving there each fountain was found to be broken. There was nothing on the outside of the packages to indicate that the contents were injured. *Held*, that there was no presumption that the breakage took place while the fountains were in defendant's charge, and that an action for such breakage could not be maintained against defendant without proving that it received the fountains in good order. The suit is based on the negligence of the carrier. It can only be maintained on the theory that the carrier or its servants did not properly care for or handle the goods. There is no rule better established or more righteous than that any one who claims

a right to damages for negligence must prove it. The presumption that a party sued has done no wrong must prevail till wrong is shown. A carrier's obligation to carry safely what he receives safely is independent of care or negligence. But in the absence of proof that there was property delivered to him, or safely delivered to him, any presumption that he received it is one which goes beyond and behind the duty of a carrier and enters into the origin and making of the contract. Until such property comes into his hands there is nothing for a contract to act upon, and the contract is not proved until that is proved. In a somewhat similar case, *Muddle v. Stride*, 9 C. & P. 380, Lord Deunman told the jury that if it were left in doubt what the cause of damage was, the defendants were entitled to their verdict, "because you are to see clearly that they were guilty of negligence before you can find your verdict against them. If it turns out, in the consideration of the case, that the injury may as well be attributable to the one cause as to the other, then also the defendants will not be liable for negligence." In *Gilbert v. Dale*, 5 Ad. & El. 543, the same rule was laid down, and it was held that there could be no recovery without proof, and that the presumption could not be raised without foundation. And in *Midland Ry. Co. v. Bromley*, 17 Q. B. 372, the same principle was affirmed and it was held that if the evidence was as consistent with the claim of one side as with that of the other the plaintiff must fail, because he must make his proof preponderate. The case of *Loughlin v. Railway*, 28 Wis. 204, dissented from. *Marquette, Houghton & Ontonagon Railroad Co. v. Kirkwood*. Opinion by Campbell, J.

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

OCTOBER, 1880.

MUNICIPAL CORPORATION — DEFECT IN HIGHWAY — BOY COASTING ON SLED. — A boy coasting upon a hand sled is not a defect or want of repair in the highway, for which a city is liable to a person struck by the moving sled. *Vinal v. Dorchester*, 7 Gray, 421; *Shepherd v. Chelsea*, 4 Allen, 113; *Barber v. Roxbury*, 11 id. 318; *Hutchinson v. Concord*, 41 Vt. 271. *Pierce v. City of New Bedford*. Opinion by the court.

PASSENGER — ONE WHO LEAVES A RAILROAD TRAIN IN MOTION CEASES TO BE. — In an action against a railroad company for a statute penalty for killing one H., claimed to be a passenger upon defendant's railroad, it appeared that the deceased, who was travelling on defendant's train, left it while it was in motion, slowly passing a station where he intended to alight, and was struck by a train passing on another track and killed. *Held*, that deceased was not a passenger after he had left the moving train, and was not entitled to protection by defendant as such. It is true that one who has bought a ticket of a railroad corporation is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting room in the station to take his seat in a car of the train, until he has reached the station to which he is entitled to be carried, and has had an opportunity by safe and convenient means to leave the train and roadway of the corporation at that station. *Warren v. Fitchburg Railroad Co.*, 8 Allen, 227. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful engine men, conductors, and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the

place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further. And while it is true that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so he assumes all risk of injury. *Gavett v. Manchester & Lawrence Railroad Co.*, 16 Gray, 501. In the case at bar, so long as the train was in motion, H. could not leave it and still retain his right to protection until he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger and to have the rights of a passenger as completely, though the train was moving slowly and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell Railroad Co.*, 14 Allen, 429. The fact that the car in which H. was had passed the platform of the station to which he was entitled to be carried, did not give him the right to leave the train at the risk of the company. *Commonwealth v. Boston & Maine Railroad Co.*

NEW JERSEY SUPREME COURT ABSTRACT.

JUNE TERM, 1880.*

MUNICIPAL CORPORATION — POWER TO REGULATE BUSINESS, NOT POWER TO TAX — LIMIT OF AUTHORITY TO REGULATE. — Power in a municipal corporation to regulate and license a business or trade confers no power to impose a tax upon such business or trade. The rules and regulations which a corporation may make in respect to business or trade; under its police power, are such only as have relation to the public health, morals, and order of the community. *Freeholders of Essex v. Barber*, 2 Halst. 64; *North Hudson Co. Railway Co. v. Hoboken*, 12 Vroom, 71; *Johnson v. City of Philadelphia*, 6 Penn. St. 445; *Kepp v. City of Paterson*, 2 Dutch. 208; *State v. City of Hoboken*, 4 Vroom, 280; *Dunham v. Village of Rochester*, 5 Cow. 462. *Mahlenbrück v. Long Branch Commissioners*. Opinion by Knapp, J.

SETTLEMENT — OF INFANT AT BIRTH THAT OF FATHER — PLACE OF BIRTH PRIMA FACIE PLACE OF. — It is a perfectly well-settled rule of the law that the legal settlement of the father at the time of the birth of a legitimate child is communicated to the child, and remains as its settlement until it acquires another, either by its own act or by the act of the father, gaining a new settlement while such child remains with him and unemancipated. 3 Burn's Just. 28; *Denton v. Stoke Lane*, 1 Sess. Cas. 18; 2 id. 112; *St. Giles v. Eversley*, Str. 580; 3 Salk. 250; *Overseers of Vernon v. Overseers of Smithville*, 17 Johns. 89; *Townsend v. Billerica*, 10 Mass. 411; *Readington v. Tewksbury*, 1 Penn. 280; *Niskayuna v. Albany*, 2 Cow. 537. It is equally well settled that the place of one's birth is, *prima facie*, the place of his settlement. This is in part a rule of evidence, but it is plenary proof, unless its effect be overcome by evidence of another settlement, actual or derivative. 3 Burn's Just. 26; *Alexandria v. Kingwood*, 3 Halst. 370; *Paterson v. Byram*, 3 Zab. 391. Such *prima facie* proof is overcome by showing that the settlement of the father was in a different place at the time of the birth, for such settlement of the father instantly communicated itself to the child, and became its settlement. *Overseer of the Poor of Shrewsbury v. Overseer of the Poor of Holmdel*. Opinion by Knapp, J.

WILL — IN FORM OF LETTER — CONSTRUCTION OF — CONTINGENT UPON EVENT. — By a will made November 15, 1866, the testatrix devised all her estate to her

* To appear in 13 Vroom's (43 N. J. Law) Reports.

husband, in fee. In January, 1876, she and her husband being about to travel abroad, she wrote this: "My Dear Father—In case of any thing happening us, I would wish you to take charge of our property. By law, I suppose it would be divided between all my sisters. I would wish it otherwise. I wish all the property to be sold except any portion of Deal E. would wish to retain for herself; then the money to be put in government securities, or any other sure investment. I make E. K. my sole heir. I know she is just, and will give to those who need, and will be guided entirely by your advice. Your affectionate daughter, M. B., 120 East 26th street. January 18th, 1876. Witnesses of signature, A. J. W., C. C." *Held*, that this instrument was of a testamentary character, being executed in conformity with the statute. *Held*, also, that it was contingent; that the contingency provided for was not the death of testatrix's husband before herself, nor the death of both by the same accident, but was the death of both while upon their travels. In construing a will, it will be concluded that the testator contemplated and made provision for a lapse only when there is a clear intimation to that effect. *Roberts v. Roberts*, 2 Sw. & Tr. 337; In goods of Porter, L. R., 2 P. & D. 22; In goods of Robinson, etc., id. 171; 2 Jarm. on Wills, 665; *Home v. Pillans*, 2 M. & K. 15; *Lord Douglas v. Chalmer*, 2 Ves. Jr. 521. *Cowley v. Knapp*. Opinion by Dixon, J.

PENNSYLVANIA SUPREME COURT ABSTRACT.

OCTOBER 4, 1880.

MASTER AND SERVANT—NEGLIGENCE—DUTY OF MASTER TO PROVIDE SAFE MACHINERY—DERRICK ROPE—MACHINERY LIABLE TO DECAY MUST BE RENEWED.—B., the employee of a railroad company, was killed while at work, by the breaking of a rope upon a derrick in use and belonging to the company. It was shown that the rope externally appeared sound, but that it had been in use for two or three years or more, continually exposed to the weather, and witnesses testified that it was actually rotten when the break occurred. There was evidence in the case that such a rope after exposure for a year or more becomes unsound, though it may not show outward signs of decay. *Held*, that there was evidence for the jury upon the question whether such rope was a sound one, and if not, the railroad company would be liable for one injured by reason of such unsoundness. A servant assumes all the ordinary risks of his employment. He cannot hold the master responsible for an injury which cannot be traced directly to his negligence. The duty which the master owes to his servants is to provide them with safe tools and machinery, where that is necessary. When he does this he does not however engage that they will always continue in the same condition. Any defect which may become apparent in their use it is the duty of the servant to observe and report to his employer. The servant has the means of discovering any such defect which the master does not possess. It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or for an external apparent one produced by time and use, not brought to the master's knowledge. These are the ordinary risks of the employment which the servant takes upon himself. *Ryan v. Cumberland Valley R. Co.*, 11 Harris, 884. But do these rules apply to such an instrument as a rope used in a derrick which is engaged in raising heavy weights? The master is bound to know that a rope under such circumstances will only last a limited time. It will not do for him to furnish a sound rope

and then fold his arms until by actually breaking it is demonstrated to be insecure. It will not do to say that the servant is bound to know this as well as his master, and to warn him that after such a time he ought to procure a new rope. Is the servant bound to notify the master of that which he knows or ought to know himself without such information? He knows how long the rope has been in use. The servant may not know. It is the duty of employers to renew instruments of this character at proper intervals. The expense would certainly not be great, and a due regard to the lives of their servants imperatively demands it. *Baker v. Allegheny Valley Railroad Co.* Opinion by Sharswood, C. J.

STATUTORY CONSTRUCTION—CONSTITUTIONAL PROVISION MADE DEFINITE BY EXISTING LEGISLATION—SURVIVAL OF CAUSE OF ACTION FOR DEATH.—By a statute of Pennsylvania, passed in 1855, the right of action in case of injuries resulting in death was conferred only upon parents for the loss of children, and children for the loss of parents, and reciprocally upon husband and wife. This was the law in 1873 when a State Constitution was adopted which declared that in cases of death resulting from injuries, "the right of action shall survive, and the General Assembly shall prescribe for whose benefits such actions shall be prosecuted." Since the adoption of the Constitution no new legislation has been enacted on this subject. *Held*, that the act of 1855 is still the law, and that no right of action survives to the administrator of the deceased person under the constitutional provision. See *Mann v. Wieand*, 4 Week. N. C. 6. *Books v. Borough of Danville*. Opinion by Green, J.

VERMONT SUPREME COURT ABSTRACT. JANUARY TERM, 1880.*

COMMON CARRIER—NOT LIABLE FOR LOSS OF GOODS BY CONNECTING CARRIER—CONTRACT BEYOND ROUTE—LIMITATIONS IN RECEIPT GIVEN BY.—(1) In the absence of special contract, a common carrier receiving a parcel marked to a point beyond its route, but having no special business relationship with the carrier on the connecting line, is responsible, as such carrier, only for safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation. In case for money delivered to the agent of an express company to be sent to a place beyond the route of the company, it appeared that the agent told plaintiff that he could not bill beyond the route of the company. Plaintiff said he wanted to pay through, and paid a certain amount for through charges, and received a receipt for the money to be sent, containing a memorandum of such payment. *Held*, that on the facts there was not a special contract to carry to destination. (2) The receipt contained a clause limiting the liability of the company to the risks of carriage to the end of its route. The consignor could not read, and the agent read the principal part of the receipt to him, but did not read that clause. *Held*, that as that clause was expressive only of the company's liability under the law, the omission to read it was no fraud on the consignor. (3) Such a receipt, like any simple receipt, may be explained by parol evidence. *Hadd v. United States & Canada Express Co.* Opinion by Veazey, J.

BANKRUPTCY—COMPOSITION—DOES NOT BAR DEBT CREATED BY DEFENDANT'S FRAUD.—An action to recover a debt created by the fraud of the defendant is not barred by a composition between defendant and his creditors under the act of Congress of June 22, 1874, in amendment of the Bankrupt Act, any more than it would be by a discharge under the original act. *Morse*

*To appear in 58 Vermont Reports.

v. Hutchins, 102 Mass. 439; *In re Devoe*, 1 Lowell, 251; Turner v. Atwood, 124 Mass. 411; Mudge v. Wilmot, id. 493; Libbey v. Strasburger, 14 Hun, 120; Leggett v. Barton, 11 Vroom, 83. *Scott v. Olmstead*. Opinion by Veazey, J.

FRAUDULENT CONVEYANCE—OF EXEMPT PROPERTY.—Fraud upon creditors is not predicable of the conveyance of property that is exempt from attachment. *Prout et al. v. Vaughn et al.* Opinion by Barrett, J.

NEGLIGENCE—WHAT CARE AND PRUDENCE TRAVELERS ON HIGHWAY MUST EXERCISE.—The "ordinary care and prudence" that the traveller on a highway is bound to exercise with reference to insufficiencies thereof, are the care and prudence of a prudent and careful man. Thus, in case for injury on a highway, the court was requested to charge that plaintiff could not recover if want of care on his part contributed to the injury. The court so charged, and charged also that the expression, "ordinary care," excluded the idea of extraordinary care and the idea of carelessness; that the plaintiff was bound to exercise a mean degree of care, "that measure of care and attention * * * that persons of ordinary care, men generally, ordinary prudent men," exercise under similar circumstances; and that if plaintiff "and what any ordinary man, any man of ordinary care and attention would have done," was "exercising such a measure of care as men ordinarily would have exercised," he had satisfied the rule. *Held*, that the charge failed to convey the true sense and force of the rule, and was therefore erroneous. *Briggs v. Taylor*, 28 Vt. 180; *Folsom v. Underhill*, 36 id. 580. *Reynolds v. City of Burlington*. Opinion by Barrett, J.

—COWS KILLED BY TRAIN ON UNFENCED RAILROAD—CONTRIBUTORY NEGLIGENCE NOT DEFENSE.—In case for the killing of cows by a train on defendant's railroad, it appeared that the cows when killed were lying on the track in plaintiff's meadow through which the road ran, and into which plaintiff had turned the cows to graze, and that the road, although it had then been in partial operation about a month, was there still unfenced. *Held*, that under section 47, chapter 28, general statutes, the duty of defendant was absolute to erect and maintain fences along its road; and that therefore the question as to contributory negligence on the part of plaintiff in turning his cows into the meadow did not arise. *Jackson v. Rutland & B. R. Co.*, 25 Vt. 150; *Morse v. Rutland & B. R. Co.*, 27 id. 49; *Bemis v. Connecticut & P. R. R. Co.*, 42 id. 375. The Legislature had the power and right to impose this duty and liability upon the defendant. *Thorpe v. Rutland & B. R. Co.*, 27 Vt. 140. *Meade v. Burlington & Lamotte Railroad Co.* Opinion by Ross, J.

MUNICIPAL CORPORATION—NEGLIGENCE IN CONSTRUCTING SEWER—LIABILITY FOR INJURY BY DISCHARGE OF SEWAGE.—In case against an incorporated village for negligence in the construction of a sewer through plaintiff's premises, and for neglect in keeping it in repair, whereby sewage overflowed upon plaintiff's premises, it appeared that defendant was by its charter empowered to make and maintain sewers. The charter having been sought and accepted with a view to the realization of benefits to the inhabitants of the village and not to the discharge of a public duty, it was *held*, that the charter power being proprietary in its character, the defendant was by implication bound so to exercise it as to work no unnecessary injury to persons or property thereby affected; and that for negligence or unskillfulness in the construction of a sewer, or want of care in keeping it in repair, an action would lie at suit of any person thereby injured. *Cooley on Const. Lim.* 247; *Shearn & Redf. on Neg.*, § 126; 2 *Dill on Mun. Corp.*, § 802; *Brine v. Great Western Ry. Co.*, 2 *Beet & S.* 463; *Manley v. Canal & Ry. Co.*, 2 *H.*

& *N.* 840; *Weet v. Brockport*, 16 *N. Y.* 161. In *Bailey v. Mayor of New York*, 3 *Hill*, 531; *S. C.*, 2 *Den.* 433, it is said: "If the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation is to be regarded *quoad hoc* as a private company. It stands upon the same footing as would any individual or body of persons upon whom the like special franchises had been conferred." To the same effect, *Detroit v. Corey*, 9 *Mich.* 165; *Jones v. New Haven*, 34 *Conn.* 1; *Child v. Boston*, 4 *Allen*, 41; *Clothier v. Webster*, 12 *C. B.* 789. The flooding of land with sewage so as to create a nuisance thereon and so as effectually to impair its usefulness, is a taking of it within the purview of the constitutional inhibition of the taking of private property for public use without compensation. *Eaton v. Railroad Co.*, 51 *N. H.* 504; *Inman v. Tripp*, 11 *R. I.* 520; *Nevins v. Peoria*, 41 *Ill.* 502; *Pettigrew v. Evansville*, 25 *Wis.* 223; *Ashley v. Port Huron*, 15 *Alb. L. J.* 81; *Pumpelly v. Green Bay Co.*, 13 *Wall.* 166; *O'Brien v. St. Paul*, 18 *Minn.* 176; *Columbus v. Woolen Mills Co.*, 33 *Ind.* 435; 2 *Ad. on Torts*, 1314. *Winn v. Village of Rutland*. Opinion by Powers, J.

WISCONSIN SUPREME COURT ABSTRACT.*

ASSIGNMENT FOR CREDITORS—ASSIGNEE HAS ONLY RIGHT OF ASSIGNOR—UNFILED CHATTEL MORTGAGE.—A voluntary assignee for the benefit of creditors is a representative only of the assignor, and cannot acquire a right of action by virtue of his assignment that his assignor could not have had. A bill of sale of personalty, binding upon the parties, intended as a mortgage, but not filed as required by statute, is binding upon a voluntary assignee for the benefit of creditors of the assignor and mortgagor. *Estabrook v. Messersmith*, 18 *Wis.* 551; *Jones v. Yates*, 9 *B. & C.* 532; *Nichols v. Kribs*, 10 *Wis.* 76; *Thompson v. Hintgen*, 11 *id.* 112; *Reiley v. Johnson's Ex'rs*, 22 *id.* 279. *Hawks v. Pretzlaff*. Opinion by Orton, J.
[Decided Nov. 10, 1880.]

INFANT—EMANCIPATED ENTITLED TO EARNINGS AGAINST CREDITOR OF FATHER—MAY PURCHASE AND CONVEY PERSONAL PROPERTY BY GIFT—POSSESSION PRIMA FACIE EVIDENCE OF TITLE.—Defendant, as constable, seized, upon an attachment against plaintiff's father, a piano which had been purchased by an infant son of the father, who had been emancipated by the father, and presented to defendant, his sister, who had it in her possession at the time of the seizure. *Held*, that plaintiff was entitled to maintain an action against defendant for the piano or its value. It is a well-settled principle of law that a father may emancipate his minor son, and by agreement with him relinquish the right he would otherwise have to his services. *Monaghan v. School Dist.*, 38 *Wis.* 100. And this he may do although insolvent at the time. *Atwood v. Holcomb*, 39 *Conn.* 270; *Lackman v. Wood*, 25 *Cal.* 147. It follows, therefore, that the infant son of the father had the right to acquire the property in controversy, by purchase or otherwise, and hold it as against his father or his father's creditors, and give it, if he saw fit, to his infant sister. Another principle of law is equally well settled, and that is that prior possession is *prima facie* evidence of title, to maintain an action to recover the property or its value as against a mere wrong-doer. *Ragan v. Perry*, 6 *Wis.* 194; *Armony v. Delamire*, 1 *Smith's Lead. Cas.* 151; *Coffin v. Anderson*, 4 *Blackf.* 394. *Wumbold v. Vick*. Opinion by Orton, J.
[Decided Nov. 30, 1880.]

PAYMENT—ACCORD AND SATISFACTION—ACCEPTANCE OF DEBTOR'S NOTE FOR LESS AMOUNT THAN PRIOR

* To appear in 50 Wisconsin Reports.

NOTE, IN PAYMENT, DISCHARGES DEBT.—Plaintiff held notes given by C. and secured by a mortgage given by the wife of C. upon her separate estate. Thereafter C. went into bankruptcy and a composition was made and confirmed. After this, plaintiffs and C. made an agreement whereby the provisions of the compositions were waived and plaintiffs accepted from C., in full payment and satisfaction of the notes named, other notes of C. for a less sum. These last notes were paid. *Held*, that the first notes and the mortgage were satisfied and discharged by the acceptance of the second notes. In *Eastman v. Porter*, 14 Wis. 80, and in *Blunt v. Walker*, 11 id. 334, it was in effect decided that "a subsisting simple contract is discharged and extinguished by the acceptance of another contract of the same nature given to the same party, and founded upon the same consideration, if it be so expressly agreed by the parties." In *Story on Prom. Notes*, § 104, it is said: "If a note be given for a pre-existing debt, and it is received as an absolute payment thereof, the original contract is extinguished, and no liability thereon any longer exists; and if such note was received as conditional payment only, then, if duly paid and discharged, the original consideration is equally extinguished. It is true that the usual rule is that accord without satisfaction is no bar to an action. This is so except where the new promise or contract itself is the satisfaction of the debt or broken contract by the accord agreement." "The party holding the claim may agree to receive a new promise of the other in satisfaction of it, or he may agree to receive a new undertaking when the same shall be executed as a satisfaction. In either case he will be held to his bargain." 2 *Parsons on Cont.* 681. In *Babcock v. Hawkins*, 23 Vt. 561, this doctrine is fully sustained. In application to this case, it makes no difference whether this principle is based upon the theory that the agreement of composition was fully executed by these parties alone, or that the original consideration enters into and makes valid the new agreement, or whether it is based upon the theory that the accord and satisfaction were complete when the new notes were accepted as such, in full performance of the agreement of composition, or upon the theory that payment of the new notes operated by force of the agreement between the parties as a payment and extinguishment of the original notes; for upon either theory, according to the better authorities, the original notes were fully paid and satisfied, because it was so intended and agreed. Holding this to be the law, it follows that if the notes, to secure which the mortgage was given, were paid and satisfied, the mortgage was also satisfied and is discharged. *Jaffray et al. v. Crane*. Opinion by Orton, J. [Decided Nov. 10, 1880.]

REPLEVIN—LIES ONLY AGAINST ONE IN POSSESSION—BY RECEIPTOR OF GOODS AGAINST SHERIFF.—*Replevin* is a possessory action, maintainable only against one who has either the actual or constructive possession of the property at the time of suing out the writ. Plaintiff was in possession of certain goods situate in his store. They were levied upon by the sheriff, under a writ of attachment against the person from whom plaintiff had procured them, upon a claim that the transfer to plaintiff was fraudulent. The goods were not removed, but piled up in one corner, and a receipt given by the plaintiff to the sheriff for them. *Held*, that they were constructively in the sheriff's possession, and plaintiff might maintain replevin for their recovery. *Gallagher v. Bishop*, 15 Wis. 303; *Johnson v. Garlick*, 25 Wis. 705; *Dudley v. Ruess*, 27 id. 679; *Grace v. Mitchell*, 31 id. 533; *Lathrop v. Cook*, 14 Me. 414; *Goff v. Harding*, 48 Ill. 148. Where an officer seizes and possesses himself of chattels under a writ in such a manner as to enable him to maintain trespass or re-

plevin against a wrongful taker thereof, then replevin may be brought against the officer by the real owner, if a stranger to the writ. *Sewell v. Nichols*, 34 Me. 582. See, also, *Morse v. Hurd*, 17 N. H. 246; *Robinson v. Mansfield*, 13 Pick. 139; *Main v. Bell*, 27 Wis. 517; *Heath v. Keyes*, 35 id. 688; *Perry v. Williams*, 39 id. 339. *Williams v. Morgan*. Opinion by Cole, C. J. [Decided Dec. 17, 1880.]

INSURANCE LAW.

FIRE POLICY—ASSIGNMENT OF INTEREST ON INSURANCE AFTER LOSS—WAIVER OF CONDITIONS.—In March, 1860, a mutual insurance company insured a mill of Silvers and Woodward for \$3,000, for five years. In May, 1869, they, with the company's consent, assigned the policy, by an absolute assignment (but in fact only as collateral security), to one Job as mortgagee. In April, 1871, Woodward conveyed his interest in the mill to Silvers, and orally assigned his interest in the policy also. The mill was burnt down in April, 1872. Before Woodward's transfer the company paid dividends to Woodward and Silvers; after that, to Silvers alone. Proof of loss was made May 2, 1872, and Silvers assigned his interest in the policy to the complainant May 13, 1874. Job's mortgage was paid in April, 1873, but he still retained possession of the policy under his assignment. On general demurrer to the bill, *held* (1) That Silvers' assignment of his interest in the policy after the loss is not within the clause which requires the consent of the company to be obtained to the assignment of any policy. (2) That the fact that the absolute assignment to Job is still in existence, although his mortgage has been paid; that as to Woodward's assignment to Silvers, though it was merely oral and unaccompanied by express consent of the company, the company, by paying dividends to Silvers afterward, waived their strict right to object to such assignment, and that, as alleged, the company knowing of Woodward's conveyance of the property to Silvers, led Silvers to believe that it regarded the policy as valid in his hands, all combine to render the remedy at law inadequate and to give equity jurisdiction. *Phillips on Ins.*, § 106; *May on Ins.*, § 826, 508; *Cook v. Block*, 1 Harv. 390; *Bodle v. Chenango Mut. Ins. Co.*, 2 N. Y. 53; *Burton v. Gore Dist. Ins. Co.*, 12 Grant's Ch. 156. New Jersey Court of Chancery, May term, 1880. *Combs v. Shrewsbury Mutual Fire Insurance Co.* Opinion by Runyon, Chancellor.

LIFE INSURANCE—INSOLVENT COMPANY—MATURED POLICY-HOLDERS PREFERRED CREDITORS—ENDOWMENT POLICIES—DATE FOR ADJUSTMENT.—(1) In an insolvent mutual life insurance company, the holders of policies matured either by death or the attainment of the age specified are preferred creditors, and the holders of running policies members of the debtor corporation, and hence the former cannot be called on to share, *pro rata*, losses occurring after their claims matured. (2) Where, at the date of such insolvency, the risk on endowment policies had not been terminated, the holders of such policies are not creditors, notwithstanding all the premiums thereon liable to be called for had been paid. (3) The day on which the insolvency occurred, as adjudged by the decree, fixes the time to which the several claims must be referred for adjustment, and not the date of the decree itself. *Commonwealth v. Massachusetts Ins. Co.*, 119 Mass. 51. New Jersey Court of Errors, June term, 1880. *Mayor v. Attorney-General*. Opinion by Dodd, J.

LIFE POLICY—ASSIGNMENT BY INSOLVENT HUSBAND TO WIFE HOW FAR VALID AGAINST CREDITORS.—Where an insolvent debtor holds an insurance policy upon his own life he may assign the same to his wife, who may hold the proceeds of the policy exempt from the claims

of creditors of her husband, except as to the amount of premiums paid by the husband within five years, the period of limitation, and interest thereon. Such a transaction is within the spirit of section 54, chapter 73, Revised Statutes 1874 of Illinois, entitled "Insurance," which provides that a married woman may, by herself and in her own name or in the name of any third person, with his assent as her trustee, cause to be insured for her sole use the life of her husband, etc. That statute is remedial in its character, and should be liberally construed in furtherance of the purpose of its enactment. In *Charter Oak Life v. Brant*, 47 Mo. 419, where a statute similar to the one referred to was under consideration, it is said: "The statute was founded on charity, and intended to subserve a beneficent object, and in a case falling within it I should be disposed to give it the most favorable construction to carry out its humane purpose." In *City Fire Ins. Co. v. Marsh*, 45 Ill. 482, where a policy had been taken out in the name of Morris, on a stock of goods, who subsequently sold the goods to Myers, and with the consent of the company, assigned to him the policy, it was held, in substance though not in form, a new insurance was granted to Myers. In *Burroughs v. State Mut. Life Assur. Co.*, 97 Mass. 350, where a policy was payable to the insured and his assignees, and duly assigned with the consent of the company, it was held that the assignment transferred the legal title to the assignee with right to sue in his own name. Illinois Supreme Court, Nov. 20, 1880. *Cole v. Marple*. Opinion by Craig, J.

NEW BOOKS AND NEW EDITIONS.

NEW YORK ANNOTATED POCKET CODE.

Parsons' Complete Annotated Pocket Code. The New York Code of Civil Procedure. Carefully Annotated and Fully Indexed. Complete in one volume. Chapters 1-22 as enacted and amended in 1880. Together with the Repealing Acts and Table of Corresponding Sections. Albany: John D. Parsons, Jr., 1881. Pp. xlvii, 340, \$31.

NEW YORK lawyers are familiar with the first installment of this edition, comprising the first thirteen chapters, which proved very popular. The nine chapters have been annotated on the same plan, by a competent lawyer, in the most careful manner. Notwithstanding its apparent bulkiness, it is only about two inches thick and can literally be put in the pocket. The typography is clear and legible. The recommendations of the edition, in addition to the annotation, are its handiness and cheapness. For court use it seems unrivalled. The annotations are very copious and the index is exhaustive. The parts can be obtained separately if desired, and thus those who have the first can supplement it with the second.

SIX DILLON'S CIRCUIT COURT REPORTS.

Cases Determined in the United States Circuit Courts for the Eighth Circuit. Reported by John F. Dillon, the Circuit Judge. Volume V. Davenport, Iowa: Egbert, Fidler & Chambers, 1880. Pp. 647.

This volume is the last of Judge Dillon's excellent series. Among cases of general interest we note the following: *United States v. Whittier*, p. 35.—The act of Congress, prohibiting the mailing of obscene matter, does not cover the case of a sealed letter, written to a fictitious person, in answer to a decoy letter, because it gives no "information" within the meaning of the statute. *Johnson v. Laflin*, p. 65.—A sale and transfer of National bank stock, made in good faith by the holder to the president of the bank, while the bank is insolvent, is valid as against the receiver, although the president pays for it with the funds of the bank and has it transferred on the books to himself as trustee. *Re Stickney*, p. 61.—"Tradesman," in the Bankrupt

Act, does not include an officer of a manufacturing company. *Hagan's Petition*, p. 98.—A boy four years old, son of poor parents, strayed two blocks from home and fell over an unguarded off-set wall fourteen feet high in a public street, and was injured. Held, that the father might recover against the receiver of the proprietor of the wall. *Re Goodrich*, p. 140.—The holder of a note made for accommodation, by extending the time of payment to the principal debtor without the maker's assent, discharges the maker, if he knows the true relation of the parties at the time of extension, although he was ignorant of it at the time of taking the note. *Flint v. Russell*, p. 151.—A livery-stable in a city is not *per se* a nuisance. See 19 Alb. L. J. 228. *Russell v. Allen*, p. 235.—A trust of realty "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," is valid. *White v. Colorado Cent. R. Co.*, p. 420.—A railroad company, storing goods carried over its line in a warehouse until called for, is liable for the destruction of such goods by a fire which the firemen were deterred from extinguishing by the presence of a large quantity of gunpowder stored in the same building by the company. *Hinnenstein v. Barnes*, p. 482.—A promissory note is not rendered invalid by containing a stipulation to pay attorney's fees in case of suit. Many of the cases are annotated by the learned reporter. At the request of the bar the reporter has appended some twenty-eight pages of the proceedings of the bench and bar on his retirement from judicial office. These contain a sincere and hearty tribute to his acquirements, bearing, and moral qualities which few other judges have called forth or deserve.

HIGH ON INJUNCTIONS.

A Treatise on the Law of Injunctions. By James L. High. Second edition. Chicago: Callahan & Co., 1880. 2 Vols. Pp. lxxii, 1735.

This work is divided as follows: Nature and definition of the remedy; injunctions against judgments; in aid of proceedings in bankruptcy; in ecclesiastical matters; pertaining to mortgages; against taxes; pertaining to streets and highways; against railways, waste, trespass, nuisance; for protection of easements and franchises; against infringements of patents, copyrights and trade-marks; pertaining to contracts, private corporations, municipal corporations; against public officers; in partnership matters; pertaining to executors and administrators, and sureties; between husband and wife; in behalf of creditors; of violation and dissolution; parties, practice, bond and damages, appeals. This is a good and natural arrangement, and we are satisfied that on the whole the work is the best for the American practitioner. It has received the sanction of the courts and the profession for a period long enough to test it. The former edition was in one volume. Mr. High has added, re-written, and rearranged, and has embodied 2,300 new cases. We think the work could be improved by a little more exact editorship. We miss several important English cases on subjects with which we happen to be somewhat familiar, and among American cases the leading ones of *Colton v. Thomas*, 2 Brewst. 808, and *Meneely v. Meneely* (in the ultimate court), 62 N. Y. 427; 20 Am. Rep. 489. There seems to us to be a want of definiteness, minuteness, and exactness, occasionally, in the statement of a principle. For example; we are told that an outgoing partner cannot represent himself as the successor of the old firm, but we are not told exactly what manner of representation will be restrained, as signs, circulars, advertisements, etc. The practitioner must find the reported case to ascertain whether it applies to his particular case. These details might well be expressed in the notes. Although the index covers 157 pages, we notice the same want of definiteness.



ness in that. For example, if the practitioner wants to find the doctrine of injunction of wrongful use of family name, or of signs, or of misrepresentations as to former employment, he will be troubled, because he cannot find "name," or "sign," or "former employment" in the index. The doctrine of names is under "trade-marks," where it does not belong, and as for "former employment," we find very little about it. These are three important sub-heads. The typography is rather ghostly, but that is not Mr. High's fault. Having said thus much, we have found all the fault that is obvious on a casual examination. These matters are not absolutely vital, but they are worth correcting. To offset our minor criticism we must say that the work is of the greatest and most frequent practical use; that it is copious and intelligent; and that no lawyer can safely or conveniently practice without it.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, January 25, 1881:

Judgment affirmed with costs—*Wood v. Wood; Rugg v. Rugg; Hale v. Moffat*.—Judgment reversed and new trial granted, costs to abide event—*Hudson v. Swan; Payne v. The Troy and Boston Railroad Co.; Cregen v. The Brooklyn Cross-Town Railroad Co.*—Judgment reversed, and judgment entered in accordance with construction of the will, with costs to all parties out of fund—*Williams v. Freeman*.—Judgment against the Board of Police Commissioners in favor of the plaintiff reversed, and judgment in favor of the city against the plaintiff reversed, and new trial granted, costs to abide event—*Swift v. The Mayor and The Police Department of New York*.—Judgment affirmed—*King v. The People*.—Order affirmed with costs—*In re Waller* to vacate assessment; *Briggs v. Waldron; Bond v. Sanford; Sahler v. Williams*.—Orders of General Term and Special Term reversed, and assessment vacated with costs—*In re Weil* to vacate, etc.—Order affirmed, and judgment absolute for respondents, on stipulation, with costs—*Taylor v. The Mayor, etc., of New York*.—Appeal dismissed, with costs—*Lieglois v. McCracken; Pardee v. Tilton*.—Motion denied with costs—*McCarthy v. Whalen; Kearney v. McKeon; Stearns v. Gage; Van Cott v. Van Brunt*.—Motion denied without costs—*The Poughkeepsie Gas Company v. The Citizens Gas Company; Taylor v. Wing*.—Motion granted, unless appellant within twenty days from the service of a copy of this order perfects his appeal by the filing and service of a due and proper undertaking and pays ten dollars costs, in which event motion denied—*Jackson v. Tuell*.—On motion of Edward Jacobs for appellant, counsel for respondent consenting, ordered on motion calendar for February 1 to be then submitted—*People ex rel. Higgins v. McAdam, justice, etc.*

CORRESPONDENCE.

ARREARS IN THE COURTS.

Editor of the Albany Law Journal:

I think, if the gentlemen now endeavoring to devise some means for the relief of the overburdened Supreme Court, would investigate the nature of the cases on its calendar in the several counties, it might result in a practical suggestion and a partial remedy.

Such an investigation would disclose the fact that a very large portion of the cases brought in the Supreme Court might, at the election of the plaintiff's attorney, have been brought in the county court, and as its calendar is far less crowded, be reached much sooner.

These gentlemen may ask, why then, do not suitors bring such actions in the county courts? The explanation is, that by bringing their actions in the Supreme Court they recover, if successful, more "costs" than are given in the county courts, and as according to the opinion most generally prevailing, the costs, when recovered, are to be appropriated by the attorney, a

strong inducement is furnished to bring their actions in the Supreme Court.

I would suggest as a remedy for this, either (1) that the costs in the county courts be made the same as those allowed in the Supreme Court, or (2) that the original jurisdiction of the Supreme Court be so limited as to exclude in some decree those cases which would be properly brought in the county courts.

G. H. P.

NEW YORK, Jan. 20, 1881.

A "CORRECTION.

Editor of the Albany Law Journal:

In your issue, January 15, 1881, on page 54, in *Zimmerman v. Erhardt*, you report the court as holding that "goods sold at various times were sold upon each occasion upon a credit of four months." This is not correct. The account was opened on a contract that a credit of four months should be allowed on each item, but there was no separate agreement for credit on each transaction.

Respectfully, yours,

E. VAN NESS.

NEW YORK, Jan. 19, 1881.

[We think our statement was strictly accurate. The goods were sold on each occasion on a credit of four months. We did not state that the credit was given on each separate occasion, and the fact that it was not so given cannot make the slightest difference.—ED. A. L. J.]

NOTES.

ON the cause lists of the English Chancery division there are 472 causes, which is precisely the same number as at this time last year. On the appeal list are 190 as against 236 appeals at this time last year.—The governor of this State has appointed Judge John C. Churchill, of Oswego, to fill the vacancy caused by Judge Noxon's death.—The January number of the *Virginia Law Journal* has a leading article, by R. T. Barton, entitled, "Is the mere possession of a bond or note, not payable to bearer, and undorsed by the payee or obligee, sufficient without evidence of an assignment to entitle the holder to enforce payment of it?" Also the proceedings of the Virginia Bar and a paper by William A. Murray on the death of William Green, who seems to have been one of the most learned of American lawyers.—The *Kentucky Law Reporter* for January has a leading article on Contracts in violation of statutes, and a note on Contracts in violation of public policy; also a note on Municipal power to "regulate," founded on *Cronin v. People*, 22 Alb. L. J. 416, 430.

The *Troy Times* says: "Courts and lawyers, with their precedents and learned flapdoodle generally, very often manage to reverse the obvious meaning of laws and bring about many wrongs which might be prevented if the rules of common sense were observed in judicial practice." And in another column of the same issue, under the head of "law for the million," it says: "A note dated on Sunday is void." A little "flapdoodle" would strengthen the *Times'* law.—Mr. Butler, of the New York Legislature, thinks that lath and plaster walls are the correct thing for our new capitol. By the way, after all the fuss made by assemblymen over the bad acoustic properties of the new assembly chamber, is it not a little remarkable that nobody had the slightest difficulty in hearing Gen. Grant there, the other day, although he speaks very low? It seems to make all the difference in the world whether any thing is being said worth listening to, and that everybody cares to hear.

The Albany Law Journal.

ALBANY, FEBRUARY 5, 1881.

CURRENT TOPICS.

AT the close of the Boston Monday lecture last week, which was delivered by the Rev. Mr. Dike, of Vermont, on "Facts on Divorce in New England," a New England divorce reform league was formed, with such men as Gov. Long, of Massachusetts, ex-President Woolsey, of Yale College, President Chamberlain, of Bowdoin College, ex-President Paul Chadbourne, of Williams College, and Judge Jeremiah Smith, of New Hampshire, for its officers. Mr. Dike has gathered some interesting and significant statistics. In President Dwight's time there was one divorce for 100 marriages. In 1849 nine causes of divorce were provided in Connecticut, and jurisdiction was taken from the Legislature and given to the courts. That year 129 divorces were granted; the next, 129; and in 1864, 426. Then for fifteen years they averaged 446 annually. During this period the ratio of divorces to marriages was one to 10.4. A repeal of the "omnibus clause," which cut off several causes of divorce in 1878, had the effect of lowering the divorce list to 316 the following year. Vermont grants divorces for six causes. In 1860, 94 divorces were granted, and from the close of the war they increased to 197 in 1878, with the ratio to marriages of one to 14. The ratio in Rhode Island is one to 13, or about 180 divorces annually. In New Hampshire there were 159 cases in 1870, 240 in 1875, and 241 in 1878. There are 14 causes for divorcement there. In Maine, in 1877, there were 478 divorces. Up to 1860, Massachusetts granted divorces for only two causes. That year there were 243 cases, or one to every 51 marriages. Between that time and 1877 the causes were increased by law to nine. So in 1866 there were 392 divorces; in 1870, 449; in 1878, 600. The ratio is now one to every 21.4 marriages. Taking the last-mentioned year we find that there were 2,113 divorces in New England, a much larger ratio in proportion to the population, says the lecturer, than in France during the days of the revolution. In that country the ratio of separation to marriages is now about one to 150; in Belgium one to 270; in England of petitions for both divorce and separation one to 300. So far as known, the West has a better record in this business than New England. For many years in Ohio the ratio averaged one to 25; it is now one to 18. Chicago is notorious in the matter of divorce, but the ratio there is only one to 12, not so bad as that of Hartford or New Haven. These are figures that cannot lie. We can hardly say so much for the reverend gentleman's story of the chief justice of Connecticut, who in conversation with his pastor, in court, excused himself for three minutes, and remarked on returning that he had divorced a couple more quickly than the pastor had ever married one. This Mr. Dike in-

stances as "unseemly haste." Nobody but a clergyman could take such an assertion seriously. The judge probably simply signed the decree which was the formal expression of the result of the inquiry. The New England divorce laws are scandalously loose, but it is hardly fair to lay all this undoing to the charge of the New England elect. It would be little fairer to contrast with these the statistics in our State, where we have but one ground for absolute divorce. The cold fact is that New England, especially Connecticut and Vermont, do the divorce business for our great State.

Prof. Potter, of Cornell University, has introduced a bill in our Legislature providing that illegitimate children shall be made legitimate by the subsequent marriage of the parents. This is a subject on which legislators may reasonably differ. Several prominent States have adopted such a rule, and it is a mere question of humanity against policy. The latest judicial utterance on the subject that has come to our notice is in *Herring v. Wickham*, 29 Gratt. 628; S. C., 28 Am. Rep. 405. Staples, J., there says: "The learned counsel has not hesitated, however, to denounce a policy, as he terms it, which favors the marriage of persons who have for years lived in open violation of law, and whose children, already grown, have their characters and principles already formed by association with the degraded and the infamous. To encourage such a marriage is to encourage adulterous intercourse, and the raising of an ignorant and vicious family to corrupt the morals of the community. It is no part of my duty to vindicate the opinions of the eminent judges who decided *Coutts v. Greenhow*. I should have thought, however, that marriage under such circumstances was the very best thing for the parties and the community. The whole theory of our statutes legitimizing children born out of wedlock, when recognized by the parent, is founded on that idea. Marriage is at least some reparation to the woman suffering under the deepest disgrace, and the innocent and unhappy offspring thrown upon the world as base-born. Marriage, which raises the woman to the position of a lawful wife, and confers upon the children the status of legitimacy and respectability."

Mr. Patterson has introduced two excellent bills in the Assembly. The one provides that whenever an action is commenced in a justice's court, and a judgment is recovered in such action in favor of the plaintiff against the defendant, such recovery shall not estop or prevent the said defendant from beginning and maintaining an action against the said plaintiff on any affirmative cause of action, notwithstanding the same might have been set up in defense of the said action in justice's court; provided that such affirmative cause of action was not, in fact, set up as a defense in the said action in the justice's court. The present state of the law frequently operates as a defeat of justice. Illustration may be found in *Blair v. Bartlett*, 75 N. Y. 150; S.

C., 31 Am. Rep. 455. In this connection we call attention to a communication in another column. The other bill provides that except where by law a subscribing witness is necessary to the validity of an instrument, it shall not be necessary in civil or criminal trials to call as a witness the subscribing witness to an instrument, but such instrument may be proved in the same manner as if there were no subscribing witness thereto. This would get rid of an arbitrary, troublesome, and useless rule of evidence. It is even held that although parties are witnesses, an instrument with a subscribing witness cannot be proved by calling the party himself who executed it.

A bill has been introduced in our Legislature to legalize lotteries at church fairs. It may be well to encourage religion by partial exemption from the ordinary pecuniary burdens of the State, but we cannot conceive how it can be defensible to legalize an act in favor of religion which is pronounced illegal and immoral in every other connection. Lottery gambling has been pronounced illegal and immoral. There can be little doubt of its bad influence. But whether this is so or not, it seems ridiculous to say that lottery gambling when conducted in the general way is wicked, but is made righteous when conducted by deacons and elders for the purpose of benefiting the church. The slave trade would be no less abhorrent if conducted by missionaries with a view to the promulgation of christianity. If religion is so weak that it can be sustained only by measures which are considered immoral in secular matters, we had better give it up, and economize in the society of Col. Bob Ingersoll. At all events let us not be hypocritical as a State. Let this measure be relegated to the waste-basket with Mr. Bergh's whipping-post scheme.

In the Senate, Mr. Robertson proposes that any judge or justice of the Supreme Court, who shall be removed from office for any cause not involving moral delinquency, shall continue to receive half pay until the expiration of the time for which he was elected, if recommended by the resolution of removal.

An article in another column, on "Psychometry as a Test of Handwriting," by Mr. Dawson, will be of interest to all our readers. Ever since Mr. Dawson perpetrated that awfully funny argument in the "Rye and Rock," case, 22 Alb. L. J. 446, we have been a little suspicious of him. There is however no other reason for supposing that he is not perfectly serious in his present article, and we assume that he is serious. But we must regard this "Psychometry" as part of the regular programme of comets and other heavenly disturbances and portents promised for the present year of perihelions. Clairvoyance and divination in court would certainly be a novelty. Why not adopt the test of the forked stick so much used in the discovery of underground springs? There is nothing in Mr. Dawson's new science that cannot be equalled by any "mind-

reader" and excelled by any juggler. An expert who has writings before him has something to look at, compare, and judge of—some "facts." The circumstance that such experts differ among themselves does not impugn their *opinion*. It simply shows that an opinion cannot be a fact. But how can these supernatural guesses at the unseen and unknown made by the psychometricians be regarded as "facts" or based on "facts"? They are the mere opinion of the guessers that somebody lies, and the fact that they never differ strikes us as evidence of some trickery. To put this awful power in the hands of the gifted few would put the community at the mercy of a Titus Oates. We suggest to Mr. Dawson, however, to endeavor to have this science applied in the Whittaker case. Whether trustworthy or not it could not do much hurt, and the result either way would be sure to suit half the community.

As a man frequently feels impelled to pay a debt on his death bed, so President Hayes has sent in the name of Mr. Stanley Matthews, of Ohio, for the vacancy on the Supreme Court bench caused by the resignation of Mr. Justice Swayne. As this is not precisely a political matter, we feel at liberty to speak our mind about it. Possibly we have already done so sufficiently. There is a very general and strong impression that this nomination is sent in, not on account of the peculiar fitness of the nominee, but on account of the intimate friendship between the president and the nominee, and the relationship of the nominee to Mrs. Hayes. This alone would not be an insuperable objection. Other things being equal, there is no reason why the president should not prefer his intimate friends, or his wife's cousins. But in this case other things are not equal. There is a spice of indelicacy in putting an Ohio man on that bench where the chief justice is an Ohio man, which is perceptible by everybody but Ohio people. The nomination belongs to the West, of course, but there are other States beside Ohio, and men as fit for the place in those other States; Judge Cooley, of Michigan, for example. Beyond this, there is a strong and general impression, out of Ohio, that while Mr. Matthews is a brilliant, learned, and eloquent lawyer, he has not a judicial mind, although he has a mind to be a judge. It is no disparagement to Mr. Matthews to say that he is as unfit for a judge as Erskine; more so than Abinger. He has had an inferior judicial experience, and cannot for a moment be compared with Judge Cooley in any of the essentials of the judicial office. We hope the Senate will not confirm this nomination. Nominations every way as fit have been rejected; Caleb Cushing's, for example. The nomination is an excellent commentary on the unwisdom of making the judicial office to be filled by appointment, and we hope our friends who think that all virtue and wisdom is in one man, and that there is no virtue and wisdom in all men, will lay this lesson to heart. We hope Justices Clifford and Hunt will not resign at present. Right here we note that the president has nominated Senator Foe-

ter to succeed District Attorney Woodford. We have nothing to say against the senator, but we have every thing to say in favor of the district attorney, and the nomination is especially noteworthy as illustrating the sincerity of the president's pretensions in favor of civil service reform.

"Colonel" Tom Buford has been acquitted of the murder of Judge Elliott, of Kentucky. It seems that the colonel was insane. He is probably now enjoying a lucid interval which will last during the remainder of his useless and accursed life, unless interrupted by more seasons of debauchery and bad temper, and a fresh grudge against somebody who may offend him. Kentucky ought to be ashamed of this wretched business. There is some talk of putting the gallant judge-killer in the lunatic asylum, but of course it is all nonsense. There is only one lesson to be drawn from such occurrences, and that is to keep away from Kentucky, or if you are already there, to keep off the bench.

NOTES OF CASES.

IN connection with our article on Evidence of Defendant's Pecuniary Standing in Slander, *ante*, 44, we call attention to the case of *Clem v. Holmes*, in the Supreme Court of Appeals of Virginia, January, 1881, 5 Va. L. J. 37. The court there said: "The second ground of error is, that in an action for seduction evidence of the pecuniary circumstances of the defendant is not admissible by way of enhancing the damages. It must be admitted there are very respectable authorities which fully sustain this view. It is so laid down in *Wood's Mayne on Damages*, 661; and the case of *Hodsoil v. Taylor*, L. R., 9 Q. B. 79, is cited as authority; and Lord Mansfield is quoted as saying it should be immaterial whether the damage came out of a deep pocket or not. The learned counsel also cites *Dain v. Wycoff*, 3 Seld. 191, as containing the same rule. If the elementary writers are to be relied on, the great weight of modern authority is the other way; holding it to be competent to show the position and pecuniary condition of the defendant in aggravation of damages. Field on Dam., § 699; 2 Greenl. on Ev., § 579; 5 Wait's Act. and Def. 668, and various cases there cited; 2 Hilliard on Torts, 520. It is a matter of some surprise that there could ever have been a question as to the admissibility of such evidence. As has been well said, the damages in this action are not measured by the mere loss of service, or the necessary expenses incurred; but they are given also to punish the seducer for the anguish and dishonor the outrage brings upon the parent. These damages are not merely compensating, they may be exemplary in their nature. The rank and condition of the parties, the injury to the most sacred feelings and affections, the shame and disgrace cast upon the family, and the anguish of mind in having a daughter whose society brings no comfort to the parent, and whose example may corrupt other members of the family, are all proper to

be considered. This being so, the jury, in fixing the amount of the recovery, may and ought to have reference to the pecuniary circumstances of the defendant. In all such cases the wrong is aggravated in proportion to the wealth and position and rank of the guilty party, all of which may be the instruments by which he more readily accomplished his purposes. A verdict which would be absolutely ruinous to a man in moderate circumstances would scarcely be felt by one possessed of a large fortune, and would be but an invitation to a renewal of the offense whenever the opportunity occurred for its commission. If the jury believe the plaintiff is entitled to vindictive damages they will the more readily give them where they are satisfied the defendant is able to pay, than they would where the appeal is made that the verdict would reduce the defendant to bankruptcy and ruin. At all events, it is better to place the jury in full possession of all the facts as to the condition and circumstances of the parties, than to leave them to grope their way in the dark, and to base their verdict upon fanciful conjectures and rumors. See *McAulay v. Birkhead*, 13 Ged. 28, and cases already cited." In *Hodsoil v. Taylor*, *supra*, Blackburn, J., said: "The jury, no doubt, would give higher damages against a rich man, and the defendant's means do in general in some way come out at the trial; that we cannot help. The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter." The case is distinguishable from that of slander, for the injury by the seduction cannot possibly be aggravated by the defendant's wealth, as it is said a slander may be.

The North German Ice Works, a joint-stock corporation of Berlin, doing business in Austria, maintained ice-houses on the bank of the Danube, near Vienna. The ice-houses were built upon the American system. The ice was cut on a pond-like area of the Danube, lifted up with crane and pulleys, drawn upward into the ice-house on a slide, and slid downward again inside, and then stored. On the inward slide the ice moves by its own weight, and with increasing velocity. Along the sides of the slide laborers are stationed with iron hooks, who are to direct the course of the cakes of ice. There were no railings or beams along the sides of the slide to keep the cakes from falling to the side. Ignaz Popp was one of the laborers stationed along the inside slide. A cake of ice weighing from one to two hundred pounds on its way down the slide flew the track and off to the side. Popp jumped aside, but was struck by the cake of ice, thrown down, and his left leg broken. He sued the company for the injury, and recovered judgment for his damages, the court holding that it was the duty of the company to provide railings or beams along the sides of the slide which would keep the ice from falling off. The judgment was affirmed by the appellate court, and finally by the Imperial Supreme Court of Austria.

A somewhat novel point of evidence was ruled in *Putnam v. Fisher*, to appear in 52 Vt. 191. This was an action for flowing land by a dam. It appeared that the common grantor, after his conveyance, and while liable on his warranty, and while owning other land bordering on the same pond, cut away part of the dam maintained next before the one in suit. That grantor being dead, the plaintiff offered to prove that while cutting it down he said it was too high. Held, inadmissible. The court said: "To the general rule that hearsay or second-hand evidence is inadmissible, there are several well-defined exceptions, but the exceptionable evidence is always guarded by some security that makes it reasonably safe to rely upon it." "This exception has been extended in this and some other States so far as to allow declarations of deceased persons to establish an ancient boundary line between individuals, though this is contrary to the English rule. *Wood v. Willard*, 37 Vt. 377; *Kinney v. Furnsworth*, 17 Conn. 355; *Smith v. Powers*, 15 N. H. 546; *Queen v. Bedfordshire*, 4 E. & B. 535. But under the decisions in England and in this country, this evidence is hedged about with qualifications that must appear before it can be received. To establish an ancient boundary, whether of public or private property, by the declarations of deceased persons, it must appear that the declarations were made before a controversy has arisen in respect to the boundary, that the declarant had knowledge, or such connection with the subject-matter as presumptively to have had knowledge, of the fact, and can identify the boundary, and that the declarant had no interest to misrepresent the fact. The declarations of deceased persons are likewise admissible in evidence in proceedings between third persons, provided they were made against the pecuniary or proprietary interests of the declarant, and provided, further, that they do not question a title that the declarant had no right to question, such as the case of a tenant who cannot dispute the title under which he holds. The declarations of Dewey, when cutting down the dam, cannot be brought within any of the exceptions to the general rule. The doctrine of *Wood v. Willard*, *supra*, has never been extended by our court beyond the case of a disputed ancient boundary line. It has not been applied to proof of other facts of ancient date. Even if the fact to be proved was one proper for the application of the rule admitting declarations, the essential conditions that must exist are not found in this case. One of the conditions recited in *Wood v. Willard*, as necessary for the admission of this class of evidence, is that the declarant has 'no interest to misrepresent the fact.' It is not stated that the declaration must be *against* interest, but that the declarant must stand at least indifferent in respect to interest. In this case Dewey's declaration was in favor of his own interest, and to hold it admissible would enable a party by his own declarations to make evidence for himself. Dewey was under a liability by virtue of his covenants of warranty; he owned land bordering upon Booth and Spaulding's pond, which was liable to encroachment if the dam was higher than it should be; and

thus he was interested to reduce its height." The general rule, as to boundaries, is that the declaration must be by the owner of the land in question, when the declarant is disinterested, and when he is on the ground, pointing out the boundaries. *Daggett v. Shaw*, 5 Metc. 223; *Bender v. Pitzer*, 27 Penn. St. 333. But in *Smith v. Forrest*, 49 N. H. 230, it was held that the declarant need not be on the ground at the time, and in *Scoggin v. Dalrymple*, 7 Jones' L. 46, that he need not be in view of the particular monument spoken of, provided it was distinctly identified. These cases are doubted in *Long v. Cotton*, 116 Mass. 414.

ACKNOWLEDGMENT OF OUTLAWED DEBT.

TWO recent cases, involving the question as to whom and how an acknowledgment of a debt, sufficient to defeat the operation of the statute of limitations, may be made, are worthy of particular notice.

In *Allen v. Collier*, 70 Mo. 138, it was held that a demand is not taken out of the operation of the statute of limitations by a written acknowledgment found among the debtor's papers after his death. The court said: "There is a conflict of the authorities as to whether an acknowledgment or promise in writing, signed by the party to be bound, if made to a stranger, would be sufficient to take a case from under the operation of the statute of limitations, but there is no conflict as to the necessity for such a promise or acknowledgment being made to some person, either to the creditor or his representative, or to a stranger. A promise or acknowledgment implies that it is made to somebody, and in every promise there must necessarily be a promisor and promisee." "A mere writing acknowledging a debt, which is retained by the person making it, and which is never delivered to the creditor or any one else, cannot have the effect of preventing the operation of the statute. In the case of *Merriam v. Leonard*, 6 Cush. 151, where the acknowledgment of the debt was contained in a mortgage duly executed and acknowledged, which was never delivered to the mortgagee, but was found after the mortgagor's death, among his papers, Chief Justice Shaw held that it did not amount to an acknowledgment of the debt, or of a willingness or intention to pay from which a promise could be implied. The deed was never delivered, and of course was not an instrument by which the signer was bound."

In *Dinguid v. Schoolfield*, 32 Gratt. 803, it was held that a deposition of the maker of a note given and signed by him, in a case in which the obligee was not a party, for the purpose of obtaining a credit for the note as to be paid by him, and for which he was allowed such a credit in that case, is such an acknowledgment of the debt by him as will defeat the plea of the statute of limitations in an action on the note by the obligee against him. The court said: "The next and only remaining ground of error is, that the plaintiff not being a party to the

suit in which the deposition was taken, the statements therein cannot be construed as admissions or acknowledgments made to him, and that no promise of payment can be implied from an acknowledgment of a debt so as to take it out of the operation of the act of limitations, unless such acknowledgment be made to the creditor to whom the debt is owing, or to some person representing him by authority." The court then quote the opinion, from Joynes on Limitations, 120, that the acknowledgment is sufficient if made to a third person, and proceed: "Since the publication in 1844 of this excellent treatise on limitations, there have been numerous decisions, both in England and the United States, adverse to the views expressed by the distinguished author, and it is said in a recent work of merit, that according to the very decided weight of the latest decisions in this country, a promise to pay a debt, made to a person not legally or equitably interested in the same, and who does not pretend to have had any authority from the creditor to call upon the creditor in relation to the debt, will not avoid the bar of the statute." The court cite to this doctrine, *Ringo v. Brooks*, 26 Ark. 540; *Gillingham v. Gillingham*, 17 Penn. St. 302; *Morehead v. Wriston*, 73 N. C. 398; *Wachter v. Albee*, 80 Ill. 47; *Kisler v. Sanders*, 40 Ind. 78; *Sibert v. Wilder*, 16 Kans. 176; S. C., 23 Am. Rep. 280; *Fletcher v. Updike*, 3 Hun, 350; *Cape Girardeau County v. Harrison*, 58 Mo. 90; *Trousdale v. Anderson*, 9 Bush, 276. These cases sustain the doctrine laid down. But the court distinguish the case in hand on the ground that the deposition was made to establish the validity of the debt, and gain him credit for it, and "he must therefore be understood to have intended that his acknowledgment of the debt, under the attending circumstances, should be accepted as such and confided in and acted upon by the creditor to whom the debt was due. He cannot be allowed to take the benefit of the acknowledgment and then repudiate its obligation." In other words, he was estopped.

In a note to *Whitney v. Whitcomb*, Smith's Leading Cases, part 2, marg. p. 726, to the doctrine of the principal Missouri case, and that an admission to a third person will not suffice, when meant only for his ear, the cases cited are *Edwards v. Culley*, 4 H. & N. 378; *Bloodgood v. Bruen*, 4 Seld. 362; *Badger v. Arch*, 10 Ex. 841; *Grenfell v. Girdlestone*, 2 Y. & C. 676; *Kyle v. Wells*, 5 Harris, 286; *Gillingham v. Gillingham*, id. 302; *Pearson v. Darrington*, 32 Ala. 227; *Reeves v. Correll*, 19 Ill. 189. The editor says this "is not so much because the promise is made to a stranger, as because there is no sufficient evidence of an intention to promise." "The view thus taken is better founded than that which prevailed in some of the earlier cases, where any acknowledgment from which the continued existence of the debt could be inferred was deemed sufficient, whether made to a third person or to the plaintiff in the action. *Newkirk v. Harrington*, 5 Harr. 88; *McRea v. Kennon*, 1 Ala. (N. S.) 295; *Soulden v. Van Rensselaer*, 9 Wend. 297; *Titus v. Ash*, 4 Wooster, 819; *Phillips v. Peters*, 21 Barb. 351; *Watkins v. Stevens*, 4 id. 168; *Careshore*

v. Huyck, 6 id. 585; *Whitney v. Bigelow*, 4 Pick. 110; *Minkler v. Minkler*, 16 Vt. 193; *Oliver v. Gray*, 1 Harr. & G. 204; *Bird v. Adams*, 7 Ga. 505; *St. John v. Garrow*, 4 Port. 225; *Mountstephen v. Brook*, 3 B. & Ald. 141; *Clark v. Hougham*, 2 B. & C. 149."

McRea v. Kennon and *Bird v. Adams*, *supra*, held that a promise by maker to former holder of a note inured to a later holder. *Soulden v. Van Rensselaer*, *supra*, that a promise to a present holder inures to a later holder. The other cases cited by Smith were of promises to entire strangers.

In *Edwards v. Culley*, 4 H. & N. 378, Pollock, C. B., said, *obiter*: "If a debtor had written in a book a private memorandum of his debt, and the creditor got hold of the book and produced it in court, that would not be an acknowledgment to take the case out of the statute, because no promise to pay could be inferred from it."

In *Bloodgood v. Bruen*, 4 Seld. 362, it was held, reversing the decision in 4 Sandf. 362, that no promise could be implied from an acknowledgment in an answer to a bill in chancery filed by a third person, or drawn out from the debtor while testifying as a witness; the promise must be made to the creditor or his agent.

But an acknowledgment or promise to a third will inure to the original promisee, if made upon a consideration or intended to be communicated to him. So, in *Collett v. Frazier*, 3 Jones' Eq. 80, where a dying man said to a bystander that he owed the plaintiff so much for a slave, which he desired to have paid, and in *Jordan's Adm'r v. Hubbard*, 26 Ala. (N. S.) 433, where decedent told A that he could not live long, and did not expect to see B (his administrator), but wanted A to bear witness that he wished B to pay his debt to C. And in *Evans v. Cary*, 29 id. 99, where A and B met at the house of a common relative, and the latter refusing to speak to him, A complained to C, who said it was because B had suffered as indorser for him, whereupon A said if B had paid any thing for him he was able and willing to pay it. These cases are cited by Smith, but the two latter lose force from the fact that the court said that the acknowledgment was valid if made to a third person, without dwelling on the intention to have it communicated.

In *Ross v. Ross*, 13 N. Y. Sup. Ct. 80, an executor put in his inventory an outlawed debt made by him to the testator. Held, a sufficient acknowledgment in writing to take it out of the statute. So, where a testator, in preparing his will, admitted the justice and validity of a debt, and when he executed the will, prepared a schedule of the indebtedness, and acknowledged that he was willing to pay it. *Rogers v. Southern*, 4 Baxt. 67. So, of an inventory and affidavit of a debt made to procure a discharge in insolvency. *Bryar v. Willcocks*, 3 Cow. 159. A recital in a mortgage that it is subject to a prior one by the same mortgagor to another on the same premises is sufficient to take the prior one out of the statute. *Palmer v. Butler*, 86 Iowa, 576. Otherwise, where a petitioner for discharge in insolvency included an outlawed claim in his schedule. *Geo. Ins. Co. v. Ellicott*, Taney, 180. In *Blushill Academy*

v. *Elli*, 32 Me. 260, it was held that charges made by the treasurer of a corporation against himself in the corporation books, for interest on his note, are recognitions of the debt sufficient to remove the bar of the statute.

PSYCOMETRY AS A TEST OF HANDWRITING.

THERE is an old rule of law which requires the production of the very best evidence of which the nature of the case is susceptible in litigations, and I desire to call your attention to instances in which this rule is violated, and never in any instance without leaving in doubt the fact that the best proof that might be adduced would remove. I refer to the employment of experts as witnesses about the genuineness of signatures or other writings. Chirography is recognized by the courts as entitled to experts. On what authority does this rule rest? No one will pretend it is legislation. Then we must get it from elementary writers and judicial rulings. What is the aim of all authors and jurists in establishing such rules and rulings? Certainty, of course. What aids do they invoke? Principally those of science. Is one science entitled to more consideration than another? Certainly not. Is there, then, a science that can make the conviction of a criminal guilty of forgery and the acquittal of those wrongfully suspected, always a certainty? There certainly is. What its name and methods? Its name is *psychometry*. Its methods the discovery of a knowledge of his own guilt or innocence in the prisoner's mind, when he takes up a pen to write, "I am innocent," on paper. Does this seem absurd? Doubtless it does to all those whose knowledge of the subject is circumscribed. Last week I would have doubted the sanity of a man who knowing me would have expected me to believe such a proposition. Now, when I hear the laugh of the skeptic, I know that before its echoes can die, if he will listen, he will change the *tenor* of his laugh. It will certainly be with me and against the skeptics. What is the test? Experiments. How many? Enough to satisfy anybody and everybody. A rule that is infallible can well afford to defy a fool that must be fallible. What shall we do then? Simply defy science, learning, genius and intellect to prove by any of their tricks that in the science of *psychometry* there is any trick at all or flaw whatever. *Psychometry* is a science from which no mortal man can conceal his real thoughts, if he will dare to write what he pretends are his convictions, upon paper. The moment he thus commits himself the *psychometric* expert can tell with an infallible certainty whether that he has said is true or false. How are we to know? Well, suppose a criminal charged with forgery is on trial, and he and each one of the jurors who are trying him should write on separate pieces of paper "I am," or "I am not" guilty of this forgery, and that six of the jurors should confess they were guilty when they were not, and that the other six, with the prisoner, should say they were not guilty. Now, suppose you call in an expert to whom all these parties are utter strangers, and you fold these thirteen pieces of paper up and submit them to him, and that he, in the presence of the court, promptly and peremptorily declares that seven of these men have lied, before he opens one of those papers, and that he points out which seven, without opening one of them, and that they are then opened in the presence of the court and found to be the six jurors that said they were guilty and the criminal who said he was not guilty. Would not such a revelation overwhelm you with the conviction that *psychometry* is a science and the criminal guilty? The evidence of all other experts is at best, after all, a matter of opinion, about which no two always agree. *Psychometric* experts express no opinions, but deal in

facts, and facts about which they all always agree. If, then, they can furnish positive evidence that can defy doubt and disproof, must it not be a higher order of evidence than conflicting opinions insusceptible of a conviction of perjury? What then is to be the first step taken to inaugurate the progress the development of science in the premises demands? It is the recognition by the courts of *psychometry* as a science. What should be done to bring this about? Now that is the question that is at the bottom of the origin of this article. It was written to ask it. The existence of this science and its independence of all other sciences or sources of social influence rest on too immutable a basis to either dread enemies or fawn on power. It asks only for a test of its integrity, and its friends are aware that it will have to encounter the open and bitter enmity of every hypocrite in the world.

ANDREW H. H. DAWSON.

MANDAMUS TO COMPEL ISSUE OF PATENT FOR PUBLIC LANDS.

SUPREME COURT OF THE UNITED STATES, DEC. 13, 1890.

UNITED STATES EX REL. MCBRIDE, Plaintiff in Error,
V. SHURZ.

The Supreme Court of the District of Columbia is authorized to issue the writ of *mandamus* as an original process in cases where, by the principles of the common law, the party is entitled to it.

When a patent to a citizen for a part of the public lands has been regularly signed by the president, and sealed with the seal of the government, countersigned by the recorder and duly recorded, the right to its possession by the grantee is perfect, and a writ of *mandamus* will lie to the officer in whose possession it is, to compel its delivery.

In the progress of the proceedings to acquire, under the laws of the United States, a title to the public lands, there must, in all cases where the claimant is successful, come a period when the power of the executive officers, who constitute the land department, over those proceedings ceases. That period is precisely when the last official act has been performed which is necessary to transfer the title from the government to the citizen.

Title by patent from the United States is title by record, and delivery of the instrument to the grantee is not essential to pass the title, as in conveyances by private persons. Therefore, when the officers, whose action is rendered by the laws necessary to vest the title in the claimant, have decided in his favor, and the patent has been duly signed, sealed, countersigned and recorded, the title of the land has passed to the grantee, and there remains nothing more to be done by the land office but the ministerial duty of delivering the instrument, which can be enforced by *mandamus*.

An acceptance of the grant will in such case be presumed from the efforts of the grantee to secure the favorable action of the department, and especially from the demand for possession of the patent.

IN error to the Supreme Court of the District of Columbia. The facts appear in the opinion.

MILLER, J. This is a writ of error to the Supreme Court of the District of Columbia. In that court it was commenced by a petition for a writ of *mandamus* to compel the secretary of the interior to deliver to the relator, McBride, a patent for a quarter-section of the public lands, which, it was alleged, had been signed by the president, the seal of the United States affixed to it, and duly recorded in the proper book in the general land office, and countersigned by the recorder. For this instrument, while in the immediate possession of the secretary, McBride made demand and was refused; whereupon he filed the petition for *mandamus*. The court, instead of issuing the alternative writ, proceeded by ordering a rule on the secretary to show cause why the writ should not issue. A

supplemental petition was filed, and Secretary Schurz, in due time, filed his answer, accompanied by certain exhibits, to which the relator replied by taking issue, according to the rules of practice prescribed by that court, on every allegation of the answer.

Upon these pleadings and the following agreed statement of facts signed by counsel for each party, the case was heard and the rule was discharged:

"Be it remembered that on the hearing of this cause before the Supreme Court of the District of Columbia, sitting in General Term on the 28th day of October, 1879, it was conceded by both parties that all the allegations of the original petition were true, except the one that the premises named in the petition were in 1862 subject to pre-emption filing or homestead entry.

"It was also conceded that the case relating to said premises set out in the answer of respondent had been appealed from the decision of the commissioner of the general land office to the secretary of the interior, and was pending before the said secretary at the time of the demand for said patent was made on him, as set forth in the said original petition of relator, and for some days thereafter, and that at the time of said demand, and for some days thereafter, the said patent was, with the papers in said case as an exhibit in said case, in the office of the secretary of the interior, and was not in the office of the commissioner of the general land office.

"It was also conceded that the incorporated town of Grantsville, set forth in the answer of the respondent, was in fact the incorporated city of Grantsville, and that it was incorporated by the territorial Legislature of Utah on the 12th day of January, 1876, and that said act should be treated as referred to and made a part of this case.

"All other matters in said case stood upon the original and supplemental petition, the answer of respondent, and the replication thereto. There was no other or further proof or evidence offered by either party.

"One of the rules of this court is as follows:

"33. The joinder in issue may be—

"The plaintiff joins issue upon the defendant's first plea.

"The defendant joins issue upon the plaintiff's replication to the first plea."

"And this form of joinder shall be deemed to be a denial of the substance of the pleading to which it relates, and an issue thereon.

"And thereupon the said court, upon the 10th day of November, 1879, upon the evidence and pleading aforesaid, gave judgment for the said respondent.

"The foregoing facts are stipulated to be a full and true statement of this case, and made part of the record therein.

"Whereupon the court orders the said stipulation to be made of record in the case." * * * * *

Some question was made on the argument in this court as to the effect of the answer as evidence, and the practice in the Court of King's Bench, in England, has been referred to as making the return to the writ conclusive or at least evidence of all it states. We are relieved of any difficulty on this point by the stipulation of the parties.

No writ of mandamus, alternative or otherwise was issued, and there was therefore no technical return to such a writ, and in strictness the rule applicable to such a writ does not apply. If, however, it could be held that the answer to the rule to show cause stands in the place of a return to a writ of mandamus, the parties have voluntarily made their own issues and stipulated as to the evidence which shall be considered by the court.

By this stipulation the allegations of the original petition, except one which is specified, are to be taken as true. Certain other facts are then set out. It is

then added that all other matters stand upon the original and supplemental petitions, the answer and replication, and that there was no other or further proof offered by either party. As the replication distinctly put in issue every paragraph of the answer, as no evidence was offered in support of the answer, and as the rule of the court is recited which makes the replication in this case a denial of the substance of the pleading to which it relates, we must exclude the supplemental petition and the answer of the respondent as evidence, and decide the case on the allegations of the original petition and the facts stipulated in the agreed case.

The petition alleged that McBride, who had the requisite qualification to assert a claim under the pre-emption or homestead laws, settled upon the land covered by the patent in the year 1862, with intent to appropriate it under the laws of the United States; that he erected a dwelling-house, cultivated the land, and has continuously occupied and resided on it ever since. That in May, 1869, he made a homestead entry of the land at the proper land office in Salt Lake City. That he duly presented this claim according to law and the rules of the land department, with such effect that a patent to him for the land was signed by the president on the 28th of September, 1877, sealed with the seal of the United States, countersigned by the recorder of the general land office, and duly recorded by him in the proper record book of that office. That this patent was transmitted by mail to the local land officers at Salt Lake for delivery to the petitioner, and was, while there, demanded by him of those officers, who refused to deliver it. That said patent was afterward, by order of the commissioner of the land office, returned to that office, and coming into the possession of the secretary of the interior on some proceedings by other parties contesting petitioner's right to the land, petitioner again demanded its delivery to him of the secretary, who also refused. He thereupon filed his petition for the mandamus.

We are met at the threshold of this inquiry by a denial of the authority of the Supreme Court of the District of Columbia to issue a writ of mandamus, as an original process.

The argument is that the jurisdiction of that court over this class of subjects is governed by section 760 of the Revised Statutes relating to the District of Columbia. That section enacts that "the Supreme Court shall possess the same power and exercise the same jurisdiction as the Circuit Courts of the United States." As this court decided in *McIntyre v. Wood*, 7 Cranch, 505, and *McClung v. Silliman*, 6 Wheat. 599, that the Circuit Courts of the United States possessed no such power, the argument would be perfect if no other powers on that subject existed in the Supreme Court of the District than what is conferred by the above section.

But this court, in the case of *Kendall v. The United States*, held that by the act of February 27, 1801, organizing originally the courts of this district, the clause of that act which declared the laws of Maryland in force at that date, continued in force in that part of the district which had been ceded by that State, invested the Circuit Court, as it was then called, with this very power, because it was a common-law jurisdiction, and the common law on that subject was then in force in Maryland. 12 Pet. 618 *et seq.* This proposition has been repeatedly upheld by the court since that time, and up to the date of the revision it was no longer an open question that in a proper case the court had authority to issue the writ.

It is now said, however, that this section being enacted as of the first day of December, 1873, defines the jurisdiction of the Supreme Court of the District as governed by the powers of the Circuit Courts of the United States over the same subject at that date, at

which time it is clear these latter courts had no such power; and that as the revision repealed all other laws on the same subject, the act concerning the law of Maryland no longer applied to the case.

This leaves out of the process of reasoning the 92d section of the Revision, which declares again that "the laws of the State of Maryland, not inconsistent with this title, as the same existed on the 27th day of July, 1801, except as since modified or repealed by Congress or by authority thereof, or until so modified or repealed, continue in force within the District." Thus the argument is precisely the same as it was in the case of *Kendall v. United States*, for it was urged there, as here, that as the act creating the court measured its jurisdiction by that of the Circuit Courts of the United States, which had no such jurisdiction, there could be none in the former, to which the court replied, the provision which continued in force the laws of Maryland.

The revision has merely separated the different sections of the act of February 27, 1801, and placed part of it in section 760 and part of it in section 92. Neither provision is repealed, but we think both of them are retained, with the construction placed on them by this court in *Kendall v. United States* and the subsequent cases. But this question would seem to be set at rest by the act of 1877, "to perfect the revision of the statutes of the United States, and of the statutes relating to the District of Columbia." The act amends section 763 of the Revision of the Statutes of the District, by enacting that: "Said courts shall have cognizance of all crimes and offenses committed within said District, and in all cases in law and equity between parties, both or either of which shall be resident or be found within said District, and also of all suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants." 19 U. S. Stat. 253.

We are of opinion that the authority to issue writs of mandamus in cases in which the parties are by the common law entitled to them, is vested in the Supreme Court of the District of Columbia.

We proceed to inquire whether the relator has made such a case.

If the relator was entitled to the possession of the patent as his property, and it was the plain duty of the secretary to deliver it to him when demanded, then, under all the authorities, and especially the decisions of this court, he is entitled to the remedy he asks. From the case of *Marbury v. Madison*, 1 Cranch, 137, down to the present time, such has been the settled doctrine of this court. And though it may be said that the opinion of Chief Justice Marshall in that case was not necessary to the decision made, which was that this court had no original jurisdiction in that case, the principles of the opinion have been repeatedly recognized and acted upon in this court since, and the case cited with approval in its definition of the circumstances under which persons holding public offices will be compelled to perform certain duties which are merely ministerial. *Kendall v. United States*, 12 Pet. 618; *Kendall v. Stokes*, 3 How. 98; *Decatur v. Paulding*, 14 Pet. 353; *Commissioner v. Whately*, 4 Wall. 584.

The next objection to issuing the writ which we are called to consider is that the secretary, in deciding whether he would deliver the patent to McBride or not, was called upon to exercise a judgment and discretion on the case presented to him which were not merely ministerial, but which were rather judicial in their character, and in regard to which many matters were to be considered—such as the validity of the title conferred by the patent, the circumstances under which it was signed, sealed and recorded, and the conflicting rights of other parties to the land covered by it. In short, that this execution of the patent con-

cluded nothing, and the authority of the secretary and the commissioner of the general land office to deal with the whole subject, including the relator's right to the land, remained unaffected by the patent. Whether this be so or not must depend upon the authority conferred by Congress upon those officers, and the effect of the patent in the stage to which it had come when the demand for its possession was made by McBride.

The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States, and under this provision the sale of the public lands has been placed by statute under the control of the secretary of the interior.

To aid him in the performance of this duty, a bureau has been created, at the head of which is the commissioner of the general land office, with many subordinates. To them as a special tribunal Congress has confided the execution of the laws which regulate the surveying, the selling and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen, and this court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring title were as yet *in fieri* before this special tribunal created by Congress for deciding the questions which should arise in the course of these proceedings, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.

But we have also held that when, by the action of these officers and of the president of the United States, in issuing a patent to a citizen, the title to the land has passed from the government, the question of who is the real owner of it is open in the proper courts to all the considerations appropriate to the case. And this is so, whether the United States shall sue to set aside the patent and recover back the title so conveyed, as in *United States v. Stone*, 2 Wall. 525, or an individual shall sue to have the title conveyed by the patent held by the patentee in trust for that individual, on account of equitable circumstances which entitle him to that relief. *Johnson v. Towsley*, 13 Wall. 72, and other cases.

In the case before us it is said that the instrument called a patent, which purports in the name of the United States to convey to McBride the land in controversy, is not effectual for that purpose for want of delivery. That though signed and sealed and recorded, and sent to the register of the land office at Salt Lake City for delivery to him, it never was so delivered, and has always remained under the control of the officers of the land department, and that the instrument is invalid as a deed of conveyance for want of delivery to the grantee. If it were conceded that delivery of this patent is essential to its power to transfer title to the grantee, and that such delivery is required as that which is necessary between man and man, it would be a question of some difficulty to decide whether such delivery has taken place in this case. The well-known principle by which the intention of the grantor in a deed to make an act which falls far short of manual delivery, to stand for delivery, when so designed, might well be applied to the act of the commissioner in transmitting the patent by mail to the local office for the purpose of delivery; while on the other hand it is argued with much force that the instrument never actually passed from the land office or the control of its officers. We do not think the decision of this point necessary to the case before us.

We are of opinion that when upon the decision of the proper office, that the citizen has become entitled

to a patent for a portion of the public lands, such a patent is in that office made out and signed by the president, and when the seal of the United States is affixed to the instrument, countersigned by the recorder of the land office, and duly recorded in the record-book kept for that purpose, it becomes a solemn public act of the government of the United States and needs no further delivery or other authentication to make it perfect and valid. That in such case the title to the land conveyed passes by matter of record to the grantees, and that delivery as in cases of deeds of private individuals is not necessary to give effect to the granting clause of the instrument.

The authorities on this subject are numerous and they are uniform. They have their origin in the decisions of the English courts upon the grants of the crown evidenced by instruments called there, as here, patents.

Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance; the first of which is by matter *in pais* or deed, the second by matter of record or an assurance transacted only in the king's public courts of record, the third by special custom, and the fourth by devise in a last will or testament.

In the chapter devoted to alienation by deed he enumerates among the requisites to its validity the act of delivery. Book 2, ch. 20. But in chapter 21, devoted to alienation by matter of record, nothing is said about delivery as necessary to pass the title, and under this head he includes the king's grants. These he says are all made matter of public record, and are contained in charters or letters-patent. He then recites the processes by which patents are prepared and perfected, the various officers through whose hands they pass, and the manner of affixing the seal to them, and their final enrollment. They are then perfect grants, and no mention is made of delivery as a prerequisite to their validity. After this they can only be revoked or annulled by *scire facias* or other judicial proceeding. 2 Commentaries, 346. The importance attached to the delivery of the deed in modern conveyancing arises largely from the fact that the deed has taken the place of the ancient livery of seizin in feudal times, when in order to give effect to the enfeoffment of the new tenant, the act of delivering possession in a public and notorious manner was the essential evidence of the investiture of the title to the land. This became gradually diminished in importance until the manual delivery of a piece of the turf, and many other symbolical acts, became sufficient. When all this passed away, and the creation and transfer of estates in land by a written instrument, called the act or deed of the party, became the usual mode, the instrument was at first delivered on the land in lieu of livery of seizin. *Shepherd's Touchstone*, 64; *Coke upon Littleton*, 266b; *Washburn on Real Prop.*, book 3, p. 308. Finally, any delivery of the deed, or any act which the party intended to stand for such delivery, became effectual to pass the title. *Church v. Gilman*, 15 Wend. 656; *Buller v. Baker*, 8 Coke, 266; *Warren v. Leitch*, 11 Fost. (N. H.) 340; *Hatch v. Hatch*, 9 Mass. 307.

But in regard to the transfer of title by matter of record, whether this record were a judgment or decree in a court of justice, as fines and recoveries, or the record made in the proper office (generally in the Court of Chancery by the lord chancellor) of the king's grant, called enrollment, no livery of seizin was necessary, nor any delivery of the document sealed with the king's seal; for when this seal was affixed to the instrument and the enrollment of it was made, no higher evidence could be had, nor was any other evidence necessary of this act or deed of the king. Hence, Mr. Cruise, in his *Digest of the English Law of Real*

Property, says: "The king's letters-patent need no delivery; nor his patents under the great seal of the duchy of Lancaster; for they are sufficiently authenticated and completed by the annexing of the respective seals to them." Title XXXIV, § 1, paragraph 3.

In the case of *Marbury v. Madison*, 1 Cranch, to which we have already referred, the court, likening the commission of the justice of the peace, which was signed and sealed by the president and left in the hands of the secretary of State, to a patent for lands, uses this language:

"By the act passed in 1796, authorizing the sale of lands above the mouth of the Kentucky river (vol. 3, p. 229), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased, and on producing to the secretary of State the receipt of the treasurer, upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of State and recorded in his office. If the secretary of State should choose to withhold this patent, or the patent being lost should refuse a copy of it, can it be imagined that the law furnishes to the injured party no remedy? It is not believed that any person whatever would attempt to maintain such a proposition."

In another part of the opinion it is said: "In all cases of letters-patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the president and the seal of the United States are those solemnities."

The same principle is found in the opinion of the court, delivered by Mr. Justice Story, in the case of *Green v. Litter*, 8 Cranch, 229.

Many decisions of State courts of the highest character to the same effect are cited in the brief of counsel for relator in this case, among which may be mentioned *Ex parte Kuhlman*, 3 Rich. Eq. 257; *Downer v. Palmer*, 31 Cal. 513. The subject is very fully and ably discussed by Mr. Justice Field in the case of *Leroy v. Jamison*, 3 Sawyer, 369.

It is also said that there was no acceptance of this patent by the grantees, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case.

The doctrine on this point is well stated by Attorney-General Crittenden, in the case of *Pierre Mutelle*, in 1841, as found in 3 Opinions of Attorneys-General, 654, which was a case like the present, in regard to the duty of the secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land did pass to *Pierre Mutelle* at the date of the patent to him, though that patent still remains in the land office without any actual tradition of it to any one. The patent was issued by authority and direction of law, and upon general principles, where the patentee does not expressly dissent, his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent and amount to an acceptance of it. The patent, in the meaning of the act referred to, is granted to the patentee from its date, though he may never actually see or receive it, and is valid and effectual to pass the title to the land."

"All legal muniments of title belong to him who owns the land, * * * but as the patent is a recorded

evidence of title, always accessible, no material prejudice can result to the true owner from a stranger getting possession of it."

The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant of which it is the evidence.

It is argued with much plausibility that the relator was not entitled to the land by the laws of the United States, because it was not subject to homestead entry, and that the patent is therefore void, and the law will not require the secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.

We are not prepared to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.

But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. And the case before us is one to which we think it is clearly applicable. To the officers of the land department, among whom we include the secretary of the interior, are confided, as we have already said, the administration of the laws concerning the sale of the public lands. The land in the present case had been surveyed and the lands in that district generally had been opened to pre-emption, to homestead entry, and to sale under their control. The question whether any particular piece of land belonging to the government was open to sale, to pre-emption, or to homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question is judicial in its character, as also the decision of conflicting claims to the same land by different parties.

It is clear that the right and the duty of deciding all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the secretary. They have therefore jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. How can it be said that when their decision of such a question is finally made and recorded in the shape of a patent, that instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts where the government never had land, it would be absolutely void. If it should issue for land once owned by the government but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the land department by certain acts of other persons, which include it within the limits of an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously the patent may be voidable, but not absolutely void.

The mode of avoiding it if voidable is not by arbitrarily withholding it, but by judicial proceeding to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and for what price it should be sold, and when, in accordance with their decision, it was sold, the money paid for it and the grant carried into effect by a patent under the seal of the United States and the signature of the president, that instrument carried with it the title of the United States to the land.

From the very nature of the functions performed by these officers and from the fact that a transfer of the title from the United States to another owner follows their favorable action, it must result that at some stage or other of the proceeding their authority in the matter ceases.

It is equally clear that this period is at the latest, precisely when the last act in the series essential to the transfer of title has been performed. Whenever this takes place the land has ceased to be the land of the government; or to speak in technical language, the legal title has passed from the government and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title-deeds destroys his title.

What is this final act which closes the transaction?

In the case of *Marbury v. Madison*, this court was of opinion that when the commission of an officer was signed by the president and the seal of the United States affixed to it, the commission was complete, and the officer appointed entitled to its possession, so that he could enforce its delivery by the writ of mandamus. In regard to patents for land, it may be somewhat different, and it is not necessary in this case to go quite so far.

But we may well consider that in all nations, as far as we know, where grants of the property of the government or of the Crown are made by written instruments, provision is made for a record of these instruments in some public government office. Our experience in regard to Mexican, Spanish and French grants of parts of the public domain purchased by us from those governments, teaches us that such is the uniform law of those countries. We have already shown that under the English law all letters-patent are enrolled and that this is the last act in the process of issuing a patent which is essential to its validity.

We are safe in saying that every State in the Union has similar provisions in reference to its grants of land, and it has been the effort of most of them to compel public record of all conveyances of land by individuals or corporations.

The acts of Congress provide for the record of all patents for land in an office and in books kept for that purpose. An officer, called the recorder, is appointed by law to make and to keep these records. This officer is required to record every patent before it is issued and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transaction—the legally appointed act which completes what Sir William Blackstone calls title by record; and when this is done the grantee is invested with that title.

We do not say that there may not be rare cases where all this has been done and yet the officer in possession of the patent be not compellable to deliver it to the grantee. If, for instance, the clerk whom the president is authorized by law to appoint to sign the president's name to the patent, should do so when he has been forbidden by the president, or if, by some mere clerical mistake, the intention of the officer performing an essential part in the execution of the patent has been frustrated. It is not necessary to decide on all the hypothetical cases that could be imagined.

But we are of opinion that when all that we have mentioned has been consciously and purposely done by each officer engaged in it, and where these officers have been acting in a matter within the scope of their duties, the legal title to the land passes to the grantee, and with it the right to the possession of the patent.

No further authority to consider the patentee's case remains in the land office. No right to consider whether he ought in equity, or on new information, to

have the title, or receive the patent. There remains the duty, simply ministerial, to deliver the patent to the owner—a duty which, within all the definitions, can be enforced by the writ of mandamus.

It is not always that the ill consequences of a principle should control a court in deciding what the established law on a particular subject is, and in the delicate matter of controlling the action of a high officer of the executive branch of the government, it would certainly not alone be sufficient to justify judicial intervention. But it may tend to reconcile us to such action as we feel forced to take, under settled doctrines of the courts, to see that any other course would lead to irremediable injustice.

If the relator in this case cannot obtain his patent he is wholly without remedy. He cannot sue the United States, in whom is the title in the absence of the patent, for the United States can be sued in no other court than the Court of Claims, and we have decided that that court has no jurisdiction in such case. *Bonner v. The United States*, 9 Wall. 156. There is no one else to sue, for the title is either in the relator or the United States. It may be many years before the city of Grantville, the party now claiming against relator, will get a patent, and it may never do so.

The relator is therefore utterly without remedy if the land be rightfully his, until he can obtain possession of this evidence of his title.

On the other hand, when he obtains this possession, if there be any equitable reason, why, as against the government, he should not have it—if it has been issued without authority of law, or by mistake of facts, or by fraud of the grantee—the United States can, by a bill in chancery, have a decree annulling the patent, or, possibly, a writ of *scire facias*. If another party (as the city of Grantville) is, for any of the reasons cognizable in a court of equity, entitled, as against the relator, to have the title which the patent conveys to him, a court of chancery can give similar relief to the city as soon as the patent comes into his possession, or perhaps before. So that it is plain that by non-action of the land department the legal rights of the parties may remain indefinitely undecided, and the rights of the relator seriously embarrassed or totally defeated, while the delivery of the patent, under the writ of mandamus, opens to all the parties the portals of the courts, where their rights can be judicially determined.

We are of opinion that the relator in the case, as presented to us, is entitled to the possession of the patent which he demanded, that the writ of mandamus by the Supreme Court of the District of Columbia is the appropriate remedy to enforce that right, and the judgment of that court is reversed, and the case remanded, with instructions to issue the writ.

Waite, C. J., and Swayne, J., dissented.

INJURY FROM DEFECTIVE PREMISES TO ONE THEREON BY INVITATION.

SUPREME COURT OF THE UNITED STATES, JANUARY 10, 1880.

BENNETT, Plaintiff in Error, v. LOUISVILLE & NASHVILLE RAILROAD CO.

The owner or occupant of land, who by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation.

IN error to the Circuit Court of the United States for the District of Kentucky. The opinion states the case.

HARLAN, J. This is a writ of error to the Circuit Court of the United States for the District of Kentucky.

The action was commenced by a petition framed in accordance with the Kentucky Code of Practice in civil cases. Its object is to recover damages for personal injuries alleged to have resulted from negligence or want of proper care on the part of the agents, servants and employees of a railroad corporation engaged in the business of transporting freight and passengers for hire. The petition was twice amended, and to it, as amended, a demurrer was interposed, and being sustained, judgment was given for the defendant. After judgment the plaintiff died, and the action was revived in this court in the name of his personal representative. The controlling question before us is whether the petition and amended petition make out a cause of action against the company.

Under the averments in the pleadings, and for the purposes of this case, as presented, we must assume the existence of the following facts:

In the year 1876, the deceased was a passenger on the cars of the defendant company from Vernon to Danville, in the State of Tennessee. At the last named place he left the train for the purpose of taking the steamer *Rapidan*, which belonged to the Evansville & Tennessee River Packet Company, and was engaged in the navigation of that river. Its customary place of landing for Danville and immediate vicinity, on that side of the river, was at a wharf-boat, moored at or against a lot, within a few hundred yards of the railroad station. Between the railroad company and the packet company there was, at the time, an arrangement or contract, by the terms of which each party enjoyed a community of interest (in what proportion it is not stated) in the freight and passenger traffic at that point. They were mutually at liberty to sell through tickets, and give through bills of lading, over their respective lines. Both the wharf and the lot were owned by, and were under the exclusive control of, the railroad company. The former was used by the company and the public for storing freight, and as a convenient place for the landing of steamboats navigating the river. The lot had been purchased and used by the company in connection with the wharf-boat, for the purpose of facilitating its passenger business, as well as for the receipt and discharge of freight coming from the river to the railroad, or going from the railroad to the river. For such use of its wharf-boat and landing, the railroad company received benefit and compensation. To further facilitate their freight and passenger business, the railroad company had erected and maintained upon such lot, in front of the wharf-boat, a large open shed depot, about 240 feet in length, and twenty feet in width, in the centre of which was a room or apartment containing an engine, which was used for the purpose of hauling freight to and from the river by means of flats or cars drawn by ropes on railroad tracks. These cars were pulled up the bank into spaces (of which there were four, two on each side of the engine-room) left in the floor of the depot. These spaces or hatch-holes, as they are called, were about eleven feet in extent, and reached from the river side of the depot nearly to its center.

The customary, and indeed the only safe, available and convenient route for persons passing from Danville to the steamboat landing, was along a plankway (on each side of which the ground was low and marshy), put down by the railroad company, about 600 yards in length, extending from Danville along a side track to the railroad, and terminating at or near the northern end of the depot; thence up a flight of

steps to the depot floor, and across the floor of the depot toward its southern end; thence down a flight of steps, located between two of the hatch-holes, to the wharf-boat, over a macadamized or gravel way, which the railroad company had constructed for the convenience of those going upon business to or from the steamboat landing. The custom of travellers, passing between the railroad station at Danville and the steamboat landing, to use as a footway the plank-road, the depot floor, and the macadamized way leading to the wharf-boat, was not only a necessary one, but was known to and permitted by the company. There was no path or safe or convenient way around the shed depot to the wharf.

Such was the situation when the deceased reached Danville by the cars of the company. He stopped at a hotel to await the coming, that night, of the steamer *Rapidan*, whose usual hours of arrival at the landing were known to the railroad company. Some time after midnight the steamer reached the vicinity of the landing, and by whistle signalled for landing at the wharf-boat. Deceased started from the hotel for the steamboat, for the purpose of prosecuting his journey, taking with him a lighted lantern. He went upon the plankway leading to the shed depot, having been informed by the landlord that that was the proper route to take. He had proceeded but a short distance when the wind extinguished the light, and fearing the boat would immediately depart, and being able to see the plankway, he proceeded to the depot (which was unlighted), and passing up the steps at its northern end, he attempted to cross the floor in the direction of the steps, at the southern end, leading down to the macadamized or gravel way which we have described. He was unaware of the existence of the openings or hatch-holes in the depot floor, or of any other obstruction or danger in his path, and although using due care, he fell through one of the hatch-holes (which had been left uncovered and unguarded for some time before), down a distance of at least five feet, upon the cross-ties and rails beneath. By the fall his left ankle and foot were broken and crushed, causing severe and permanent injury, attended by sickness and long confinement to his bed. The demurrer concedes that the company were aware, as well of the condition of the hatch-holes in the depot floor, as that such condition was unsafe and dangerous to the travelling public.

1. The right to revive this action in the name of the personal representative of Bennett seems to be clear under the laws both of Kentucky and Tennessee, by each of which States the defendant company was incorporated, and in the latter of which occurred the injuries for which damages are claimed. Ky. Gen. Stat. 179; Tennessee Code, § 2846.

2. The facts disclosed by the pleadings, and by the demurrer conceded to exist, seem to bring this case within the rule—founded in justice and necessity, and illustrated in many adjudged cases in the American courts—that the owner or occupant of land, who, by invitation, express or implied, induces or leads others to come upon his premises, for any lawful purpose, is liable in damages to such persons—they using due care—for injuries occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation. *Railroad Co. v. Hanning*, 15 Wall. 659; *Carleton v. Franconia Iron and Steel Co.*, 99 Mass. 217; *Sweeney v. Old Col.*, 10 Allen, 373; Wharton's Law of Negligence, § 349-352; Cooley on Torts, 604-7, and authorities cited by those authors. The last named author says that when one "expressly or by implication invites others to come upon his premises, whether for business or for any other purpose, it is his duty to be reasonably sure that he is not inviting them into

danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit."

The rule is also illustrated in many cases in the English courts, some of which it may be well to examine. One, referred to by this court in *Railroad v. Hanning*, is *Corby v. Hill*, 4 Scott's C. B. (N. S.) 562. That was an action for an injury sustained by the plaintiff while travelling upon a private way leading from a turnpike road to a certain building, and over which parties having occasion to visit such building were likely to pass, and were accustomed to pass, by leave of the owners of the soil. The defendant negligently obstructed the way by placing thereon certain materials without giving notice or warning of the obstruction by light or other signal, and by reason thereof the plaintiff's horse was driven against the obstruction and injured. One of the pleas was that the defendant had placed the materials on the road by the license or consent of the owners of the soil. Upon the argument of the case counsel for the defendant contended that the owners of the soil, and consequently, also, any person having leave or license from them, might, as against any other person using the way by the like leave and license, place an obstruction thereon without incurring responsibility for injury resulting therefrom, unless in the case where an allurements or inducement was held out to such other person to make use of the way. Upon the general question, as well as in response to this argument, Cockburn, C. J., said: "It seems to me that the very case from which the learned counsel seeks to distinguish this, is the case now before us. The proprietors of the soil held out an allurements whereby the plaintiff was induced to come upon the place in question; they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, and having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe, and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, Williams, J., said: "I see no reason why the plaintiff should not have a remedy against such a wrong-doer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy, and there is no authority against it." Willis, J., remarked: "The defendant has no right to set a trap for the plaintiff. One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury."

Another case often cited is *Chapman v. Rothwell*, El., Bl. & El. 168. The declaration there charged that the defendant was in possession and occupation of a brewery, office and passage leading thereto from the public street, used by him for the reception of customers and others in his trade and business as a brewer. The passage was the usual and ordinary means of ingress and egress to and from the office, from and to the public street. The defendant negligently permitted a trap-door in the floor of that passage to be and remain open, without being properly guarded and lighted. The plaintiff's wife had been to the brewery office as a customer in the defendant's business, and was walking along the passage on her return to the public street, when she fell through the trap-door and was injured and killed. Upon the argument counsel for defendant insisted that no facts appeared showing it to be the

duty of the defendant to keep the trap-door closed. To this Erie, J., replied, with the sanction of Lord Campbell, C. J.: "If you invite a customer to come to your shop and leave a pitfall open, or a large iron peg in the part of the floor over which the customer is likely to tread, is not that a duty and a breach if accident ensues?" The court there drew a distinction between the case of a mere visitor, as in *Southcot v. Stanley*, 1 H. & N. 247, and a customer, who, as one of the public, is invited for the purposes of business carried on by the owner or occupier of the premises.

In *Indermaur v. Dames*, L. R., 1 C. P. 228, and L. R., 2 C. P. 313, the court, referring to the class of persons who visit premises upon business which concerns the occupier, and upon his invitation, express or implied, said that it was settled law that a visitor of that class, "using reasonable care on his part for his own safety, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

In *Launcester Canal Company v. Panaby*, 11 Ad. & El. 242, which was the case of a company making a canal for their profit, and opening it to the public use on payment of tolls, it was held by the Exchequer Chamber that the common law, in such a case, imposed a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they kept it open for the public use of all choosing to navigate it, that they may navigate it without danger to themselves or property.

The same principle was applied by the Exchequer Chamber in *Gibbs v. Trustees of the Liverpool Docks*, 3 H. & N. 173. That was an action by the owners of a ship to recover for an injury done to the cargo by reason of the ship, when entering, having struck a bank of mud carelessly and negligently left in and about the entrance to the dock. The defendants were not individually profited by the operations of the company of which they were trustees, but by statute, were bound as such trustees to apply the tolls received in maintaining the docks, and in paying the debt contracted in making them. The court, speaking by Coleridge, J., held, that whether the defendants received the tolls for a beneficial or a fiduciary purpose, the knowledge, upon their part, that the entrance to the dock was dangerous, imposed upon them the duty of closing the dock against the public as soon as they became aware of its unsafe condition; that they had no right, with a knowledge of its condition, to keep it open and to invite the vessel in question into the peril which they knew it must encounter, by continuing to hold out to the public that any ship, on the payment of the tolls to them, might enter and navigate the dock.

The judgment was affirmed upon full consideration in the House of Lords, 11 H. L. Cas. 686. In the opinion, there delivered by Mr. Justice Blackburn, on behalf of all the judges who heard the argument, among whom were Lords Cranworth, Wensleydale and Westbury, it was said, "for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming that it was the duty of the trustees to take reasonable care that the dock was in fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty and did not take reasonable care that it was fit."

We forbear further citation of authorities. It is clear that the rule which obtains in the English courts

is in harmony with that generally recognized in the courts of this country.

That upon the case as made by the pleadings the railroad company is liable in damages none of us entertain any doubt. As the deceased did not purchase from the railroad company a through ticket, but only a ticket over its line from Vernon to Danville station, it may be argued that the relation of carrier and passenger which existed between him and the company, terminated when the latter left the train at Danville station, and consequently, that there was no breach of the company's contract of transportation. But there was nevertheless a breach of legal duty or obligation for which, as property owner, the railroad company is responsible.

It cannot be pretended that Bennett, at the time he was injured, was in any sense a trespasser upon the premises of the company. Nor is this case like many, cited in the books, of mere passive acquiescence by the owner in the use of his premises by others. Nor is it a case of mere license or permission by the owner, without circumstances showing an invitation extended or an inducement, or in the language of some of the cases, an allurement held out to him as one of the general public. It is sometimes difficult to determine whether the circumstances make a case of invitation, in the technical sense of that word, as used in a large number of adjudged cases, or only a case of mere license. "The principle," says Mr. Campbell, in his *Treatise on Negligence*, "appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it."

As each case must largely depend upon its special circumstances, we shall not attempt to lay down a general rule upon the subject. It is quite sufficient to say that no difficulty of discrimination exists in the case before us. This is the case of a traveller, going upon a way which had been constructed and was maintained by a railroad company, in part for its own benefit and profit, to be used by all without distinction, who desired, for purposes of business, to pass to and from the company's wharf-boat moored at an established landing upon a public navigable river. The deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had been, so to speak, dedicated by the owner. They were so situated, with reference to the river, and were so occupied and controlled by the company as not only to invite their use by the public, but in a sense, to compel those having business at the river landing to abandon such business, or in its prosecution, to pass over the route through the shed depot. It was therefore the plain duty of the company to take such precautions, from time to time, as ordinary care and prudence would suggest to be necessary for the safety of those who had occasion to use the premises for the purposes for which they had been appropriated by the company, and for which, with its knowledge and permission, it was commonly used by the public.

We are all of opinion that the pleadings, though somewhat extended and argumentative, state facts sufficient to require an answer from the defendant. It is a case peculiarly for the consideration of a jury of practical men, who, under proper instructions, can best ascertain to what extent, if at all under the circumstances actually existing, the railroad company was negligent in the discharge of any duty or obligation imposed by the law, and how far, if at all, the deceased was wanting in due care upon the occasion when he was injured.

To guard against misapprehension, it is proper to remark also that we must not be understood as making the plaintiff's right of recovery dependent upon proof of every single fact averred in the pleadings, or which

and been exposed to the elements. The case considered the question of the right of the owner to recover not only the value of the property but also the value of the property after it had been damaged. The court held that the owner was entitled to recover the value of the property after it had been damaged, and that the defendant was liable for the damages.

The judgment is affirmed and the costs remanded with a certificate to certify the damages, and for further proceedings in conformity with this opinion.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION BY INFANT FOR MONEY PROMISED FROM HIM BY PAID PROMISOR—WHAT IS ON CONTRACT AND NOT ON TORT. A complaint alleged "that the plaintiff is an infant; that he borrowed and advanced to defendant various sums of money, amounting to \$401.25; that thereafter defendant by false and exaggerated representations of the profitable nature of his business, induced the plaintiff to become his partner; that plaintiff was thereby induced to agree to put \$1,000 as capital into the business; that he did so by allowing the previous loans to be applied on his share of capital and paying the balance in cash; that becoming satisfied of the falsity of the representations he demanded the money back which was refused, wherefore he demands judgment for \$1,000." *Held*, that this was sufficient to set forth an action upon contract, and that a nonsuit on the ground that it was an action in tort (there being no evidence sufficient to establish a tort) was erroneous. Almost all the contracts of an infant are voidable and liable to be rescinded. This one was of that character. *Millard v. Hewitt*, 19 Wend. 301; *Chapin v. Shuter*, 49 N. Y. 407; *Boyl v. Mix*, 17 Wend. 119; *Stafford v. Boof*, 9 Cow. 626; *Goode v. Harrison*, 3 B. & A. 139; *Cooper v. Overton*, 10 Bing. 252; *Green v. Green*, 60 N. Y. 556. That there are allegations of fraudulent representations in the complaint does not of necessity fix the character of the action. See *Vander v. Cooley*, 2 Hun, 74; *Byxble v. Wood*, 24 N. Y. 607; *Hess v. Torry*, 63 id. 614; *Neftel v. Lightstone*, 77 id. 90; *Freer v. Denton*, 61 id. 492; *Graves v. Waite*, 60 id. 156. Judgment reversed and new trial granted. *Spruman, appellant, v. Kelm*. Opinion by Finch, J. [Decided Dec. 21, 1880.]

EVIDENCE OF EXPERT—OPINION FORMED FROM CONFLICTING TESTIMONY.—MARITIME LAW—COMPULSORY PILOTAGE DAMAGES—AUCTION SALE AS PROOF OF VALUE. (1) In an action for injury done by a collision between defendants' steamship and a collier alongside her in the harbor of Liverpool, a witness, who had followed the sea and was familiar with the harbor of Liverpool and how steamers were coaled there, and who testified that he had heard testimony and a protest read to the jury and testimony of one or two witnesses and the circumstances detailed by the witnesses, was asked: "Under the circumstances detailed by those witnesses and in the protest, and when a steamship alongside a collier begins to drag with the wind blowing heavily in squalls from the south-west and the collier working and chafing against the steamship's sides, what, in your opinion, should have been done by the persons in charge of the steamship?" There was some not very material discrepancy between the testimony and the protest. *Held*, that the question was an improper one. The rule is that in a case of this kind a nautical man cannot be called upon to testify as to his opinion upon evidence given by other witnesses which covers a great variety of facts, and calls for a comprehensive and critical view of the testimony given and the inference to be drawn from the evidence of the witnesses. See *McCullum v. Seward*, 62 N. Y. 316; *In the Ann and Mary*, 2 W. Rob. 106; *In the Clarent*,

2 Mart. C. 353. See also *Carpenter v. E. Trans. Co.*, 11 N. Y. 577; *Smith v. May*, 39 Ohio, 211. When facts are controverted, it is not entirely clear a hypothetical question may be put based upon the facts claimed to have been proved by the evidence. *Freeman v. Lawrence*, 11 J. & S. 265; *Dexter v. Morris*, 10 Han. 311; *United States v. McGinnis*, 1 Curt. C. C. 1, 2, 17; *Harris v. Peck*, 56 Barb. 390. (2) The defendants claimed that the steamer was in charge of a pilot which they were compelled to take, under the law of England, when the collision occurred. That they were relieved from liability while the pilot was in charge by those laws. The steamer had left its dock for its voyage and had anchored to take in coal. The collier came alongside, was secured and had commenced putting in coal when the accident occurred. *Held*, that none of the English decisions hold that the pilot has control of the ship and the doctrine of compulsory pilotage applies, when a vessel has not completed its loading and coaling and is at anchor. See upon this subject, *Rodriguez v. Melhuish*, 10 Exch. 117; *The Woburn Abbey*, 38 L. J. N. S. 125; *The Maria*, 1 W. Rob. 106; *Attorney-General v. Case*, 3 Price, 302; *The Princeton*, L. R., 3 P. D. 90. (3) In an action for injury done to goods, a sale at public auction, when due notice, of the goods, is evidence for the consideration of the jury of their value; but it cannot be said that it is evidence of what the goods are fairly worth in the absence of other evidence. See *Campbell v. Woodworth*, 20 N. Y. 499; *Gill v. McNamee*, 42 id. 44; *Wells v. Kelsey*, 37 id. 143; *Crounse v. Fitch*, 1 Abb. App. Dec. 475. Judgment reversed and new trial granted. *Guterman et al. v. Liverpool, New York & Philadelphia Steamship Co., appellant*. Opinion by Miller, J. [Decided Jan. 25, 1881.]

ILLEGAL CONTRACT—MONEY PAID ON MAY NOT BE RECOVERED BACK IF NO DURESS.—In an action to recover the amount paid by plaintiff upon his promissory note which, it was alleged, was given to compound a felony, the court at trial charged the jury that if they found that the note was given on the illegal consideration of the compounding of an alleged crime, it was void; that it had no legal force or effect, and the plaintiff was entitled to recover the amount of the note with interest. The court refused to instruct the jury that if there was no fraud, duress or undue influence on the part of the defendant, and the note was given simply to compound a felony, then the plaintiff was not entitled to recover. *Held*, error. If there was simply a compounding of a felony, both plaintiff and defendant on an equality agreeing that the plaintiff should give his written promise to the defendant, and that thereafter the defendant should give his oral promise to conceal the felony and abstain from prosecuting it, then they were in *pari delicto* and the law leaves them where it finds them. *Fivaz v. Nicholls*, 2 C. B. 501. The court say that one who aids in doing an act that is by law made a criminal offense, if he does it voluntarily, that is, without force or threats compelling his will, he may not maintain an action to recover any thing paid by him in furtherance thereof. Judgment reversed and new trial ordered. *Haynes v. Rudd, appellant*. Opinion by Folger, C. J. [Decided Dec. 21, 1880.]

PARTITION—INFANT PARTIES—WHEN SUMMONS NEED NOT BE SERVED ON NON-RESIDENTS—APPEARANCE WITHOUT SERVICE SUFFICIENT.—In an action to compel defendant to perform his agreement for the purchase of certain real estate, the defense was that plaintiff's title was not good for reason that the title of infants in certain partition proceedings, under which plaintiff purchased, was not divested. A., who originally owned the property, died intestate, leaving children, a portion of whom were minors who lived with their father in Hamburg, Germany. One of the chil-

dren commenced a partition suit. No service of the summons was made on the minors (some of whom were under and some over sixteen years of age) either personally or by publication. Upon petition of the plaintiff in the partition suit, an order was made therein that one D. be appointed guardian for the infant defendants, unless they, or some one in their behalf, should within a term specified, after service upon them of the order, procure a guardian to be appointed, and directing that a copy of the order should be served upon the infants and upon their father. This was done, and no proceedings being taken by or in behalf of the infants for the appointment of a guardian, D. was, at the expiration of the time limited, appointed guardian *ad litem* for the infants who appeared in the suit by him, and made an answer in the partition suit. *Held*, that the appointment of the guardian was valid, and the title of plaintiff herein was good. *Glover v. Haws*, 19 Abb. Pr. 161, note, refers to a foreclosure suit, and need not be considered here. As to proceedings for partition, the provisions of the Revised Statutes (2 R. S. 317, tit. 3, ch. 5) are in force so far as they can be applied to the substance and subject-matter of the action without regard to form. Code, § 248; *Sanford v. White*, 56 N. Y. 359. And there is no intention in section 116 of the Code to depart from the rules laid down in the statute (2 R. S. 317, § 2). Under that, no previous notice is required to be given in the case of non-resident infants, and this is the true construction of the clause in subd. 2 of section 116 of the Code, so far as it relates to non-resident infants affected by actions for partition. The provisions for such a case contained in the section would be unnecessary if a previous service of the summons was required. What was done in the proceedings in question was sufficient, both under the Code (section 116) and the Revised Statutes (2 R. S. 317). Judgment affirmed. *Gotendorf v. Goldschmidt*, *appellant*. Opinion by Danforth, J. [Decided Dec. 1, 1880.]

SHERIFF—KINGS COUNTY—SEIZURE UNDER DECREE OF FORECLOSURE—ADVERTISING SUFFICIENT TO CONSTITUTE—DELIVERY OF PROCESS TO SUCCESSOR.— By the Code of Procedure (section 287) it was provided that real property, adjudged to be sold, must be sold in the county where it lies, by the sheriff or by a referee, etc. By Laws 1876, chap. 439, it is enacted that all sales of lands in the county of Kings, under a judgment or decree of any court, etc., shall be made by the sheriff of said county. The new Code declares that within ten days after the service of a certificate upon the sheriff, whose term is about to expire, he must deliver to his successor "all mandates then in his hands, except such as he has fully executed, or has begun to execute by the collection of money thereon, or by a seizure of or levy on money or other property, in pursuance thereof" (section 184, subd. 1). The sheriff of Kings, in pursuance of a decree of foreclosure of mortgage in that county, advertised the real estate, described in the decree, to be made on the 10th of January, 1879, and sold the same accordingly. *Held*, that there was a sufficient seizure of the real estate under section 184, which authorized the sheriff to make the sale, although the certificate prescribed had been served upon him. No formal levy is necessary in selling land under an execution or order of the court, and the right of the officer to make the sale becomes perfect upon the delivery of the execution. It is then seized for the purpose of enforcing the judgment or decree. The same rule applies to a foreclosure decree. By the advertisement, as directed, the seizure becomes complete. See *Rodgers v. Bonner*, 45 N. Y. 379. Judgment affirmed. *Union Dime Savings Institution v. Andarascu*, *appellant*. Opinion by Miller, J. [Decided Dec. 14, 1880.]

SURETYSHIP—CONTINUING PLEDGE OF CORPORATE STOCK—GUARANTY FOR DEBT OF ANOTHER.—(1) De-

fendant was the wife of H., the president of the plaintiff, a National bank. H. was largely indebted to the bank and was pecuniarily embarrassed. To attempt to enforce payment of his debt to the bank would ruin both him and the bank, and it was deemed advisable to give him an extension of time in the hope that he would tide over his difficulties. To secure the bank from loss, defendant assigned to it nine hundred shares in a corporation owned by her. It was agreed between the parties, in writing, that the stock should be held by the bank as collateral security for demands that the bank "may from time to time have and hold against H." H. became bankrupt after this transaction, and unable to pay what he owed the bank. *Held*, that the language of the agreement should be interpreted as applying the pledge to demands against H. held and owned by the bank after the making of it, though the debts arose before. *Mares v. Rowles*, 14 East, 510. (2) *Held*, also, that a giving of time by the bank to H. would not discharge the liability of the stock pledged by defendant for his debt. The agreement by which such stock was hypothecated made it a continuing security. *Douglass v. Reynolds*, 7 Pet. 113; *Agawam Bank v. Strever*, 18 N. Y. 502. The effect of a continuing security is that it applies to any future transaction between the parties that is within the limits of the agreement. This agreement implies that the dealings of H. and the bank are such as are usual in a bank of discount and loan, with a borrower from it. This might limit the liability of the guarantor. Otherwise there is no limit. Defendant might, by giving notice at any time after it was made, have restricted the liability of the guaranty to the demands actually held by the bank at the time of the notice. *Mason v. Pritchard*, 2 Camp. 436. As it reads it is unlimited in period. As it particularized no demand it applied to debts successively renewed. *Merle v. Wells*, 2 Camp. 413. See, also, *New Hampshire, etc., Bk. v. Gill*, 16 N. H. 578. A contract for continuing guaranty contemplates that the creditor and principal will carry on the business provided for, in the manner in which it has theretofore to the knowledge of the guarantor been transacted. *Reddish v. Watson*, 6 Ham. (Ohio) 510. See, also, *New Haven, etc., Bk. v. Mitchell*, 15 Conn. 206; *Coombs v. Wolf*, 8 Bingh. 156; *Howell v. Jones*, 1 Cr. M. & R. 97; *Fox v. Parker*, 44 Barb. 541. The defendant put her stock in possession and power of use of plaintiff and H., and the assignment, without any express restriction thereon. The legal presumption in such a case is that the parties entrusted with the pledge are authorized to use it in any legitimate way in which it may be made subservient to their purposes. Judgment affirmed. *Merchants' National Bank of Whitehall v. Hall*, *appellant*. Opinion by Folger, C. J. [Decided Jan. 18, 1881.]

UNDERTAKING—UPON APPEAL FROM JUDGMENT IN EJECTMENT TO GENERAL TERM—SURETIES LIABLE FOR WASTE AFTER APPEAL TO COURT OF APPEALS.— Upon the appeal of one W. to the General Term from a judgment for the recovery of real property, rendered in favor of plaintiff, for the purpose of staying execution pending the appeal defendants made an undertaking in the form prescribed in § 138 of the old Code. It contained, among other provisions, this, that "during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon." The judgment appealed from was affirmed by the General Term, and W. appealed to the Court of Appeals from the judgment of affirmance, and gave the requisite undertaking with new sureties to stay execution pending that appeal. After this he committed waste upon the real property in question. *Held*, that defendants were liable for such waste upon the first undertaking. Such liability is within the letter of their obligation and is not limited to waste com-

mitted during the pendency of the appeal to the General Term. While in such contracts as these on the one hand sureties are not to be made liable by a strained construction, on the other hand full effect is to be given to the language employed as in other cases. *Gates v. McKee*, 13 N. Y. 232; *Rochester City Bank v. Elwood*, 21 id. 88. If the continuance in possession had been by permission of the plaintiff, the surety would have been relieved from liability and an unreasonable neglect or refusal to proceed to enforce his judgment after notice to do so from the surety would have discharged the surety from liability for the subsequent acts of his principal. *Pain v. Packard*, 13 Johns. 174; *King v. Baldwin*, 17 id. 384; *Schroepnell v. Shaw*, 8 N. Y. 446; *Colegrove v. Tallman*, 57 id. 95. But in this case plaintiff could not have been called upon to enforce the judgment as he was stayed by the undertaking in appeal to the Court of Appeals. But for any liability in consequence of the acts of W. pending that appeal, the sureties in the undertaking on the appeal to the General Term could resort for indemnity to the sureties in the other undertaking. *Huckley v. Keltz*, 58 N. Y. 583. This last named case is not in conflict with the decision in the case at bar. Judgment of General Term reversed, and that on report of referee affirmed. *Church, appellant, v. Simmons, et al.* Opinion by Andrews, J. [Decided Dec. 21, 1880.]

UNITED STATES SUPREME COURT ABSTRACT.

ASSIGNMENT—OF CLAIM AGAINST UNITED STATES MAY BE MADE FOR BENEFIT OF CREDITORS—STATUTORY CONSTRUCTION—PRACTICE—DISMISSING BILL FOR ERRONEOUS REASON.—(1) The provision of the United States Statute of 1853 (U. S. R. S., § 3447) prohibiting "all transfers and assignments of any claim upon the United States, or of any part thereof, or any interest therein," does not prevent a transfer of such claim by an assignment for the benefit of creditors. The mischief designed to be remedied by the statute were mainly two. 1st. The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. 2d. That by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest. Both these considerations, as well as a careful examination of the statute, leave no doubt that its sole purpose was the protection of the government and not that of the parties to the assignment. The voluntary assignment of an insolvent debtor for the benefit of his creditors of his effects, which include a claim against the government, cannot embarrass the government. Such an act does not come within the evil aimed at in the statute mentioned. See *United States v. Gillis*, 95 U. S. 407; *Spofford v. Kirk*, 97 id. 484; *Erwin v. United States*, id. 392. (2) When a suit might be dismissed below for want of proper parties, but was dismissed by sustaining a demurrer involving the merits, *held*, that if the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, the court would have been bound to affirm it. But standing as a decision on the merits of the case it is a bar to any other suit. It should therefore be reversed and remanded to that court. If the complainant shall ask leave to amend his bill by making the proper parties defendants, he should be permitted to do so and proceed with his case. *If he does not do this, a decree should be entered dis-*

missing the bill for want of these parties and without prejudice to any other suit on the merits. *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore City*, 4 Wall. 280; *House v. Mullin et al*, 22 Wall. 42; *Kendig v. Dean*, 97 U. S. 423. Decree accordingly, reversing decree of U. S. Circ. Ct., Indiana. *Goodman, Appellant, v. Niblock*. Opinion by Miller, J. [Decided Jan. 10, 1881.]

COSTS—IN MANDAMUS AGAINST GOVERNMENT OFFICIAL TO COMPEL PERFORMANCE OF OFFICIAL DUTIES, MUST BE ALLOWED.—In this case defendant was sued by writ of mandamus in regard to the manner in which he had discharged certain official duties as Secretary of the Interior. No intentional wrong was charged or proven against him. Judgment was rendered against him in this court. *Held*, that he was liable for costs. In such case the court has no option but to follow the rule that the prevailing party shall recover of the unsuccessful one the legal costs which he has expended in obtaining his rights. In *Kendall v. United States*, 12 Peters, 629, which is the leading case establishing the right of a citizen to the use of the writ of mandamus to compel a public officer to perform a duty merely ministerial, the relator recovered his costs. The duty in that case, as in the present, was one demanded of a cabinet officer, namely, the Postmaster-General, and which he refused to perform. It is obvious that he thought he was right in refusing to do the act demanded of him, yet this court rendered judgment for costs against him. In *United States v. Boutwell*, 17 Wall. 604, which was the case of a writ of mandamus against Mr. Boutwell as Secretary of the Treasury, and which the court held to be abated by his retirement from office, it was said. "It is the personal default of the defendant that warrants the impetration of the writ, and if a peremptory writ of mandamus be awarded, the costs must fall upon the defendant." And it is argued that as it would be unjust to make the successor in office of the delinquent secretary pay the cost of defending the action of his predecessor, the writ must of necessity abate. Judgment for costs in favor of plaintiff granted. *United States ex rel. McBride v. Shurz*. Opinion by Miller, J. [Decided Jan. 10, 1881.]

EVIDENCE—WHEN CERTIFIED COPY OF ORIGINALS ON FILE IN GOVERNMENT OFFICE NOT.—The account of a delinquent revenue officer, or other person accountable for public money, as finally adjusted by the proper officers of the Treasury Department, to be admissible as evidence under section 886 of the Revised Statutes, should be certified and authenticated to be a transcript from the books and proceedings of the department. It is not sufficient that the certificate states the account or accounts offered as evidence to be copies of originals on file. The latter is the form of certificate used in reference to mere copies of bonds, contracts, or other papers connected with the final adjustment, and which, duly certified and authenticated, have the same effect as the originals would have if produced in court. Such originals may never have become a part of the books and proceedings of the department, in the sense of the law, or within the meaning of former decisions. *U. S. v. Buford*, 3 Pet. 12; *Smith v. U. S.*, 5 id. 292; *Cox v. U. S.*, 6 id. 172; *U. S. v. Jones*, 8 id. 375; *Gratiot v. U. S.*, 15 id. 336; *Boyt v. U. S.*, 10 How. 109; *Bruce v. U. S.*, 17 id. 457. Judgment of U. S. Circ. Ct., W. D. Tennessee, affirmed. *United States, Plaintiff in Error, v. Pinson*. Opinion by Harlan, J. [Decided Jan. 10, 1881.]

JUDGMENT—IN PARTITION—NOT AVAILABLE FOR ERROR, IN COLLATERAL PROCEEDINGS—ADVERSE POSSESSION—COLOR OF TITLE SUFFICIENT AGAINST STALE CLAIM.—(1) The validity of a partition was assailed in an action to quiet title, because no complaint or peti-

tion of the applicant for the partition appeared in the record as the foundation of the proceedings. The statute under which the partition was had did not in terms require an application therefor to be in writing, or that it be filed in the records of the court. The recitals in the order of partition showed a compliance with the statute; they showed jurisdiction in the court over the subject. *Held*, that the order was a determination that the application was sufficient, and that due notice of it had been given. This conclusion is not open to collateral attack: it can only be questioned on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it. *Vorhees v. Bank of United States*, 10 Pet. 449; *Thompson v. Toimie*, 2 id. 157; *Comstock v. Crawford*, 3 Wall. 306. The cases of *Lease v. Carr*, 5 Blackf. 363, and *Shaw v. Parker*, 6 Ind. 345, do not conflict with this. These cases each held an order in partition erroneous from a defect in the petition, upon a review upon a writ of error, but not that the order and subsequent proceedings were void. It was the common case of the reversal of proceedings because of intervening error. If not thus corrected, the existence of the error in no respect impairs the validity and efficacy of the subsequent proceedings, or the order or judgment thereon. The distinction between erroneous and void orders and judgments is familiar and is fully recognized, not only in Indiana, but every State in the Union. *Horner v. Doe*, 1 Ind. 130; *Doe v. Smith*, 4 id. 228; *Doe v. Harvey*, 3 id. 105; *Babbitt Ashley v. Land*, 14 id. 223; *Cox v. Matthews*, 17 id. 367; *Evans v. Ashby*, 22 id. 17; *Waltz v. Barroway*, 25 id. 883; *Hawkins v. Hawkins*, 28 id. 71; *Compere v. Hanna*, 34 id. 76; *Gavin v. Graydon*, 41 id. 564; *Burk v. Hill*, 55 id. 424; *Hays v. Ford*, id. 55; *Hunter v. Burnsville Turnpike Co.*, 56 id. 219; *Wiley v. Pavey*, 61 id. 458. (2) Whenever an instrument, by apt words of transfer from grantor to grantee—whether such grantor act under the authority of judicial proceedings or otherwise—in form passes what purports to be the title, it gives color of title. Even should such instrument be considered as invalid, possession under it for the period prescribed by statute bars the right of the true owners as effectively as possession under the most perfect title. It is an absolute defense to the action of ejectment. And a suit in equity, brought after that period, for the determination of the title and for possession of the property, will not be entertained, as it is founded on a stale claim. *Decree of U. S. Circ. Ct., Indiana*, affirmed. *Hall et al., Appellants, v. Law*. Opinion by Field, J. [Decided Dec. 20, 1880.]

MUNICIPAL BONDS—WHEN THE ISSUE OF, CANNOT BE COMPELLED THOUGH VOTED BY PEOPLE—STATUTORY CONSTRUCTION.—By an act of the Legislature of Wisconsin, passed in 1864, the legal voters of certain counties, among which was the county of Eau Claire, were authorized to vote upon the subject of municipal aid in the construction of a railroad from Tomah to Lake St. Croix, by the T. and L. S. C. Railroad Co. The act declared that "if the majority of the ballots cast in any of said counties be for railroad aid, the county board of supervisors of said counties shall have power, by resolution, to cause to be issued bonds," etc. The board of supervisors of each county voting were required to annually cause to be levied a tax to pay the interest upon the "bonds which either of said counties may issue," etc. The act further provided that "the said bonds, when authorized to be issued as aforesaid, shall be held by the county board of supervisors of each of said counties, and the same, or the avails thereof, shall be expended in the grading of said railroad, etc.; and the said bonds shall be delivered to the said railroad company when the board of supervisors of each of said counties are satisfied that the same will be applied for such purpose." In 1867, at an election

in Eau Claire county, a majority of votes were cast in favor of aid to the amount authorized by statute. The railroad company mentioned constructed its road and demanded the issue of the bonds authorized. The board of supervisors refused to issue such bonds, on the avowed ground that the highest court of Wisconsin had declared it illegal to levy a tax to pay such bonds. Thereafter, in 1872, the act of 1864, so far as it related to the issue of the bonds mentioned in the former act by the county of Eau Claire, was repealed. *Held*, that the railroad company or its assignee could not enforce the issue by the county named of the bonds authorized under the act of 1864. *Aspinwall v. Commissioners, etc.*, 22 How. 364, followed. It is clear that there was no binding agreement or contract between the railroad company and the county, by which the latter became legally bound to execute and deliver bonds to aid in the construction of the railroad named. The act of 1864, neither in express words nor by necessary implication, made it imperative upon the supervisors to issue bonds in pursuance of the popular vote. The act was an enabling one, and its legal effect was to invest the board with power to supplement the expressed will of the people by an issue of bonds. There was nothing in its provisions justifying the conclusion that the popular vote was to be taken as an absolute direction that the supervisors should issue the bonds, at all events, and without regard to the circumstances intervening after the people had voted in favor of county aid to the enterprise in question. Judgment of U. S. Circ. Ct., W. D. Wisconsin, affirmed. *Wadsworth, Appellant, v. Board of Supervisors of Eau Claire County*. Opinion by Harlan, J. [Decided Jan. 10, 1881.]

FINANCIAL LAW.

INDORSEMENT—EXTENSION OF TIME OF PAYMENT UPON USURIOUS CONSIDERATION, DISCHARGES—DEFENSE OF USURY PERSONAL TO DEBTOR.—An agreement by the holder of a past-due promissory note with the maker, and without the knowledge or consent of the indorsers, for an extension of the time of payment for a definite period, in consideration of an usurious premium, paid in advance, discharges such indorsers, and the holder of the note, for the purpose of continuing the liability of the indorsers, cannot set up that the contract of extension was upon a usurious consideration and therefore void. In *Ready v. Huebner*, 46 Wis. 602, it was held that "the defense of usury is personal to the debtor, his privies in blood or estate, or privies in the contract." The defense of usury is so far personal to the borrower, and those in privity with him, that the creditor in this case, after having received the usurious premium, could not the next day, by alleging his own usurious agreement and the benefits he had received by virtue of it, have maintained an action upon this note against the maker and the sureties. In the language of Reade, J., in *Scott v. Harris*, 76 N. C. 205: "It was not for the creditor to say that the contract was usurious. His conscience takes fright at a danger which may never approach him. The debtor may plead usury or not at his pleasure, and unless and until he does so, the note which was given for the usury is valid, and a part of it has already been paid in goods. The contract was sufficient to prevent the sureties from paying the debt and suing the principal; and that is the wrong of which they have the right to complain." If, then, the creditor's hands were tied by receiving the usurious premiums until after the period of the extension had expired, there would seem to be no escape from the conclusion that the indorsers were thereby discharged. *Myers v. Bank*, 78 Ill. 257; *Wittmer v. Ellison*, 72 id. 301; *Austin v. Darwin*, 21 Vt. 38; *Turrell v. Boynton*,

23 id. 142; *Bank v. Woodward*, 5 N. H. 99; *Cox v. Ry.*, 44 Ala. 611; *Kensingham v. Bedford*, 1 B. Monr. 325; *Armistead v. Ward*, 2 Patt. & H. 504. Wisconsin Supreme Court, December 17, 1880. *Hamilton v. Prouty*. Opinion by Cassoday, J.

MUNICIPAL BONDS—INTEREST COUPONS PROMISSORY NOTES—PERFORMANCE OF DUTIES OF TOWN COMMISSIONERS BY A PART OF THEM.—Detached interest coupons payable to bearer at a special time and place have all the attributes of negotiable paper; and assumption will lie thereon. *Jones on Railr. Sec.*, §§ 317, 320, 322; *Town of Concord v. National Bk. of Derby*, 51 Vt. 144. In assumption by the *bona fide* holder of town bonds, to recover the interest specified in coupons thereof, of which the plaintiff was also the *bona fide* holder, it appeared that the bonds were issued under authority of an act passed to enable the defendant, among other towns, to subscribe for railroad stock in aid of the construction of a railroad, and to issue bonds for that purpose. The act provided that "the assent in writing thereto of a majority of the tax payers," signed and acknowledged before a justice of the peace by "each person so assenting," should first be had upon an instrument of assent, naming three resident citizens and tax payers to be commissioners to make such subscription; that when such instrument had been so signed and acknowledged, such commissioners should "append thereto a certificate by them subscribed and sworn to," stating that such assent had been signed and acknowledged, as required by the act, and should cause such instrument and certificate to be recorded in the town clerk's office; and that "such certificate so executed and recorded" should be conclusive evidence of the facts stated, and by the act authorized to be stated therein. Defendant offered to prove that the instrument of assent was not signed by a majority of the tax payers, that but two of the commissioners signed the certificate, and that the third refused to sign because such instrument had not been signed by such majority. *Held*, that at common law, as well as under section 2, chapter 4, General Statutes, the certificate of the two commissioners, the third having shared in their deliberations but refused to concur in their decision, was a valid certificate in compliance with the act, and conclusive evidence of the facts therein stated; and that the evidence offered by defendant was therefore inadmissible. *First Nat. Bk. of St. Johnsbury v. Concord*, 50 Vt. 257; *Coke's Lit.* 181b; *Billings v. Prinn*, 2 Bl. 1017; *The King v. Forrest*, 8 T. R. 38; *The King v. Beeson*, 2 id. 592; *Witherell v. Garthurn*, 6 id. 388; *Grindley v. Barker*, 1 B. & P. 229; *Attorney-Gen. v. Bavy*, 2 Atk. 212; 2 *Kent's Com.* 633; *Story's Ag.*, § 42 note; *Jewett v. Alton*, 7 N. H. 253; *Scott v. Detroit Y. M. Ass'n*, 1 Doug. (Mich.) 119; *Commissioners of Allegheny v. Lecky*, 6 S. & R. 166; *Commonwealth v. Canal Commissioners*, 9 Watts, 466, 471; *Cooper v. Lampeter Township*, 8 id. 125; *Kingsbury v. School District*, 12 Meto. 99, 105; *Charles v. Hoboken*, 3 Dutch. 203; *Curtis v. Butler County*, 24 How. 435, 450; *Jones v. Andover*, 9 Pick. 145, 151; *Cooley v. O'Connor*, 12 Wall. 391; *Downing v. Ruger*, 21 Wend. 178; *Crocker v. Crane*, id. 211; *Ex parte Rogers*, 7 Cow. 526; *Johnson v. Dodd*, 56 N. Y. 76; *Groton v. Hulbert*, 22 Conn. 178; *Babcock v. Lamb*, 1 Cow. 238; *Baltimore Turnpike*, 5 Binn. 481; *Louk v. Woods*, 15 Ill. 256; *Walker v. Regan*, 1 Wis. 597; *Jefferson County v. Stagle*, 66 Penn. 202; *Austin v. Helms*, 65 N. C. 560; *Schenck v. Peay*, 1 Woolw. 175; *New York Life Ins. Co. v. Staats*, 21 Barb. 570; *Powell v. Tuttle*, 3 Comst. 896; *People v. Coghill*, 47 Cal. 361; *Pell v. Ulmar*, 21 Barb. 60; *People v. Walker*, 23 id. 304; *People v. Nichols*, 52 N. Y. 478; *Martin v. Lemon*, 26 Conn. 192; *Damon v. Granby*, 2 Pick. 345; *Hanson v. Dexter*, 36 Me. 516; *Gallup v. Tracy*, 25 Conn. 10; *Williams v. School District*, 21 Pick. 75; *Matter of*

Bakman, 1 Abb. Pr. 444; *Matter of Palmer*, 31 How. Pr. 42; *Newell v. Keith*, 11 Vt. 214; *Wolcott v. Wolcott*, 19 id. 37; *Hodges v. Thacher*, 23 id. 455; *George v. School Dist.*, 6 Meto. 497; *Bradford v. Justice's Court*, 33 Ga. 332; *People v. Hayes*, 7 How. Pr. 249; *People v. Comptroller*, 20 Wend. 596; *Bennington v. Park*, 50 Vt. 178; *Village of Winoski v. Gokey*, 49 Vt. 282; *Thompson v. Arms*, 5 id. 546; *Plymouth v. Commissioners*, 16 Gray. 341; *Howard v. Proctor*, 7 id. 131; *Coffin v. Nantucket*, 5 Curtis, 272; *Wilson v. Waterville School Dist.*, 46 Conn. 89. Vermont Supreme Court, October term, 1879. *First National Bank of Bennington v. Town of Mount Tabor*. Opinion by Royce, J.

WARRANTY—OF TITLE ON SALE OF NON-NEGOTIABLE CERTIFICATE.—The legal rules that apply to the sale of a non-negotiable certificate of indebtedness, issued by a corporation, are the same that obtain when a chattel is sold, and there is, consequently, under ordinary circumstances, a warranty implied on such sale. In this case the plaintiff purchased of the defendant, through a broker, what purported to be a certificate of the Citizens' Gas Light Company, declaring a scrip dividend of ten per cent on the amount of its capital stock, with interest payable at the option of the company. This certificate was shown to be spurious, and had been declared void by a decree in chancery. *Held*, the plaintiff was entitled to recover the money thus paid, from the defendant. *Benj. on Sales*, 5:7; *Littaner v. Goldman*, 72 N. Y. 506; *Young v. Cole*, 2 Bing. N. C. 724; *Gompertz v. Bartlett*, 2 E. & B. 849; *Thrall v. Newell*, 19 Vt. 208. New Jersey Court of Errors, June term, 1880. *Wood v. Sheldon*. Opinion by Beasley, C. J.

RECENT ENGLISH DECISIONS.

AGENCY—SUB-AGENT'S LIABILITY TO ACCOUNT TO PRINCIPAL—WHEN SUB-AGENT NOT ENTITLED TO SET-OFF.—Where a principal employs a factor to sell for him, and the factor employs a sub-agent to carry out the sale, disclosing that such employment is on behalf of an unnamed principal, the principal is entitled to an account from the sub-agent irrespective of any claim such sub-agent may have against the factor. A principal is, under the above circumstances, entitled to follow the proceeds of his property, wherever they can be distinguished, in the hands of the sub-agent, who stands toward him in the relation of trustee. The plaintiffs sought to recover a sum of 2,571l. alleged to be due from the defendants as the balance in respect of three cargoes of corn consigned by the plaintiffs for sale. The plaintiffs shipped the corn from New Zealand, taking bills of lading making it deliverable to them in London. These bills were indorsed specially to M. and T., factors, of Glasgow, with instructions to them to sell the corn in London. M. and T. then indorsed the bills specially to the defendants, who were corn factors and brokers in London, for the purpose of sale. The terms on which defendants acted for M. and T. differed from those on which M. and T. acted for the plaintiffs. The plaintiffs were aware that sales effected for them by M. and T. in London were made by brokers or agents employed by them, but the plaintiffs were in no way parties to these sub-contracts, and the plaintiffs' names were not disclosed upon them, M. and T. appearing on the face of them as principals. The defendants paid the proceeds of the sales into their own account with their bankers in the usual way, and from time to time made general remittances to M. and T., but the defendants' books showed the amounts received and paid in respect of each particular cargo. The defendants sought to set off against the balance claimed money due to them from M. and T. upon other accounts. At the trial the jury found,

first, that the plaintiffs did not, through their agents, employ the defendants to sell and account for the proceeds of the corn; secondly, that the defendants knew, or had reason to believe, that M. and T. were acting in these sales as agents for another. *Held*, that upon the admitted facts the plaintiffs were entitled to succeed in the action both as undisclosed principals and as equitably entitled to follow the proceeds of the corn, which was the property of the plaintiffs, in the hands of the defendants, who were in the position of trustees of the plaintiffs. See *Rabone v. Williams*, 7 Term Rep. 360 n.; *William v. Everett*, 14 East, 582; *Robbins v. Fennell*, 11 Q. B. 284; *Fish v. Kempton*, 7 C. B. 604; *Knatchbull v. Hallett*, 13 Ch. D. 696. Q. B. Division, August 7, 1890. *New Zealand and Australia Land Co. v. Ruston*. Opinion by Field, J., 43 L. T. Rep. (N. S.) 473.

SLANDER—WORDS NOT SLANDEROUS IN PRIMARY SENSE MUST BE SHOWN SLANDEROUS INNUENDO.—In an action of slander where the plaintiff, in his statement of claim, annexes a meaning to the words complained of, and fails to sustain such meaning, he cannot discard that and adopt another. Where words which are not slanderous in their primary sense are taken in a secondary sense distinct from their primary sense, there must be evidence of facts which would reasonably make them defamatory in their secondary sense. In this case the plaintiff alleged in his statement of claim that the defendant falsely and maliciously spoke and published of the plaintiff the words, "His shop is in the market," meaning thereby that the plaintiff was going away and was guilty of fraudulent conduct in his business, inasmuch as he had received subscriptions from members of a certain club, well knowing that they would be unable to obtain any benefit therefrom. There was no evidence to support the innuendo. *Held*, that the words, not being in themselves defamatory, and there being no evidence to wholly support the innuendo, the defendant was entitled to judgment. *Capital and Counties Bank v. Henty*, L. R., 5 C. P. Div. 94. C. P. Div., Nov. 17, 1890. *Ruell v. Tatnell*. Opinions by Lindley and Lopes, JJ., 43 L. T. Rep. (N. S.) 487.

WILL—CONDITIONS IN RESTRAINT OF MARRIAGE TO PARTICULAR CLASS NOT INVALID.—The rules adopted by courts of equity from the ecclesiastical or civil law, that conditions in general restraint of marriage are invalid, and the consequent distinctions as to whether a bequest amounts to a condition or only to a limitation, do not extend to conditions or limitations to devise of land. A testatrix devised real estate in strict settlement to her brother for life, with remainder to his issue in tail, with remainders over in default of failure of her brother's issue. The will contained a proviso that if the brother married a domestic servant the limitations in favor of himself and his issue were to be absolutely null and void, and in lieu thereof the testatrix devised her real estates to the use of such persons and with such limitations as the same were devised in default or failure of issue of her said brother. The brother married a domestic servant. *Held*, that the condition not being in general restraint of marriage, but only in restraint of marriage with one of a specified class, was good. *Perrin v. Lyon*, 9 East, 170, discussed and followed. Ch. Div. Nov. 13, 1890. *Jenney v. Turner*. Opinion by Bacon, V. C., 43 L. T. Rep. (N. S.) 468.

CORRESPONDENCE.

HUN'S REPORTS.

Editor of the Albany Law Journal:

From a communication to your paper, which you have had the kindness to show me, I infer that there

exists in the profession some misunderstanding in regard to the publication of my reports. My present contract with Messrs. Little & Co. calls for their publication in numbers. Any person preferring to take the reports in that form rather than to wait until the volumes are completed, will be furnished with the numbers on applying to Messrs. Little & Co. therefor. Volume 22, of which the first three hundred pages were published in a number in December, will be completed in a week. The first number of volume 23 will probably be ready about the same time.

Yours, very respectfully,

MARCUS T. HUN.

ALBANY, N. Y., Jan. 31, 1881.

ABBOTT'S NEW CASES.

Editor of the Albany Law Journal.

A letter from a correspondent, appearing in a recent issue of the ALBANY LAW JOURNAL, accuses the publisher of Abbott's New Cases with "a bold and bare attempt to make a book without reference to the first and announced purpose of its publication," because the volumes contain selections from the decisions of the Court of Appeals. The entire foundation for this imputation is his statement that the publishers started out with their first volume by saying they did not propose to publish those cases which would appear in an official series. The announcement of the preface, referred to, is as follows:

"PREFACE.

"It is the object of this series to give to the profession early reports of cases, in all departments of law, which involve new questions or contribute to the settlement of mooted questions, or establish new rules.

"It is not desired to present cases officially reported. The only exception to this rule is in respect to a class of decisions affecting procedure, of which the profession are interested to receive early and accurate information in advance of the official reports.

"March 30, 1877.

A. A."

The profession seem to be interested to receive early reports of such cases as are important as guiding them on questions of pleading, practice and evidence, because cases of this class enable them to conduct correctly the business in hand. One of the features of this series which has been most approved by the subscribers to it has been the selection of cases of this sort from the decisions of the Court of Appeals, and the explanations and practical notes of the editor, Austin Abbott. Neither the publisher nor the editor have any desire or intent to do otherwise than supply an actual want, and the success of the series and its acceptability to practicing lawyers at large, is indicated by the fact that its circulation is increasing every month, and is now larger than it ever has been at any time before. Of course there is no lawyer who appreciates a need for every case in a number, but we believe that of these cases none have failed to be appreciated and welcomed by many of the subscribers.

Respectfully,

GEO. S. DIOSKY,

Publisher of Abbott's New Cases.

ESTOPPEL BY JUSTICES' COURT JUDGMENTS.

Editor of the Albany Law Journal:

In *Blair v. Bartlett*, 75 N. Y. 150, it was held that where a physician sued in justice's court for his services, and the defendant withdrew his answer, and the plaintiff had judgment, these facts were a bar to an action by that defendant for malpractice, in the matter in which the services were rendered. This case follows *Gates v. Preston*, 41 N. Y. 113, and is followed in *Dunham v. Bowen*, 97 N. Y. 76.

2 R. S. marg. p. 234 (section 50) provide what may be set off in justices' courts. The first subdivision limits set-offs to demands on contract. Section 57 precludes the defendant, who neglects to plead such set-off, from maintaining afterward any action thereon. Section 58 declares that the preceding section shall not extend to claims for unliquidated damages which could not be set off on the trial. Is not this section intended to prevent the result, which was accomplished by these decisions? The Code of Civil Procedure is more explicit. Section 2947 declares that where a defendant neglects to interpose a counterclaim, etc., he shall be precluded thereafter from maintaining an action therein. And section 2948 says that this prohibition does not extend to a case where the counterclaim consists of a claim for unliquidated damages.

The case of *Blair v. Bartlett*, and similar cases are put on the ground of *res adjudicata*. But the result is the same, whatever be the ground. Is the defendant in the justices' court suit compelled there to litigate his right of action for damages? If the physician sues in a justice's court for the value of his services, must the defendant, whether he desires to do so or not, contest in that tribunal the question of malpractice? If so, then the defendant is deprived of two rights; one the right to have a common-law jury; the other the right of appeal to the Court of Appeals. For in the action in the justices' court he can have but a jury of six; and he can appeal only to the Supreme Court. Thus his claim for damages by reason of malpractice, which may be great, cannot reach a common-law jury or the highest court. And those decisions hold that the result is the same to the defendant, whether he set up the malpractice, or do not set it up. In either case, he is estopped by a judgment against him.

It might seem that the Code of Civil Procedure, by its use of the word counterclaim, in sections 2947 and 2948, intended to avoid this result. But the intent is not much more clear than was that of the Revised Statutes, where they excepted claims of unliquidated damages from those which a defendant in a justice's court was precluded afterward from maintaining. If the doctrine of *res adjudicata* was to preclude him, the exception contained in section 58 was of no avail. It is certainly a matter of importance that claims of such a serious and difficult character as that in *Blair v. Bartlett* should not be put to the hazard of a justice's court trial, with its limited appeal. HUBERUS.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, February 1, 1881.

Judgment affirmed with costs—*Bills v. The New York Central & Hudson River Railroad Company*; *Sterne v. Goepf*; *Hall v. Keeler*; *Lott v. Crooke*; *Wachtel v. The Noah Widows and Orphans Benevolent Society*.—Order affirmed with costs—*In re claim of William H. Flandrow*; *Flandrow v. Schell*; *Abbott v. Decker*.—Judgment reversed and new trial granted, costs to abide event—*De Laney v. Van Aulen*.

NOTES.

THE *Criminal Law Magazine* for January contains an article on the Construction of Penal Statutes, by Franklin Fiske Heard, and the extradition case of *Re Perry*, with a note, and other interesting matter.—*Morrison's Transcript and Monthly Journal of Law* is the title of a new legal periodical, published at Washington. Its main purpose is to give promptly the full opinions of the United States Supreme Court, with brief original head-notes, and concise statements of facts when necessary. The present number contains 144 pages and 30 cases. Of this number we have already

given the opinions or sufficient abstracts in 13, comprising all of general interest and importance; and of these a considerable number appeared in our last volume. We have given a great many besides. To those practitioners who wish to have all the opinions more promptly than the official reports, this will be a valuable publication. The head-notes are well made. The *Monthly Journal of Law* is a subordinate part, and will apparently fulfill the publisher's promise that it shall be "meager" when the Supreme Court is sitting, and "light" at other times. The publishers say they "do not propose to encumber it at any time with the usual lumber of monthly digests and abstracts—a sort of work now much overdone in law magazines." We suspect that the profession will hardly agree with this opinion, and will not be apt to abandon the "lumber" spoken of, for the "light" diet of the *Monthly Journal of Law*. On the whole, we are inclined to believe that the publishers overrate the general importance and interest of the Supreme Court decisions, and underrate that of the "lumber" business in which we and others are engaged.—The January number of the *American Law Register* has an article on Remedies of Illegal Taxation, by Judge Cooley; the case of *Stevenson v. McLean*, on Contract by letter, with a note by Edmund H. Bennett; *Stone v. Sargent*, on Removal of causes, with a note by Richard C. Dale; *Hynes v. McDermott*, on Foreign marriage, with a note by Hugh Weightman; and *Craford v. Scovel*, on Avoidance of deed for insanity, with a note by Geo. W. Reed.

Five of the 35 lawyers of Harrisburg, Pa., have died within a few weeks.—The *Troy Times* tells about a justice's court suit in Ulster county involving one cent, and which the defeated party intends to appeal. The *Times* says it expects to hear of it in the Court of Appeals. Now here the *Times* again shows its need of some of the legal "flapdoodle" of which it lately spoke.

—The *Central Law Journal*, in a necrology of 1880, includes "the distinguished, learned and accomplished Isaac Grant Thompson, editor of the ALBANY LAW JOURNAL, who has probably spent more years in the harness than the editor of any other legal publication in the country." Mr. Thompson died in August, 1879.

—We have received the *Bankers' Almanac and Register* for 1881, and *Legal Directory*, compiled by Benjamin Romans, and published by the *Bankers' Magazine*. It is a standard and indispensable publication for bankers.

Miss Kettrell, a new clerk in the Nevada Legislature, had to undergo a remarkable ordeal for a woman, in being sworn in. Judge Hawley adjured Miss Kettrell to support the Constitution and the laws, not to bear arms against her country, and to pay no attention to the laws of the Legislatures of other States when they happened to conflict with those of her State. He assured her that she was not eligible as a servant of the State if she had, since the adoption of the Constitution of Nevada, fought a duel, acted as second at a duel, or carried a challenge to fight a duel. The young woman was able to set Judge Hawley's mind completely at rest.—A young lawyer wishing to cite an authority, and not being able to remember it, his opponent remarked, "Though lost to cite, to memory dear."

From a charming paper in the February *Harper's*, on Literary and Social Boston, by George P. Lathrop, we learn that James Russell Lowell was a lawyer in his youth. The writer speaks of him as "a youthful lawyer without a practice, somewhat exquisite in matters of dress, and given to penning odes instead of briefs. He also published a novel called *My First Client*—a subject that probably gave free play for the imagination—which has since disappeared from mortal ken."

The Albany Law Journal.

ALBANY, FEBRUARY 12, 1881.

CURRENT TOPICS.

MR. FIELD has made his annual visit to the Legislature in the Sisyphean attempt to get his Penal and Civil Codes made law. These Codes, which have been before the public for fifteen years, have been adopted in sixteen States. It is unquestionable that the main opposition in this State ostensibly springs from the idea among lawyers that the adoption of them will diminish legal business. This objection certainly cannot apply to the Penal Code, and we do not believe it is well founded even in respect to the Civil Code. When the sewing-machine was invented some people predicted that it would ruin all the poor seamstresses, but it has had a contrary effect. We do not believe that the putting the substance of thousands of legal adjudications into the form of statutes will prevent or diminish litigation. The adoption of the Code of Civil Procedure, although it simplified practice, did not diminish litigation, nor enable men to act as their own lawyers. And even if the proposed measure should have this effect some people will think it not an unmitigated misfortune. We have a strong suspicion that the hostility of lawyers to the Codes really is due to laziness, or to use a more tender periphrasis, an indisposition in old age to learn new lessons. But fortunately for the prosperity and happiness of mankind such selfish motives sooner or later are made to yield to the dictates of justice and necessity. These Codes will some time be adopted. We hope that time has come. They undoubtedly need some modifications. But let us first adopt them, and then amend them. If we wait to amend them according to the caprices of everybody, they will never be adopted.

There was great force in what Mr. Field said, before the Assembly judiciary committee, on the subject of indictments. Our indictments and the quibbling pertaining to them are simply ridiculous and contemptible. There is no reason why an indictment for murder should exceed a dozen lines in length. A draftsman who cannot be precise and certain in that space, cannot be in a greater space. The quibbling over indictments is like that of demurrers in civil actions, simply tending to delay, expense, and defeat of justice. A striking illustration of this is found in a recent decision of the Court of Appeals, that a "woman with child" is a "pregnant woman." In the indictment in this case, for procuring a miscarriage, there were three counts, one charging the assault with an instrument, another with an instrument of wood, and the third with an instrument of metal. The cumbrous machinery of the administration of criminal justice should be simplified and made more effective, by a

resort to the principles of common sense which inspired the adoption of our Code of Civil Procedure.

Of course the newspapers are opposed to Mr. Cleary's bill, in the Assembly, to abandon the publication of the session laws in the county newspapers. The measure would cut off a source of large profit to them. The true way to inform the community of new laws is to furnish every family in the State with a free copy. This should be done at the lowest bidder, and would be cheaper and more effective than the present method, we have no doubt. — Mr. Strait proposes to permit the verification of pleadings in justices' courts. Why not? — Assemblyman Howland proposes a bill requiring county clerks to give bonds for faithful performance of their duty and to account for and pay over the moneys deposited with them. This is a wise provision. — Mr. Congdon introduces the usual bill in favor of the law-school students, postponing the repeal of their privilege of admission. It would be better to make a permanent provision, allowing some grace to the law-school graduates in the term of study, as an inducement for students to acquire a law-school education rather than to serve a mere clerkship — say a deduction of six months from the term of study. — Mr. Williams proposes to compel courts to appoint referees agreed upon by the parties, to sell real estate under judgment. We do not believe in any such hampering of the courts, as we have frequently said. — Mr. Congdon proposes to make husband and wife competent and compellible witnesses for or against one another, "except no husband or wife shall be allowed, but not compelled to disclose" confidential communication made during marriage. It is hard to tell what the last clause means. The whole scheme is bad. To compel or suffer a husband or wife to testify for or against the other would be more inhuman than wife beating. — Mr. Potter introduces an important insurance bill, providing that no policy shall be defeated, by the existence of liens or incumbrance except in case of willful false statements; second, that proofs of loss may be furnished within 60 days after loss; third, that no change of title within six months of the loss shall avoid the policy; that a change of title by act of the assured shall prejudice the right of any mortgagee, assignee, or other whom the insurance is payable; that in the last case the beneficiary may furnish proofs of loss, after six months and within 60 days, when the insured refuses or neglects; that the option to rebuild or repair may be notified within 30 days in writing to the person furnishing proofs.

Senator Sessions proposes to prohibit foreign insurance companies doing business in this State from removing causes against them to the Federal court on pain of forfeiting their rights in this State.

A correspondent, in commenting on our recommendation to utilize the county courts, by cutting off costs in actions brought in the Supreme Court

of which the county courts have jurisdiction, suggests that to carry this scheme into effect it would be necessary to have the county judge distinct from the surrogate in counties where those offices are now united. It is quite possible that this would be necessary, but the necessity should not defeat the proposition. The Supreme Court is now overworked. The county courts generally are not worked nearly up to their capacity. We believe in "equalizing the circulation," and also in strengthening the Supreme Court.

Judge Barrett and the attorney-general have decided that the law is powerless to prevent the consolidation of two great corporations, like the two great telegraph companies. We assume that these eminent authorities are right in their view of the law, but this state of the law is to be regretted. These corporations singly are powerful enough to make their own terms, to a great extent, with the public, but when they consolidate, the public is completely at their mercy. This is more peculiarly the case with telegraph companies than with any other, even railroad corporations, for under any circumstances there will be fewer telegraph lines than lines of travel. The Legislature ought hereafter, in the charters, to prohibit such consolidations, or if not, they ought at least to fix rates of tariff, or forbid the raising of such rates by consolidation. This country is being ground to pieces by railroad monopolies, and it is high time that it were stopped, and not extended to other corporations for public accommodation.

At last we have found what the "naming" of a member of the House of Commons by the speaker means. It was said by Mr. Speaker Onslow, long ago, that he could not imagine what would happen to a member if the speaker should "name" him. There has been a sort of vague dread that the unfortunate man would shrivel up and blow away. Now it seems that to "name" a man means to stop his talking. It means the enjoining of vexatious and obstructive debate. After debate has gone a reasonable length of time, and when it is apparent that the sole object is to prevent action and determination, the speaker may "name" the obstructors, and they must cease obstructing and let the weary be at rest. If they continue moving their arms or lips, they may be removed from the presence of the house and consigned to outer darkness, where there is doubtless wailing and gnashing of teeth. All this sounds very reasonable. The process of obstruction is very annoying to the majority. But the exercise of the right of stopping debate is a despotic and dangerous one. If it had been commonly exercised in the past, it would have been a hard blow at reform and the advance of liberty in England. The privilege of "obstruction" has been frequently used by many of the wisest and best statesmen of England, and if we are not mistaken, in favor of measures that have finally become triumphant. Where the majority is so overwhelming, and the minority so petty, as in the recent case, it

seems that the community could not suffer; but after all, principle is more precious than the mere temporary issue, and a bad precedent even in a great crisis may sow the seed of mischief. The majority of the House of Commons thought they had good reason to be wroth with the few agitators and obstructionists; but so the majority of our House of Representatives thought of John Quincy Adams and the right of petition, and some of them lived to see the triumph of the petitioners. On the whole, England seems to have a world of trouble. The speaker can "name" the Irish; but can he "name" the Afghans and the Boers?

NOTES OF CASES.

IN *Commonwealth v. Ford*, Massachusetts Supreme Court, January, 1881, to contradict a witness for the prosecution, in regard to his former testimony, the defendant called a newspaper reporter, who had reported the proceedings in which the former testimony was given, and from whose report an account of those proceedings had been printed in his newspaper, and asked that the reporter be allowed to refresh his recollection from the printed account, no search having been made for the written report, but the reporter supposing it had been destroyed, and knowing that the printed account was in accordance with his written report. The request was declined. The prisoner's exception to this ruling was sustained. The court observed: "The witness should have been allowed, for the purpose of refreshing his memory, to look at the printed report, which he stated, as of his own knowledge, was printed substantially as made by him. It was not contended that the written or printed report or any portion of their contents could be put in evidence. They were clearly incompetent in any aspect of the case as presented. The rule, therefore, that to prove by oral testimony the contents of a paper relied on as evidence, it is necessary first to show that it has been lost or destroyed, or that upon diligent search it cannot be found, has no application to this case. In order to refresh the recollection of a witness, it is not important that the paper, book or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection. 1 Greenl. Ev., §§ 436-439; *Chapin v. Lapham*, 20 Pick. 467. See *Coffin v. Vincent*, 12 Cush. 98; *Kensington v. Inglis*, 8 East, 273. The case most resembling the case at bar is *Horne v. McKenzie*, 6 Cl. & Fin. 628. See, also, *Ree v. Duchess of Kingston*, 20 How. St. Tr. 619; *Burton v. Plummer*, 2 A. & E. 341; *Huff v. Bennett*, 6 N. Y. 337." In *Horne v. McKenzie*, *supra*, a surveyor was allowed to refresh his memory by an extract from his field-notes, embodied in a printed report made by him, and verified by him as correct.

In *Latter v. Braddell*, C. P. Div., January 15, 1881, 43 L. T. (N. S.) 605, a singular case came before Lindley and Lopes, JJ., who differed in opinion. The plaintiff was a domestic servant in the service of Captain and Mrs. Braddell. In consequence of a suspicion entertained by Mrs. Braddell, she sent for the doctor and requested him to examine the plaintiff to see if she was in the family way. The doctor did so without using any force or doing any thing more than was necessary for the purpose of the examination. The plaintiff strongly expressed her dislike to be examined, but offered no further resistance, and did what the doctor told her. She afterward brought an action for assault against the master and mistress and the doctor. The judge at the trial withdrew the case from the jury as against the master and mistress, and the jury found a verdict for the defendant. *Held*, by Lopes, J. (1), that it was not correct to tell the jury, that to maintain the action, the plaintiff's will must have been overpowered by force or the fear of violence. A submission to what is done, obtained through a belief that the plaintiff was bound to obey her master and mistress, is a consent obtained through fear of evil consequences to herself, induced by her master and mistress' conduct, and is not sufficient. (2) That the action is maintainable unless what was done was so unmistakably with the plaintiff's consent, that there was no evidence of non-consent upon which a jury could reasonably act. *Held*, by Lindley, J. (1), that a verdict in the plaintiff's favor could not be supported in point of law against her master and mistress. (2) That the plaintiff had it entirely in her own power physically to comply or not with her mistress' orders. (3) That there was no evidence of want of consent as distinguished from reluctant obedience or submission to her mistress' orders, and that in the absence of all evidence of coercion as distinguished from an order which the plaintiff could comply with or not as she chose, the action could not be maintained. Lopes, J., said: "I know not what more a person in the plaintiff's position could do, unless she used physical force. She is discharged without a hearing; forbidden to speak; sent to her room; examined by her mistress' doctor, alone, no other female being in the room; made to take off all her clothes and lie naked on the bed; she complains of the treatment; cries continually; objects to the removal of each garment; and swears the examination was without her consent. Could it be said in these circumstances her consent was so unmistakably given that her state of mind was not a question for a jury to consider? I cannot adopt the view that the plaintiff consented because she yielded without the will having been overpowered by force or fear of violence. That, as I have said, is not, in my opinion, an accurate definition of consent in a case like this. I do not understand why, if there was a case against the doctor, there was none against Captain and Mrs. Braddell. The doctor was employed to see if the plaintiff was in the family way. The plaintiff does not suggest in her evidence that he did more than was necessary for ascertaining that fact. If this is so, the Brad-

dells are responsible for what was done by the doctor. It is said there ought to be no new trial as against the doctor. I cannot agree with the definition of consent given by the learned judge, and I think the withdrawing the case against the Braddells influenced the jury in finding for the doctor. They would naturally think the doctor only did what he was told; the Braddells put him in motion, and it would be hard when the principals are acquitted to find the agent guilty. There should be a rule absolute for a new trial." Lindley, J., said: "The plaintiff had it entirely in her own power physically to comply or not to comply with her mistress' orders, and there was no evidence whatever to show that any thing improper or illegal was threatened to be done if she had not complied." "The plaintiff was not a child; she knew perfectly well what she did, and what was being done to her by the doctor; she knew the object with which he examined her, and upon the evidence there is no reason whatever for supposing that any examination would have been made or attempted if she had told the doctor she would not allow herself to be examined." "In the present case, there was no evidence of any threat at all in the event of non-compliance with the orders of the mistress; and it appears to me that there was no evidence to show that Mrs. Braddell did any thing illegal, or in other words, to show that what she ordered to be done was done against the plaintiff's will in any accurate sense of that expression."

In *Barnett v. Ward*, Supreme Court of Ohio, January, 1880, it was held that words charging a woman with sleeping with a man not her husband impute to her a want of chastity, and therefore are actionable *per se*; that the fact that a woman bears a different name from a person with whom she is charged to have had intercourse tends to prove that she is not the latter's wife. The court said: "The plain and obvious import of the language charging the defendant in error with sleeping with John Fox, when, or the night, her watch was stolen, was to impute to her illicit intercourse with Fox. No one could hear the language uttered without understanding from it that the person uttering it intended to charge that such intercourse had in fact taken place. As was said in *Shields v. Cunningham*, 1 Blackf. 86, a phraseology more indecent might have been used, but no set of words, however plain and explicit, would have conveyed the idea with more certainty. See *Townshend on Slander and Libel*, § 172; *Guard v. Risk*, 11 Ind. 156. The objection that no testimony was offered showing, or tending to show, that the plaintiff was an unmarried woman is equally untenable. It is quite immaterial whether she was married or single. It is only important to know that she was not the wife of Fox. And this presumptively appeared from the circumstance that she did not bear his name. If in the face of this presumption, and notwithstanding it, it was claimed that she was the wife of Fox, the burden was on the defendant below to establish the fact by proof." The charge laid was that the defendant said the plaintiff slept with a man not her husband. The

proof was that he said she was in bed with such man. Of this the court said: "We think the variance between this language and the words alleged to have been spoken were not such as to justify the court in arresting the case from the jury, and in directing a nonsuit." "It not only was not shown that the defendant below was misled to his prejudice by the supposed variance, but that he was so misled was not even suggested. Indeed it is not easily seen how he could have been misled by a variance so slight. The words proved, as well as those in which the charge was laid, imputed to the plaintiff below a want of chastity. The words proved were slightly variant from those alleged, but they clearly were of the same import and meaning. That the defendant below could have been misled by a difference in phraseology apparently so immaterial is hardly to be believed. At all events the court was not authorized, in the absence of any claim or showing that the defendant below was misled to his prejudice by the variance, to dismiss the action."

BOARDING AND LEAVING RAILWAY CARS IN MOTION.

THREE recent cases on this subject deserve notice. In *Cotter v. Frankford & Southwark Ry. Co.*, Pennsylvania Common Pleas, January 23, 1881, the facts were as follows: The plaintiff resided at Frankford, 23d ward, Philadelphia, and was in the habit of riding on the defendants' road each morning by a six o'clock train to Bromley's mills, at Germantown avenue and York street, at which place he was employed. The defendants use in that section of the city a dummy engine and two of the ordinary passenger street cars as a train. The defendants' train had stopped at Unity street, Frankford, to take on passengers, and had started again, when the plaintiff signalled the engineer to stop, and as he did not stop, he ran toward the train, and in attempting to get on the platform of the middle car his foot slipped and he fell under the wheel, and his leg was so crushed and injured that it had to be amputated. As an excuse for attempting to get on the car the plaintiff testified that on a former occasion one of his fellow-workmen at Bromley's mills, who was allowed by the company defendant to act as brakeman on the six o'clock train in the morning, in consideration of a free ride, said to him as he got on the car that he was young, and should run and jump on the car. This was denied by the witness on the other side, and witnesses were also produced who testified that they had warned the boy against jumping on the car while in motion. The jury found in favor of the plaintiff. The court said: "The degree of care required of a child of tender years is always a question of fact for the jury, and what is negligence *per se* in an adult, might not be so in one of tender years. But an important question in this case is, what duty was owing by the defendant to the plaintiff? The train was bound to stop on his signal, and on failure to do so, the defendant would be liable in damages re-

sulting therefrom, if loss of employment or otherwise; but it would be irrational to say that a failure on the part of those in charge of the train to stop would justify any one old enough to travel alone in attempting to get on a moving train as a passenger. The duty to the plaintiff did not, therefore, extend to his personal safety when not on the train as a passenger, nor to his safety getting on, unless the train had stopped." The court also held that the invitation on the former occasion did not bind the company, because outside the scope of the servant's authority, and not contemporaneous. To same effect, *Phillips v. Rena., etc., R. Co.*, 49 N. Y. 177; *Huebner v. N. O. & C. R. Co.*, 23 La. Ann. 492.

The next case, *Kelly v. Hannibal & St. Joseph Railroad Co.*, 70 Mo. 604, was the converse of the above in its circumstances. The plaintiff in the latter case was a passenger who was injured in trying to leave a train under slow motion, having been negligently carried past his destination. The court below nonsuited the plaintiff, and this was reversed, the court holding that the question of negligence was one for the jury. The court said: "In the case of *Doss v. M., K. & T. R. R. Co.*, 59 Mo. 27; S. C., 21 Am. Rep. 371, it was held that whether the attempt of plaintiff to step from the cars while the train was in motion was, under all the circumstances of the case, such negligence as would relieve defendant of all liability for accident, was a question of fact for the jury. For a person to jump from a car propelled by steam while in rapid motion, is mere recklessness, and the leap must be made at his peril; but to step from a car not beyond the platform when its motion is slight or almost imperceptible may or may not be negligence, and of this the jury are to decide from all the attending circumstances. The following cases are to the same effect: *Wyatt v. Citizens' R. R. Co.*, 55 Mo. 485; *Karle v. K. C., St. J. & C. B. R. R. Co.*, 55 id. 476; *Lloyd v. H. & St. J. R. R. Co.*, 53 id. 509; 56 id. 338. 'These are risks which the most prudent men take, and plaintiff will not be barred of a recovery if he adopted that course which the most prudent men would take under the circumstances.' *Smith v. Union R. R. Co.*, 61 Mo. 588; *Meyer v. Pacific R. R. Co.*, 40 id. 151." "If a passenger be negligently carried beyond his stopping place, and where he had a right to be let off, he can recover for the inconvenience, loss of time, and expense of traveling back. But when he jumps, or leaves the train, under circumstances which prudence would forbid, he does it at his own risk and assumes the consequences of his own act." To the same effect, *Damont v. New Orleans & Carrollton Ry. Co.*, 9 La. Ann. 441. In the *Doss* case the plaintiff was not a passenger, but had gone into the car to attend some friends, and the train was started without reasonable notice. The leading case, to the same effect, is *Railroad Co. v. Aspell*, 23 Penn. St. 147; *Thomp. on Carr. Pass.* 252. To same effect, *Jeffersonville, etc., R. Co. v. Jefferson's Adm'r*, 26 Ind. 228; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302; *Burrows v. Same*, 63 id. 556; *Dougherty v. Chicago, etc., R. Co.*, 86 Ill. 467; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray, 64.

In *Commonwealth v. Boston & Maine R. Co.*, Massachusetts Supreme Court, October, 1880, the circumstances were similar to those in the Missouri case. The action was for a statute penalty for killing one H., who claimed to be a passenger upon defendant's railroad. It appeared that the deceased, who was travelling on defendant's train, left it while it was in motion, slowly passing a station where he intended to alight, and was struck by a train passing on another track and killed. *Held*, that deceased was not a passenger after he had left the moving train, and was not entitled to protection by defendant as such. The court said: "It is true that one who has bought a ticket of a railroad corporation is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket office or waiting-room in the station to take his seat in a car of the train, until he has reached the station to which he is entitled to be carried, and has had an opportunity by safe and convenient means to leave the train and roadway of the corporation at that station. *Warren v. Fitchburg Railroad Co.*, 8 Allen, 227. The duty of the corporation toward him is to furnish a well-constructed and safe road, suitable engine and cars, competent and careful engine men, conductors, and other necessary laborers, in order that all injuries which human foresight can guard against may be prevented. But this duty rests on the corporation only so long as the passenger sees fit to be carried by it; and if he chooses to abandon his journey at any point before reaching the place to which he is entitled to be carried, the corporation ceases to be under any obligation to provide him with the means of travelling further. And while it is true that if he leaves the train while it is at rest at a station, he is entitled to an opportunity so to do in safety, it is equally true that the corporation is not under any obligation to make it safe for him to leave the train while it is in motion, and that if he does so he assumes all risk of injury. *Gavett v. Manchester & Lawrence Railroad Co.*, 16 Gray, 501. In the case at bar, so long as the train was in motion, H. could not leave it and still retain his right to protection until he had left the roadway of the corporation. By leaving the train while in motion, he ceased to be a passenger and to have the rights of a passenger as completely, though the train was moving slowly and was near by the station, as if he had left it while moving at full speed between stations. *Hickey v. Boston & Lowell Railroad Co.*, 14 Allen, 429. The fact that the car in which H. was had passed the platform of the station to which he was entitled to be carried, did not give him the right to leave the train at the risk of the company." In *Harvey v. Eastern R. Co.*, 116 Mass. 269, it was held that the attempt to get on a moving train was *prima facie* contributory negligence. In *Illinois Cent. R. Co. v. Statton*, 64 Ill. 183; S. C., *id.* 109, the train stopped and remained a reasonable time, but the decedent waited until it began to move, and was killed in attempting to get off. It was held that there was no ground of recovery.

The case is different if the passenger acts under

the instructions of the company's employees. Thus, in *Chicago & Alton Railroad Co. v. Randolph*, 53 Ill. 510; S. C., 5 Am. Rep. 60, the plaintiff purchased a ticket and got on a freight train. The train not stopping at his station (and not being advertised to stop there), he jumped on while it was moving slowly, and was injured. There was conflicting evidence whether the conductor suggested to him to jump. It was held that it was a question for the jury whether the plaintiff acted prudently.

In *Lambeth v. North Carolina R. Co.*, 66 N. C. 794; S. C., 8 Am. Rep. 508, the decedent was killed in attempting to leave a train moving from two to four miles an hour. The conductor went out on the platform to help him alight. It was held that if without direction from the conductor he voluntarily incurred danger by jumping off, there could be no recovery; but otherwise if the motion was so slow that the danger was not apparent to a reasonably prudent person, and the decedent acted under the conductor's instructions. The circumstances and holding were substantially like this case in *Filer v. N. Y. C. R. Co.*, 49 N. Y. 47; S. C., 10 Am. Rep. 327, where the train was advertised to stop; and *Georgia R. Co. v. McCurdy*, 45 Ga. 288; S. C., 12 Am. Rep. 577. In the latter case the conductor agreed to let the passenger off at a stopping place for wood and water only. The court indulged in the following graphic language: "Who that has seen much railroad travel can fail to see in his mind the picture of this scene? The conductor in a pet; his train bound to slack up its speed at an unusual point; the passenger conscious that he was giving unusual trouble; the train slacks its speed; he stands ready, the conductor ready also, to give the word — now jump! None but a timid and yet resolute man would fail, and jump he did."

In *Loyd v. Hannibal & St. Joseph R. Co.*, 53 Mo. 509, the train stopped at the station only a minute; during that time plaintiff's little child alighted; plaintiff followed without delay, but after the train was in motion, and received her injuries in consequence of jumping from the train. *Held*, that plaintiff would not be barred of recovery by the fact that she jumped from the train while in motion. See, also, *Penn. R. Co. v. Kilgore*, 32 Penn. St. 292, where the circumstances were precisely similar.

In *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356; S. C., 26 Am. Rep. 272, the court charged that starting the train on the instant of the signal was negligent, and that while attempting to board a train moving rapidly would be negligent, such an attempt, if the train were moving slowly, would not be negligent. *Held*, error, and that this was a question of fact. See, also, *Johnson v. Westchester R. Co.*, 70 Penn. St. 357.

In *Eppendorf v. Brooklyn City, etc., R. Co.*, 69 N. Y. 195; S. C., 25 Am. Rep. 171, the plaintiff signalled a street car to stop; the car was open, with a side step or rail; the driver applied the brake, and while the car was moving slowly, the plaintiff undertook to board it, when the driver started suddenly, and he was injured. *Held*, a proper case for the jury.

The court said: "Ordinarily it is perfectly safe to get upon a street car moving slowly, and thousands of people do it every day with perfect safety." And so it is not negligence *per se* to leap from a street car in motion, when it has not stopped on request. *Wyatt v. Citizens' R. Co.*, 55 Mo. 485; *Crissey v. Hestonville, etc., R. Co.*, 75 Penn. St. 367. But *contra (obiter)*, *Nichols v. Sixth Ave. R. Co.*, 38 N. Y. 131.

THE COURT OF APPEALS ON "CONSTRUCTIVE NOTICE."

WHENEVER any unusually interesting case appears, it is the custom of the LAW JOURNAL to make mention of it. It has therefore surprised me that no reference has been made to the case of *Stearns v. Gage*, reported in 79 N. Y., page 102. In that case the plaintiff sought to vacate two conveyances of real estate, on the ground that they were fraudulent as against creditors. The defendant, Lorenzo D. Gage, who purchased the real estate, paid full value for it. The case was referred, and the referee found that the facts "were sufficient to put the said Lorenzo D. Gage, at the time he purchased and took the deed from said Franklin B. Gage, upon inquiry as to the real nature and intent of the transaction by which the said Franklin acquired the title from his father, and amount, in law, to a constructive notice of such transaction and the intent with which it was made by the parties thereto." Upon the report of the referee judgment was entered in favor of the plaintiff, setting aside the conveyances of real estate. From that judgment an appeal was taken to the General Term, and the judgment was affirmed. An appeal was then taken to the Court of Appeals from the judgment of the General Term, and it is the decision rendered on that appeal to which I wish to refer.

There was nothing new or peculiar about the case itself. Cases of a like character had come before the courts of this State and of every other State hundreds and hundreds of times; and the tribunals of England had been surfeited with them. The law applicable to such cases had been settled as firmly as the everlasting rocks. There was nothing new or peculiar about the report of the referee. There was nothing new or peculiar about the decision of the General Term. But there appears to be something decidedly new and peculiar about the decision of the Court of Appeals.

What is this well-settled law which has been mentioned? It is this: 1st. Constructive notice is the same, in effect, as actual notice; it is, as Judge Selden says, in *Williamson v. Brown*, 15 N. Y. 364, 359, "a legal inference from established facts; and like other legal presumptions, does not admit of dispute." The following are a very few of the cases in this State which support this proposition: *Jackson v. Mather*, 7 Cow. 301, 304; *Cunningham v. Freeborn*, 11 Wend. 240, 253-4; *Birdsall v. Russell*, 20 N. Y. 220, 249; *Baker v. Bliss*, 39 id. 70, 74; *Reed v. Gannon*, 50 id. 345, 351; *Bennett v. Buchan*, 76 id. 386, 390-1.

2d. Where the established facts amount to constructive notice, a purchaser is not protected, whether he has paid part value or full value, or ten times the actual value.

In the case of *Williamson v. Brown*, before referred to, Judge Selden says (p. 359): "I can see no foundation in reason for a distinction between the evidence requisite to establish a want of good faith, in a case arising under the recording act, and in any other case; and the authorities here referred to are sufficient to show that no such distinction is recognized, at the present day, by the courts." The plaintiff in that

case, who was a purchaser of real estate for full value, brought an action to restrain the foreclosure of a mortgage which had been recorded after the deed under which he claimed title. The cause was tried before a referee, who found that though the plaintiff had no actual notice and had used due diligence in making inquiries, he was nevertheless chargeable with constructive notice of the existence of the mortgage at the time he purchased; and a judgment was thereupon entered dismissing plaintiff's complaint. On appeal to the General Term the judgment was affirmed. But the Court of Appeals very properly reversed these judgments, on the ground that a diligent examination by the purchaser had not led him to a discovery of the mortgage at the time of the purchase, and that therefore constructive notice was not established.

Baker v. Bliss, 39 N. Y. 70, was an action brought to declare and enforce a resulting trust in favor of the plaintiff as the judgment creditor of the defendant, Joseph A. Bliss, against certain real estate in the hands of the defendant, Pinner. Pinner had purchased the real estate, paying full value. The referee, to whom the action was referred, found that Pinner had no actual notice of the fraud, or that there was a resulting trust, or knowledge or notice of the facts which rendered the deed fraudulent and void as against creditors; and as a matter of law that the facts proved were sufficient to put Pinner upon inquiry, and amounted in law to constructive notice, and rendered judgment in favor of the plaintiff. This judgment was affirmed by the General Term, and on appeal to the Court of Appeals the judgment of the General Term was also affirmed. In the opinion delivered by Judge Miller, in the Court of Appeals, he says: "Although the question involved is one of good faith, yet in judgment of law a want of caution and diligence, such as an honest man would ordinarily exercise, is a want of good faith (*Pringle v. Phillips*, 5 Sandf. S. C. 157; *Danforth v. Dart*, 4 Duer, 101); and Pinner having failed to exercise that caution and diligence, the referee was entirely justified in the conclusion at which he arrived upon the question presented to him."

In *Reed et al. v. Gannon*, 50 N. Y. 345, an appeal was taken to the Court of Appeals from a judgment of the General Term of the Court of Common Pleas for the city and county of New York, affirming a judgment in favor of plaintiffs, entered upon the decision of the court at Special Term. The action was brought to restrain the defendant, Gannon, from foreclosing a mortgage upon certain chattels, executed to him by the other defendant, Osman Reed, Jr. The plaintiffs claimed under a trust deed from the defendant, Osman Reed, Jr., to the plaintiff, Nunez, as trustee for Mary C. Reed, the other plaintiff. The consideration was valuable. At the time of the execution of the trust deed the mortgage was not filed, nor had either of the plaintiffs any knowledge of its existence. The Court of Appeals reversed the judgment on the ground that the plaintiffs were chargeable with constructive notice of the existence of the mortgage. Judge Rapallo, who delivered the opinion, says: "Conceding that the burden of showing notice was, in the first instance, upon the defendants, yet enough had been shown to establish a *prima facie* case of notice, sufficient to put the plaintiffs on inquiry, which was conclusive unless rebutted; and not having been rebutted, the finding that the plaintiffs were purchasers in good faith was erroneous."

Bennett v. Buchan, 76 N. Y. 386, was an action brought to recover damages for an alleged breach of covenant in an assignment of a judgment. The plaintiff, H. Amelia Bennett, through her agent, John C. Bennett, had purchased of one Rich a judgment against certain partners. Prior to said assignment Rich had released Allen H. Gillett, one of the judgment debtors, from all liability on the judgment. The

action was referred, and the referee found that the plaintiff, at the time of purchasing the judgment and receiving the assignment, had no notice, and was not chargeable with notice or knowledge that Gillett had been released or discharged therefrom, and rendered judgment in favor of plaintiff. This judgment was affirmed by the General Term. On appeal to the Court of Appeals the judgment was reversed and a new trial granted, the court holding that the facts established were sufficient to charge the plaintiff's agent, John C. Bennett, with constructive notice, and that notice to the agent was notice to the principal. Judge Miller wrote the opinion.

I will not occupy further space with a consideration of authorities in support of the proposition. It is like arguing that two and two make four. Those who require further support will find it in the following cases, which are only a few of many: *Herlich v. Breunian*, 11 Hun, 194; *Pringle v. Phillips*, 5 Sandf. 157, 168-9; *Dunforth v. Dart*, 4 Duer, 101; *Green v. Slayter*, 4 Johns. Ch. 38, 46; *Holbrook v. Mix*, 1 E. D. Smith, 154, 161; *Pitney v. Leonard*, 1 Paige, 461; *Penulleton v. Fay*, 2 id. 202; *Troup v. Hurlburt*, 10 Barb. 354, 358; *Kennedy v. Green*, 3 M. & K. 609, 719; *Whitbread v. Boulnots*, 1 Y. & C. 303, 328; *Peeters v. Goodrich*, 3 Conn. 146; *Booth v. Barnum*, 9 id. 286; *Hobart v. Hilliard*, 11 Pick. 144; *Stafford v. Ballow*, 17 Vt. 320; *Heaton v. Prather*, 84 Ill. 330; *Garahy v. Bailey*, 25 Tex. Supp. 294; *Shaw v. Spencer*, 100 Mass. 382, 390-1; *Nudd v. Hamblin*, 8 Allen, 131-3; *Wood v. Carpenter*, 21 Alb. L. J. (No. 5) 93; *Jenkins v. Eldredge*, 3 Story, 181, 207-8. Indeed it is extremely difficult, if not impossible, to find any case, except, perhaps, the case of *Stearns v. Gage*, which does not support the proposition.

We come then to the case of *Stearns v. Gage*. The opinion was written by Judge Miller, who, it will be remembered, delivered the opinions in the cases of *Baker v. Bliss* and *Bennett v. Buchan*, before referred to. After reviewing the facts in the case and holding that they were not such as to raise any question of constructive notice, Judge Miller says: "Be that as it may, however, we think that this is not material, as actual notice is required where a valuable consideration has been paid. The statute relating to fraudulent conveyances (2 R. S. 137, § 5) provides that its provisions 'shall not be construed in any manner to affect or impair the title of a purchaser for a valuable consideration, unless it shall appear that such purchaser had previous notice of the fraudulent intent of his immediate grantor, or of fraud rendering void the title of such grantor.' This plainly means that actual notice shall be given of the fraudulent intent, or knowledge of circumstances which are equivalent to such notice. Circumstances to put the purchaser on inquiry, where full value has been paid, are not sufficient. If he knew of the fraud, that would be enough. It is not found that he had such knowledge in the case considered. As there is no such finding, we may assume that he had no knowledge of the fraud; and without this no case is established which would invalidate the conveyance to him and warrant the conclusion of the referee. No authority has been cited which sustains the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor; and such a rule would carry the doctrine of constructive notice to an extent beyond any principle which has been sanctioned by the courts, and cannot be upheld."

A few observations on this opinion are now in order. 1st. It would be impossible to cite any authority which did not sustain "the principle that a purchaser for a valuable consideration, without previous notice, is chargeable with constructive notice of the fraudulent intent of his grantor." 2d. It would be easy to cite a score of authorities which sustain the principle. 3d.

"Such a rule would carry the doctrine of constructive notice" no further than it has been carried in every case where the question has come before the courts, and among others the case of *Baker v. Bliss*, 39 N. Y. 70, in which Judge Miller wrote the opinion. 4th. The application of the doctrine of constructive notice is never prevented by a valuable consideration. The fact that a valuable consideration has been paid is merely a circumstance tending to show that the purchaser had no actual notice of the fraudulent intent of his grantor. But where the established facts are such that the law infers fraud from them it is not of the slightest consequence whether no value or double value has been paid. "Legal or implied notice," says Judge Selden, in *Williamson v. Brown*, 15 N. Y. 359, "is the same as constructive notice, and cannot be controverted by proof." How then can proof of the payment of full value affect constructive notice, which "cannot be controverted by proof?" 5th. "But it will be found," says Judge Selden, "on looking into the cases, that there is much want of precision in the use of these terms" (i. e., legal or constructive notice). "They have been not unfrequently applied to degrees of evidence barely sufficient to warrant a jury in inferring actual notice, and which the slightest opposing proof would repel, instead of being confined to those legal presumptions of notice which no proof can overthrow." If one were not bound to assume that the Court of Appeals "can do no wrong," judicially, it would seem as if the opinion in *Stearns v. Gage* was open to this charge of a "want of precision." Judge Miller says that actual notice must be shown, "or knowledge of circumstances which are equivalent to such notice;" but a knowledge of circumstances which are equivalent to actual notice simply constitutes a definition of constructive notice. Unless the facts proved are such that from them the law infers notice, no question of constructive notice can arise. 6th. It seems that, in the opinion of Judge Miller, where a purchaser has paid full value, the conveyance may be set aside if a jury finds, on evidence however contradictory and unsatisfactory, that the purchaser had notice of the fraud of his grantor, since that is a case of actual notice; but that the conveyance cannot be set aside, where the facts established are such that the jury has nothing to say about it and the law itself infers notice to the purchaser of the fraud of his grantor, since that is a case of constructive notice.

We are now in a position to understand the opinion and decision in the case of *Stearns v. Gage*, if such a thing be possible; and it is proper to proceed earnestly and patiently, acting always on the presumption that the Court of Appeals "knows what it is talking about." It appears, then, that where a valuable consideration has been paid constructive notice is not sufficient, but that proof of a knowledge of circumstances which are equivalent to actual notice, or in other words, proof of constructive notice, is sufficient. There seems to be something wrong here. We shall have to try again. Suppose we start, as before, by saying that it appears that where a valuable consideration has been paid constructive notice is not sufficient. But since, in every case where the question has arisen, such notice has been held sufficient, it would have been proper for the court to have cited these cases and disapproved or overruled them. This has not been done and so we are still in perplexity. Possibly, however, Judge Miller is merely chargeable with a "want of precision" in the use of the term "constructive notice." A reference to the opinion shows that this explanation will not hold; for Judge Miller quotes, approvingly, Judge Selden's definition of constructive notice, "that when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiry and ascertained

the extent of such prior right, or to have been guilty of a degree of negligence fatal to the claim to be considered a *bona fide* purchaser."

I am afraid it will be necessary to give it up. It is fair to assume that the Court of Appeals, in the case of *Stearns v. Gage*, meant what it said; and yet, on the other hand, it is evident that it did not mean what it said. Will some one have the kindness to explain what it did mean? J. H. HOPKINS.

INNKEEPER AND GUEST.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, JANUARY 8, 1881.

KOPPER V. WILLIS.

Defendant kept a restaurant at which he furnished meals. On the third floor of the premises were rooms he had fitted up for lodgers. In an application for license to sell liquors, defendant had set forth that he kept an inn at the place occupied by him, and he had received a license as an innkeeper to sell liquors there. Plaintiff, at the invitation of a friend, took a meal in the restaurant, which meal the friend paid for. As he sat down to eat, plaintiff hung his coat on a hook provided for the purpose in the restaurant. During the meal the coat was stolen. *Held*, (1) that the defendant, by his own act and declaration in obtaining the license, rendered himself an innkeeper; (2) and that plaintiff was a guest so as to make defendant liable as innkeeper for the loss of the coat.

APPPEAL from a judgment rendered by the justice of the Ninth District Court, in favor of the plaintiff for the value of an overcoat stolen.

J. Homer Hildreth, for appellant.

Charles Blandy, for respondent.

DALY, C. J. The question in the case is whether the relation of innkeeper and guest existed between the defendant and the plaintiff, when the latter lost his coat in the defendant's establishment, which is a close and difficult one upon the facts, which are as follows:

The plaintiff, who is an attorney, was asked by another person, one Brewster, "to come out to dinner."

They went to the defendant's establishment, situate at No. 112 Grand street, where Brewster had been in the habit of going, but where the plaintiff had never been before.

They went into the restaurant, which was considerably crowded with people at the time, where there were several tables, and where the plaintiff saw "all around the room hooks occupied almost entirely by coats of guests hung up."

He and Brewster hung up their overcoats upon adjoining hooks, and then sat down at a large table in the center of the room, about eight or ten feet from the place where their coats hung, and had dinner, for which Brewster paid.

When the plaintiff went to get his coat it was gone. He notified the defendant of the loss, and that he would hold him responsible.

The defendant replied that it was very singular; that it was the first instance of any one having lost his overcoat since he had begun the establishment, which was about four months previously; that he was very sorry, and would use every effort to get it back, which he did by advertising it and offering a reward for it upon the advice of a detective.

The premises occupied by the defendant, where he kept a restaurant and had rooms fitted up for the accommodation of guests, consisted of the first floor and basement and the half of what was called the top floor of the building.

It appears that about three weeks previously, the defendant applied for a license as an "inn, tavern or hotel keeper," which application was accompanied by his affidavit, in which he set forth that he then kept an

inn or tavern at that place, 112 Grand street; that he had sufficient ability to keep one, and the necessary accommodations to entertain travellers at that place; that an inn or tavern was required there for the accommodation of travelers; that he kept in the house at least three spare beds and the necessary bedding for the accommodation of travelers; that he had the necessary kitchen utensils to provide meals for and did provide meals for them on application; and that he had complied with the law to place on or adjacent to the house a sign indicating that he kept an inn or tavern; upon which application he received a license to sell spirituous liquors, ales, etc.

A printed circular was offered in evidence by the defendant, in which his establishment was entitled "Merchant's Dining Room and Cafe," and described as a place where gentlemen could find a first class restaurant, at which meals were served at reasonable prices, every thing being cooked on the premises; that wines, liquors and cigars would be found on the side-board; and that he superintended personally to see that his patrons were properly and quickly served; and that the dining room and cafe was open from 7 A. M. to 8 P. M.

The defendant also offered in evidence two business cards upon which his establishment was entitled "R. R. Willis, restaurant, wine and sample room," all of which evidence the justice rejected.

The plaintiff testified, in answer to a question put in behalf of the defendant, that he did not give his coat in charge to the defendant, or to any of his attendants, which was not material, as it had been settled, as long as *Cayles' case* (860, 82), that it is not essential, upon the question of liability, that the guest should deliver his property into the custody of the innkeeper or his servants, or acquaint him with it; that it is sufficient that it is within the inn.

The plaintiff also testified that he did not register his name in any book, as a guest, or ask for any book in which to register it.

The justice, upon this state of facts, gave judgment for the plaintiff, and in a carefully considered opinion drew attention to this material distinction in respect to the defendant's liability as an innkeeper, that it did not appear that on the third or top floor of the premises, where he had rooms fitted up for the accommodation of guests, he carried on the business of an innkeeper, independent of furnishing meals, etc., on the first floor, but on the contrary, that the whole business was carried on under a license as an innkeeper, entitling him to sell spirituous liquors, etc.

In *Cromwell v. Stevens*, 2 Daly, 15, I had occasion to examine what constituted an innkeeper, not only by a review of the adjudged cases in which that question has been considered, but by a historical inquiry into the origin and reason of the rule that innkeepers are responsible for the loss of the property of their guests; in which I came to the conclusion, from the authorities, that an inn is a house where all who conduct themselves properly, and who are able and ready to pay for their entertainment, are received, if there is accommodation for them, and who, without any stipulated engagement as to the duration of their stay or as to the rate of compensation, are, while there, supplied at a reasonable charge with their meals, lodging, refreshment and such services and attention as are necessarily incident to the use of the house as a temporary home; that a mere restaurant or eating house is not an inn, nor a mere lodging-house in which no provision is made for supplying the lodgers with meals; and that in respect to houses for the entertainment of travellers, of which there are many in this and other cities, where the guest or traveller pays so much a day for his room, and takes his meals or not, as he thinks proper, in the restaurant, paying separately for each meal as he takes it, they are to be considered inns,

If the restaurant forms a part of the establishment and the whole house is kept under one general management for the reception of all guests or travellers that may come there.

The main business of the defendant in this case was undoubtedly the keeping of a restaurant; and if nothing else had appeared but the fact that on the half of the third floor of the premises he had rooms for lodgers, that incident would not perhaps in itself have changed the character of the restaurant into an inn, subjecting him to the extraordinary liability imposed by the common law upon innkeepers.

In *Parkhurst v. Foster*, 1 Salk. 387, Chief Justice Holt held that a man, who kept a lodging-house and cooked meat for his lodgers at four pence per joint, sold them small beer at two pence per mug, and found them suitable room and hay for their horses at certain rates, was not an innkeeper upon whom soldiers could be quartered, under a statute, authorizing soldiers to be billeted upon inns; and in *Doe d. Pelt v. Lanning*, 4 Camp, 73, Lord Ellenborough held that a coffee-house, known in London as Grigsby's coffee-house, though people from the country lodged there as in an inn, was not an inn within the meaning of a policy of insurance, which declared that the policy should be void if an inn was kept upon the premises unless an increased premium was paid.

But the difficulty in the present case is that the defendant himself has established by his own act and declaration that he keeps an inn, having obtained, upon an affidavit made by him for that purpose, a license to sell spirituous liquors upon the premises, which he could not have obtained unless upon proof by affidavit to the Board of Commissioners of Excise that he kept an inn, and that an inn was necessary for the accommodation of travellers in the place where he kept it. Laws of 1857, ch. 628.

The fact that the defendant kept an inn being established, liability necessarily attaches in respect to all who come to his inn for the purpose of entertainment, whether it be to occupy one of his rooms as a lodger, or to take a meal in the restaurant.

It was suggested in the opinion delivered in *Krohn v. Sweeney*, 2 Daly, 202, that "it may well be that a person occupies a two-fold character, viz., that of a mere restaurant keeper, so far as relates to persons resorting to his refectory only for the purpose of taking their meals, while he is an innkeeper, with all the responsibilities attaching to such, as respects travellers who are received and accommodated by him as guests, with lodgings in that portion of the building arranged as lodging places for an uncertain price, and under no express agreement."

This however was obiter in that case, and no such distinction, I apprehend, can be maintained consistently with adjudged cases, where there is no doubt of the fact that the defendant keeps an inn, unless, as pointed out by the judge below, the one business is carried on separate and distinct from the other, in the same building, as was the case in *Carpenter v. Taylor*, 1 Hilt. 195, but was not the case here, as appears by the facts already referred to, enumerated by the defendant in his affidavit, wherein he expressly states that it is by reason of those facts that he applies for a license to sell spirituous liquors, or where it appears that the guest makes a specific contract with the innkeeper as a regular boarder, at a fixed rate of compensation per week, or otherwise (*Seward v. Seymour*, Anthon's Law Student, p. 521; Laws of N. Y. 1860, ch. 446); and where it appears by the defendant's own showing that the establishment he keeps is an inn, it is immaterial how slight may be the entertainment or how temporary the use made of it, if the party loses his property in the inn while there in the character of a guest.

In *Bennett v. Mellon*, 5 T. R. 273, the plaintiff's servant went to the defendant's inn and asked if he might

leave the plaintiff's goods there until the next market day, and the innkeeper's wife told him that he could not as they were very full of parcels; whereupon the servant sat down in the inn, putting his master's goods immediately behind him on the floor, and had some liquor. When he got up, after sitting there a little while, the goods were missing, and upon this state of facts, all the judges held that the innkeeper was liable. I have heretofore expressed a doubt whether this case was rightly determined, but it has been acquiesced in and acted upon for nearly a century, and if it is now to be disregarded, that responsibility must be taken by the court of last resort.

As the plaintiff in the present case went into the restaurant, which was a part of the defendant's establishment, to get his dinner, he was certainly there in the character of a guest, which is not affected by the circumstance that the friend who asked him to go there paid for the dinner.

If it was an inn, the defendant was answerable for the loss of the coat whilst plaintiff was taking his dinner; and as the justice below held that it was, I do not see how we can say that he erred when the facts sworn to in the defendant's affidavit show that it was.

Judgment affirmed.

COMMISSION FOR TESTIMONY IN PROCEEDINGS TO DISBAR ATTORNEY.

NEW YORK COURT OF APPEALS, DEC. 14, 1880.

IN MATTER OF HAHN.

In proceedings to disbar an attorney, the person proceeded against can be convicted only upon evidence good at common law, delivered, if he chooses, in his presence by witnesses subject to cross-examination. A commission to take testimony out of the State in such proceedings without the consent of the accused person is not allowable.

A PPEAL from an order of the General Term of the Supreme Court in the First Department directing a commission to issue to take testimony out of the State in proceedings to disbar an attorney.

Mr. Bishop, for appellant.

Mr. Forbes, for Bar Association of New York city, respondent.

DANFORTH, J. The power of the court to admit and to remove attorneys is given by statute (*In re Cooper*, 22 N. Y. 67; *In re Percy*, 59 id. 657), and in either case the proceeding is a special one. If instituted for the latter purpose, the person proceeded against "must be allowed an opportunity of being heard in his defense" (New Code, § 67), and can be convicted only upon evidence good at common law, delivered, if he chooses, in his presence by witnesses subject to cross-examination. *In re Eldridge*, Court of Appeals, Oct. 1880.

The order appealed from derogates the protection afforded by that right, for it requires the examination of a witness at a distance from the place of trial, upon written interrogatories, and was granted against the opposition of the accused person. It is clearly not within the statute which authorizes "depositions taken without the State for use within the State" (New Code, tit. III, art. 2, ch. 14), for that relates to actions only in their various stages, and neither by its terms nor any implication can it be extended to any other mode or form of proceeding. This appears from the Code itself; for as the provision cited limits the commission to an action, so in another place we find a declaration that "the word action," when applied to judicial proceedings, signifies an ordinary prosecution in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress

and prevention of a wrong, or the punishment of a public offense. § 3333, *id.* Such is not the character of this case. It is, indeed, of a public nature, and quasi criminal (*In re Kelly*, 50 N. Y. 495) but it involves merely the power and control of the court over its officers, and however terminating, will neither enforce nor vindicate a private right, and by this very circumstance is excepted from the class of ordinary prosecutions set on foot by one party against another.

Nor was the limitation unintentional. Prior to 1862, the general construction given to similar provisions of the Revised Statutes (2 R. S., Part 3, tit. III, art. 2, ch. 7) had confined their operations to actions and issues joined therein. It was held that the power of the court to award a commission without the consent of parties, depended entirely on the statute (*Wood v. Howard Ins. Co.*, 18 Wend. 646; *In re Whitney*, 4 Hill, 533; *McCall v. Sun Mutual Ins. Co.*, 50 N. Y. 332) and that it only extended to a case where the parties were before the court for the prosecution or defense of their rights in the form prescribed by law. A commission was refused, therefore, in a statutory proceeding by a receiver before referees, in relation to claims against an insolvent insurance company (*Wood v. Howard Ins. Co.*, 18 Wend. 646) in proceedings where trustees had been appointed under the statute, against an absconding debtor, and the latter desired to controvert the claims of creditors (*In re Whitney*, 4 Hill, 533) in supplementary proceedings, under § 202 of the old Code, when the judgment creditor desired the testimony of witnesses out of the State, material and necessary for him, and in all, the denial was for want of power to grant the application. For the purpose apparently of providing for such and similar cases, the Legislature, in 1862 (Laws of 1862, ch. 375), amended the then existing statutes in relation to taking the testimony of witnesses out of the State, so that commissions might issue, not only in an action, but "in any proceeding pending in any court of record," or "whenever any issue of fact shall have been joined in any such action or proceeding." This statute was however repealed in 1877 (Laws of 1877, ch. 417, § 38) and the provisions therein not relating to actions have not been re-enacted.

The question before us must be decided upon the statute as it now stands, and it is I think the same in principle as that in the cases above cited. It may be conceded, as the learned counsel for the respondent claims, that by the new Code (§ 7), the court has power given it "to devise and make new process and forms of proceeding necessary to carry into effect the powers and jurisdictions possessed by it;" but the application of this provision to the case in hand is not perceived. Upon what occasion and in what manner the power so conferred shall be exercised does not now concern us, for the order itself directs that "the commission issue, according to the form of proceedings prescribed," in the article of the new Code to which I have already referred. No new form or process has been devised, but a power exercised which the Legislature has not thought proper to bestow.

The order also answers the proposition of the learned counsel for the respondent, that "the commissioner thereby appointed is in a similar position to the referee," for by its terms the deposition taken by the commissioner is to be returned to the referee; the trial before him is stayed only until it arrives, and afterward it, with the other evidence, is to be considered by him, and when, upon the material so furnished, his opinion is formed, the whole evidence together with that opinion is to be reported to the court.

It is also true that by the order "the question of right to issue the commission, and the legality of the evidence taken thereunder, is reserved until the final hearing of the matter before the court;" but this was without the consent of the appellant, and the order

does in fact direct the issuing of the commission and proceedings under it.

We think such reservation does not affect the final character of the order, and as it was made without authority, that it should be reversed and the motion for commission be denied.

RATE OF INTEREST AFTER MATURITY.

MASSACHUSETTS SUPREME JUDICIAL COURT.
JUNE, 1880.

UNION INSTITUTION FOR SAVINGS v. CITY OF BOSTON ET AL.*

Is an action upon a contract to pay a sum of money at a certain time with interest at a specified rate, the creditor is entitled to recover interest at that rate, not merely until the time the principal is agreed to be paid, but until it is actually paid or his claim for principal and interest is judicially determined.

BILL to enforce a lien upon moneys due from the city of Boston for damages for land taken for public use by the city. The opinion states the case.

GRAY, C. J. This is a bill in equity by a mortgagee of land taken by the city for the public use, and the equity of redeeming which from the plaintiff's mortgage is owned by the defendant Farnsworth, to enforce a lien upon the money due from the city for damages for such taking. By the terms of these mortgages, the amounts of the mortgage debts were to be paid in five years, which had elapsed some time before the filing of the bill, "with interest semi-annually at the rate of seven and a half per centum per annum;" and the question is, at what rate the interest is to be computed for the time since the principal sums became due.

By the statute of 1867, chapter 58, section 1, the legal rate of interest in this Commonwealth is six per cent a year, when there is no agreement for a different rate; and by section 2 it is lawful to contract for any rate of interest, "provided, however, that no greater rate of interest than six per centum per annum shall be recovered in any action, except when the agreement to pay such greater rate of interest is in writing."

When a written agreement is made, as authorized by the statute, to pay a greater rate of interest yearly than six per cent, the intention of the contract and the effect of the statute appear to us to be that the creditor shall receive the stipulated rate of interest so long as the debtor has the use of the principal; and that in an action upon the contract, the creditor shall recover interest at that rate, not merely until the time when the principal is agreed to be paid to him, but until it is actually paid, or his claim for principal and interest judicially established.

In *Drannon v. Hurrell*, 112 Mass. 63, it was accordingly held, in an action upon a promissory note payable in four months, "with interest at ten per cent," that interest was to be computed at that rate, not merely to the maturity of the note, but to the time of the verdict; and upon reconsideration of the authorities there referred to, and examination of the numerous decisions cited at the argument of the present case, we see no reason to overrule or qualify the point adjudged, although the statement in the opinion that "the plaintiff recovers interest, both before and after the note matures, by virtue of the contract, as an incident or part of the debt," might well be modified so as to say that the interest after the breach of the contract, though not strictly recoverable as part of the debt, but rather as damages, is ordinarily to be measured according to the intention manifested by the contract, by the standard thereby established.

In *Price v. Great Western Railway*, 16 M. & W. 244,

*To appear in 220 Massachusetts Reports.

248, Baron Parke said that the reason why, under a mortgage deed whereby interest is payable up to a certain day, interest beyond that day might be recovered as damages, was "because the deed shows the intention of the parties that it should be a debt bearing interest;" and added "the jury give it as damages for the detention of the debt. It is not recoverable as interest on the contract itself."

In *Morgan v. Jones*, 8 Exch. 620, the owners of a vessel mortgaged it as security for a debt, with a proviso for redemption on payment of the principal and interest at the rate of ten per cent in six months, but without any provision for payment of interest after that time. The principal not being paid then, it was held by Chief Baron Pollock and Barons Parke, Platt and Martin that the mortgagee was entitled to interest at the same rate until payment; and Baron Parke said: "It was a sale of a chattel, redeemable on a certain day; then, if the mortgagors do not avail themselves of that provision, the same rate of interest continues payable. It is exactly like a mortgage of real estate, where the mortgagee becomes the legal owner."

So in *Keene v. Keene*, 3 C. B. (N. S.) 144, an action by an indorsee against the drawer of a bill of exchange for £200, payable in twelve months, with interest at the rate of ten per cent per annum, was referred to a master, who allowed ten per cent interest after, as well as before, the maturity of the bill. The defendant moved to recommit the case to the master; and argued that there was no implied contract on the part of the drawer, upon the acceptor's default, to pay more than the ordinary interest of five per cent; that the acceptor could only be liable to interest at five per cent after maturity of the bill; and that the bill was in effect a bill for £220. But the court overruled the motion. Mr. Justice Willes said: "Until the maturity of the bill, the interest is a debt; after its maturity, the interest is given as damages at the discretion of the jury. Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed; and the master is substituted for a jury." Chief Justice Cockburn said: "I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of damages the rate of interest the parties themselves had contracted for. I think he has done quite right." Mr. Justice Crowder said: "I am of the same opinion. The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as to the value of the money." And Mr. Justice Williams concurred.

In *Cook v. Fowler*, L. R., 7 H. L. 27, a debtor, on May 2, 1864, gave a warrant of attorney to a creditor "to secure the payment of the sum of £1,330, with interest thereon at and after the rate of £5 per cent per month, on the 2d of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of £1,330 and interest thereon on the day aforesaid, execution or executions and other processes may then issue for the said sum of £1,330 with interest, together with costs of entering up judgment, etc., etc., and all other incidental expenses whatever." The debtor died before the 2d of June, and no judgment was entered up. The creditor, who also held mortgages on lands of his debtor, concealed his warrant of attorney for three years, and then set it up in answer to a bill of the executors against him for an account, and more than a year later first claimed to be allowed interest for the whole time at the rate of sixty per cent a year. It was held by the House of Lords, affirming a decree of Vice Chancellor Stuart, that he was entitled after the 2d of June, 1864, to ordinary interest only; and this upon two grounds: 1st. That the warrant of attorney and the defeasance did not create a contract, but only an authority to enter up judgment on June 2, 1864, and a stipulation that execution might

then issue. 2d. The extraordinary and excessive rate of interest, and the conduct of the creditor.

Although Lord Chelmsford (apparently overlooking the cases of *Morgan v. Jones* and *Keene v. Keene*, above cited) said, "There is no authority that I can find to support the argument of the counsel for the appellant, that when a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterward," L. R., 7 H. L. 35, Lord Chancellor Cairns and Lord Selborne were clearly of a different opinion. The Lord Chancellor said that, according to the well-known principle, which had been referred to in many cases, "any claim in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider the position of the claimant, and the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain, might be taken and generally would be taken as the measure of interest; but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case and to decide what was the proper sum to be awarded by way of damages." Pp. 32, 33. And Lord Selborne said: "Although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle not of implied contract but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to." Pp. 37, 38.

In a later case Lord Justice Amphlett considered it to be clearly established by the previous decisions that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the date; and so in the redemption of mortgages although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the court will assume that interest is payable after the day at the same rate as before; and that although what has to be paid may technically be called damages, they are damages of a peculiar kind, for it would not be left to a jury to regulate the amount; but the jury would be directed as a matter of law to find damages of the same amount as the interest which would have been payable if the promise had extended over the period. *Gordillo v. Weguelin*, 5 Ch. D. 287, 303.

In the very recent case of *In re Roberts*, 14 Ch. D. 49, where by a mortgage deed reciting an agreement for a loan of £5,000 at the rate of ten per centum per annum, the mortgagor covenanted to pay in six months the sum of £250, being half a year's interest on the £5,000, and in twelve months the sum of £250, being a further half-year's interest, and also the principal sum of £5,000, making together £5,250, and made no covenant for the payment of interest in the event of the principal remaining unpaid after the day named for its repayment, but actually paid interest at the rate of ten per cent for three years afterward, and then died; and after a decree for administration of his estate the mortgagee proved as a creditor for principal and interest; it was indeed held by Sir George Jessel, M. R., and Lords Justices Brett and Cotton, that he was entitled in such a suit to interest at the rate of five per cent only. But no decision upon the point appears to have been brought to the notice of the court, except

Cook v. Fowler, above cited; and the case was decided upon the assumption that there was no precedent for giving more than the ordinary rate of interest by way of damages. Under such circumstances the case cannot be considered, by a court not bound by it as authority, to outweigh the decisions of Chief Baron Pollock and Baron Parke, of Chief Justice Cockburn and Mr. Justice Willes and their associates, and the opinions of Lord Cairns and Lord Selborne, above quoted. It may also be observed that the Master of the Rolls said (without giving any reason why the agreement of the parties should be allowed a greater effect by way of protection of the party who had broken his contract, than for the benefit of the party who by such breach had been deprived of the use of his money) that if the rate of interest named by the parties were below the ordinary rate, it would be the proper measure of damages; and that Lord Justice Cotton took the precaution to remark that the court was not deciding what rate of interest should be allowed in a suit for redemption.

Before the decision in *Brannon v. Hursell*, the rule there declared had been established in Indiana, California, Texas, New Jersey, Illinois, Wisconsin, Iowa, Nevada and Tennessee. *Kilgore v. Powers*, 5 Blackf. 22; *Kohler v. Smith*, 2 Cal. 597; *Guy v. Franklin*, 5 id. 416; *Corcoran v. Doll*, 32 id. 82; *Hopkins v. Crittenden*, 10 Tex. 189; *Wilson v. Marsh*, 2 Beasley, 289; *Phinney v. Baldwin*, 16 Ill. 108; *Ethyre v. McDaniel*, 28 id. 201; *Hearth v. Rhodes*, 66 id. 351; *Spencer v. Marfield*, 16 Wis. 541; *Pruyn v. Milwaukee*, 18 id. 367; *Hand v. Armstrong*, 18 Iowa, 324; *Thompson v. Pickel*, 20 id. 490; *McLane v. Abrams*, 2 Nov. 199; *Overton v. Bolton*, 9 Heisk. 762. It has since been affirmed by decisions of the highest courts of Ohio, Michigan and Virginia. *Monnett v. Sturges*, 25 Ohio St. 384; *Marietta Iron Works v. Lottimer*, id. 621; *Warner v. Juff*, 38 Mich. 662; *Cecil v. Hicks*, 29 Gratt. 1. And it has been acted on by Judge Lowell in the Circuit Court of the United States for this District. *Burgess v. Southbridge Savings Bank*, 2 Fed. Rep. 500.

In Connecticut the law seems formerly to have been considered as settled in accordance with these decisions; and although some recent *dicta* have a tendency to explain away the grounds assigned in the earlier judgments, there is no adjudication to the contrary. *Beckwith v. Hartford, Providence & Fishkill Railroad*, 29 Conn. 268; *Adams v. Way*, 33 id. 419; *Hubbard v. Callahan*, 42 id. 524, 537; *Suffield Ecclesiastical Society v. Loomis*, 42 id. 570, 575; *Seymour v. Continental Ins. Co.*, 44 id. 300.

The earlier decisions in New York support the same rule, both as to mortgages and as to ordinary debts. *Miller v. Burroughs*, 4 Johns. Ch. 436; *Van Beuren v. Van Gaasbeck*, 4 Cowen, 496. But in the light of later cases the question may perhaps be considered an open one in that State. See *Bell v. Mayor of New York*, 10 Paige, 49; *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Ritter v. Phillips*, 53 id. 586. It may be doubted however whether the cases of *Macomber v. Dunham*, 8 Wend. 550, and *United States Bank v. Chapin*, 9 id. 471, sometimes referred to in discussions of the subject, are really applicable. In one of them the decision was that a corporation authorized by its charter to charge interest for a full month on loans for more than fifteen days and less than a month, could not demand interest at the same rate during subsequent months while such a loan remained unpaid. In the other, the only point decided was that a bank limited by statute to six per cent interest on all discounts was not thereby prevented from recovering the legal rate of seven per cent as damages after breach of the contract by the other party. Each case turned, not upon the terms of a contract, but upon the effect of a peculiar statute, the scope of which was clearly defined and

limited. And in neither of them is there any intimation of an intention to overrule the decision of Chancellor Kent in *Miller v. Burroughs*, or that of Chief Justice Savage and Justices Sutherland and Woodworth in *Van Beuren v. Van Gaasbeck*. The case of *Kitchen v. Mobile Bank*, 14 Ala. 233, is like *United States Bank v. Chapin*.

In *Ashuelot Railroad v. Elliot*, 57 N. H. 397, 437, 439, cited for the defendant Farnsworth, the point decided was that upon bonds bearing interest at the rate of six per cent annually, payable half-yearly, interest after maturity and payment of all the coupons should be computed in equity at the rate of six per cent, without annual or other rests; in short, that compound interest should not be allowed in a suit on the principal debt. That decision, in effect overruling *Pierce v. Rowe*, 1. N. H. 179, accords with the general current of authority, in equity as well as at law. *Ferry v. Ferry*, 2 Cush. 92; *Connecticut v. Jackson*, 1 Johns. Ch. 13; *Van Benschooten v. Larson*, 61d. 313; *Mowry v. Bishop*, 5 Paige, 98; *Sparks v. Garrigues*, 1 Binn. 152, 165; *Stokely v. Thompson*, 34 Penn. St. 210; *Doe v. Warren*, 7 Greenl. 48; *Parlhurst v. Cummings*, 56 Me. 155. It does not affect the question before us.

The leading cases in support of the defendant's view are *Ludwick v. Huntzinger*, 5 W. & S. 51, and *Brewster v. Wakefield*, 22 How. 118.

In *Ludwick v. Huntzinger*, it was held by the Supreme Court of Pennsylvania that on a bond for the payment of money in twenty-one months, with three per cent interest from date, the obligee was entitled to recover three per cent interest until the time fixed for payment, and six per cent afterward.

In *Brewster v. Wakefield*, it was held by the Supreme Court of the United States (reversing the judgment of the Supreme Court of the Territory of Minnesota in 1 Minn. 352), that upon a mortgage to secure notes which respectively stipulated for the payment of interest at the yearly rates of twenty-four and twenty-five per cent, where the rate fixed by statute in the absence of express agreement was seven per cent, interest at the rate of seven per cent only could be recovered after the maturity of the notes. Chief Justice Taney, in delivering judgment, said: "The contract being entirely silent as to interest if the notes should not be punctually paid, the creditor is entitled to interest after that time by operation of law, and not by any provision in the contract. And in this view of the subject we think the Territorial courts committed an error in allowing, after the notes fell due, a higher rate of interest than that established by law where there was no contract to regulate it." He then referred to the cases of *Macomber v. Dunham*, *United States Bank v. Chapin*, and *Ludwick v. Huntzinger*, above stated; and added: "Nor is there any thing in the character of this contract that should induce the court, by supposed intendment of the parties or doubtful inferences, to extend the stipulation for interest beyond the time specified in the written contract. The law of Minnesota has fixed seven per cent per annum as a reasonable and fair compensation for the use of money; and where a party desires to exact from the necessities of a borrower more than three times as much as the Legislature deems reasonable and just, he must take care that the contract is so written, in plain and unambiguous terms; for with such a claim he must stand upon his bond."

The same rule appears to have been followed by the Supreme Court in a case from the Territory of Utah. *Burnhiser v. Firman*, 22 Wall. 170. And it has since been adopted as a general rule by the courts of Kansas, Minnesota, South Carolina, Rhode Island, Kentucky, Arkansas and Maine. *Robinson v. Kinney*, 2 Kans. 184; *Lash v. Lambert*, 15 Minn. 416; *Moreland v. Lawrence*, 23 id. 84; *Langston v. South Carolina Railroad*, 2 S. C. (N. S.) 248; *Pearce v. Hennessy*, 10

R. I. 223; *Rilling v. Thompson*, 12 Bush, 310; *Newton v. Kennerly*, 31 Ark. 626; *Duran v. Ayer*, 67 Me. 145; *Eaton v. Boissonnault*, 67 id. 540.

But the later judgments of the Supreme Court exhibit a difference of opinion as to the general rule, though not of adjudication in the particular cases before the court.

In *Cromwell v. County of Sac*, 96 U. S. 51, which arose in the Circuit Court of the United States for the District of Iowa upon a bond given in Iowa and stipulating for the payment of ten per cent interest, Mr. Justice Field, delivering the judgment of the Supreme Court, treated the decision in *Brewster v. Wakefield* as based upon the exorbitant rate of the interest, and after referring to *Brannon v. Hursell* and many of the other American cases above cited, said: "The preponderance of opinion is in favor of the doctrine that the stipulated rate of interest attends the contract until it is merged in the judgment." And it was held, reversing in this respect the judgment of the Circuit Court, that the construction given by the Supreme Court of Iowa to the statute of that State was conclusive, and that interest must be computed at the rate expressed in the contract to the time of judgment.

On the other hand, in the case of *Holden v. Trust Co.*, 100 U. S. 72, which arose in the District of Columbia under a statute like ours except in not allowing the parties to stipulate for interest at a greater rate than ten per cent, it was held, upon a bill in equity, that on a note made payable in four years with interest at the rate of ten per cent payable semi-annually and secured by a conveyance of real estate in trust, interest from the maturity of the note should be computed at the ordinary rate of six per cent only; and Mr. Justice Swayne in delivering judgment said: "The rule heretofore applied by this court under the circumstances of this case has been to give the contract rate up to the maturity of the contract, and thereafter the rate prescribed for cases where the parties themselves have fixed no rate. *Brewster v. Wakefield*, 22 How. 118; *Burnhull v. Firman*, 22 Wall. 170. Where a different rule has been established, it governs, of course, in that locality. The question is always one of local law. This subject was fully examined in the recent case in this court of *Cromwell v. County of Sac*, 94 U. S. 351. We need not go over the ground again. Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to every thing beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages. Where none has been agreed upon, the law fixes the amount according to the standard applied in all such cases. It is the legal rate of interest where the parties have agreed upon none. If the parties meant that the contract rate should continue, it would have been easy to say so. In the absence of a stipulation, such an intention cannot be inferred."

The law upon this subject as declared by the Supreme Court of the United States would appear to be, that in the District of Columbia or in a Territory of the United States, the rate of interest agreed by the parties in the usual form is recoverable to the stipulated time of payment only, and the statute rate of interest afterward; but that cases arising in any State must be governed by the local law as expounded by its courts.

Two observations may be made on the judgments which are opposed to the decision in *Brannon v. Hursell*. 1st. They admit that the intent of the parties, if expressed with sufficient clearness in their contract, will govern the rate of interest to the time of judgment. *Brewster v. Wakefield* and *Holden v. Trust Co.*, above cited; *Pearce v. Hennessy*, 10 R. I. 227; *Capen v. Crowell*, 66 Me. 282; *Patne v. Caswell*, 68 id. 80; *Gray v. Briscoe*, 6 Bush, 687; *Young v. Thompson*, 2 Kans. 21. They assume, in opposition to the leading

English cases, that if interest after the maturity of the contract is to be recovered not as interest but as damages, it must necessarily be estimated at the ordinary rate.

The question being, as is clearly recognized in the two most recent judgments of the Supreme Court of the United States, one of local law, in deciding which this court is not bound by the opinion of any other tribunal, we are constrained, with great respect for those who take a different view of the subject, to say that the rule established in this Commonwealth by the adjudication in *Brannon v. Hursell* appears to us to best accord with the purpose of the Legislature, with the apparent intention of the parties, with the usage and understanding of men of business, with the weight of legal reasoning and authority, and with the principles of equity that govern the enforcement and redemption of mortgages.

In the case before us, each of the mortgages to the plaintiff, duly recorded and subject to which the defendant Farnsworth took his title, makes the payment by the mortgagors of the principal debt in five years, "with interest semi-annually at the rate of seven and a half per cent per annum," a condition upon which the mortgage, and "one note of even date herewith" whereby the mortgagors "promise to pay the said corporation or order the said sum and interest at the times aforesaid," shall be void. Each of the notes thus referred to does in the most explicit terms require interest to "be paid semi-annually at the rate of seven and a half per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid;" and the description of the debt and interest in the mortgage might be held sufficient to give any one taking the land subject to the mortgage such information that he could not redeem the land without paying interest according to the stipulation in the notes, even if by that stipulation such interest was to be computed for a longer period than would appear upon the face of the mortgage taken by itself. *Richards v. Holmes*, 18 How. 143; *Ackens v. Winston*, 7 C. E. Green, 444. But we do not decide that point, because we are of opinion on the grounds already stated that the legal effect of the provision of the mortgage is the same as that of the fuller language of the note.

The stipulated rate is only one-fifth of one per cent a year higher than the interest payable upon some notes of the United States, and there is no pretense that it is unconscionable or unreasonable. The claim upon the money received by Farnsworth from the city is no less than it would have been against the land for which that money is a substitute. *Farnsworth v. Boston*, 126 Mass. 1. As he might at any time have stopped the running of the interest after the maturity of the notes by performing his obligation and paying the mortgage debt, neither the lapse of time nor the other circumstances of the case afford any reason why the plaintiff should not recover interest at the stipulated rate at the time of the decree.

Decree affirmed.

FORMS OF INSTRUMENTS — FRAUD — ASSIGNMENT OF SUIT.

SUPREME COURT OF THE UNITED STATES, JAN. 10, 1891.

GEORGE ET AL., Plaintiffs in Error, v. TATE.

A bond given by defendants below to prevent the execution of an attachment against the principals in such bond, in favor of the firm of M. & G., was assigned for a valuable consideration, to plaintiff below, T., by a writing reading thus: "I, W. G., in consideration, etc., do hereby assign to T. the within instrument and all my interest," etc. "Witness my hand and seal," etc. "M. & G., by W. G." It was shown that the other partner, G., acquiesced in the assignment.

Held, in an action upon the bond by T., that the assignment was valid to transfer to T. the title of the firm to such bond.

Held, also, that proof of fraudulent representations by M. & G., beyond the recitals in the bond, to induce its execution by defendants, was not admissible.

Held, further, that an instruction that an assignment of the claim in suit against the principals in the bond, or an assignment of the judgment rendered therein, would also transfer the bond, was not error.

IN error to the Circuit Court of the United States for the District of Kansas. Action upon a bond. The opinion states the case.

SWAYNE, J. The errors assigned in this case relate to three subjects: The admission in evidence by the court upon the trial below of the instrument dated November 1, 1872; the refusal by the court to permit evidence to be given of fraud by the defendant in error, in procuring from the plaintiffs in error the bond upon which the judgment below was recovered; and the instructions given by the court to the jury touching the set-off claimed by the plaintiffs in error.

These several topics will be separately considered.

1. The instrument referred to purports to be an assignment to Tate of the bond of the plaintiffs in error. It begins and proceeds: "I, William Greene, in consideration of the sum of \$8,500 to me in hand paid by Samuel W. Tate, * * * do hereby assign to said Tate the within instrument, and all my interest in the covenants and agreements therein contained, * * * and I hereby assign and convey to and for the benefit of said Tate, all my right and interest in a certain suit now pending, * * * wherein I, William Greene, and J. J. Myers are plaintiffs, and M. B. George & Bros. are defendants," etc. The testatum clause is: "Witness my hand and seal, this 1st day of November, A. D. 1872. Myers & Greene, by Wm. Greene."

It was in proof that the firm of Myers & Greene were largely indebted to Tate. He applied to Myers for payment. Myers said they had a claim against George & Brothers then in suit. He requested Tate to "go up and see Billy Greene," and added, "he will let you have the claim against George & Bros." Tate went to Greene, and Greene had the instrument in question drawn, and after its execution delivered it to Tate. Greene further agreed that the judgment in the pending suit should be assigned to Tate as soon as it was recovered.

Tate subsequently saw Myers and showed him the assignment. He said it was "all right," and Tate thereupon gave up to him the notes of Myers & Greene to the amount of the claim against George & Bros.

The bond was given to prevent the execution of a writ of attachment issued for the seizure of the property of George & Bros., to secure the payment of any judgment Myers & Greene might recover against them. It was conditioned for the payment of such judgment.

Viewing the transaction in the light of this evidence, it cannot be doubted that it was the intention of both parties that the bond should be transferred to Tate, and we think that intent was made effectual. The difficulty, so far as there is any, has arisen from the unskillfulness of the draftsman of the instrument. The assignment could have been made by one of the partners, and he could have made it by parol. *Jones v. Guaranty Co.*, 101 U. S. 631; *Story on Part.*, § 101. The signature of the firm-name shows that the instrument was intended to be the act of both partners, and effect must be given to it accordingly. This can be done upon settled legal principles and analogies.

If a promissory note be drawn "I promise to pay," etc., and is signed by more than one person, it is the joint and several note of all who sign it. *Clark v. Blockstock*, 3 Eng. C. L. 159; *Hunt, Adm'r, v. Adams*, 6 Mass. 519; *Same v. Same*, 5 id. 368.

"One party only be named as obligor in the body of

a bond, and others sign it also, all are bound. In no other way can any effect be given to the signatures of those not so named. The intent is clear and that is sufficient. *Parks v. Brinkerhoff*, 2 Ill. 685; *Perkins v. Goodman*, 21 Barb. 220. A bond to B.'s executors, B. being alive, is a bond to B. *Langdon v. Goole*, 3 Levinz, 22.

In *Simpson v. Henderson*, 22 Eng. C. L. 313, a written contract stipulated that a ship should be ready to take freight on board "forthwith." Parol evidence was admitted to show the surrounding circumstances when the contract was made. Lord Tenterden said: "The word *forthwith* in strictness means immediately, but it is plain this cannot be the construction to be affixed here. It was known that she required some repairs, at least to be coppered, and some time must be allowed for that." He left it to the jury to say whether, under the circumstances, the vessel had been made ready within a reasonable time.

"Debt on an obligation to pay 7l. by 2s. a week until the 7l. were paid, and if he failed of the payment of the 2s. at any of the days whereon it ought to be paid, the obligation to be void, or else to remain in full force. The defendant pleaded that he did not pay the 2s. on one of the days whereon it ought to be paid. The plaintiff demurred." * * * "The court held that the condition should be taken distributively, by referring particulars to particulars, viz., that if he paid the 7l. the obligation should be void, but if he failed of the paying of the 2s. at any of the days, it should be in full force—to which the rest agreed—for the obligation shall not be of no effect if by any means it may be made good." *Vernon v. Alsop*, 1 Levinz. 77. It has been said by an eminent writer that "words are the counters of the wise and the money of the unwise." Their office is to symbolize ideas. The intent of the parties is the contract, and whenever that is ascertained, however inartificially expressed, it is the duty of courts to give it effect.

As between Myers & Greene and Tate, the title of Tate was good by estoppel. The consideration which passed from him to them made it so. A title to real estate thus acquired is effectual either for attack or defense in an action of ejectment. *Dickerson v. Colgrove*, 100 U. S. 578. The court below committed no error in this connection.

2. Proof of fraudulent representations by Myers & Greene, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorne et al. v. Day*, 19 How. 211; *Osterhout v. Hill et al.*, 3 Hill, 513; *Belden v. Davies*, 2 Hall (S. C.), 466; *Franchot v. Leach*, 5 Cow. 506. The remedy is by a direct proceeding to avoid the instrument. *Irving v. Humphrey*, 4 Hopk. 284.

The evidence was properly rejected for another reason. Where a party reaps the benefit which the bond gives in such cases, and is called upon to respond, he is not permitted to repudiate the obligation he has assumed. In a case not unlike this Judge Story said: "The question is not new, and I am entirely satisfied that where the claimant voluntarily accepts a delivery on bail, it is an estoppel of his right to contest the security. He accepts or not at his pleasure, and it would be grossly inequitable if he might lie by until the close of the cause and receive and use the property, and then by detecting an error in the bond set the whole judgment of the court at defiance." *The Brig Struggle*, 1 Gallison, 477. See, also, *Bigelow on Estoppel*, p. 206, and *post*, and 2 Whart. on Evidence, § 1089, and the authorities cited by each author.

3. The instructions as to the set-off or counter-claim were as favorable to the plaintiffs in error as they had a right to ask. The jury, upon the evidence, found against them. With this result, there being no error of law involved, this court has nothing to do.

4. It is insisted that the court erred in instructing the jury that "an assignment of the claim in suit against George & Bros., or an assignment of the judgment rendered thereon, would also transfer the bond sued upon in this action."

In this there was no error. The instruction was in exact conformity to the law upon the subject. *Bordoin v. Coleman*, 6 Duer, 182; *Craig v. Parks*, 40 N. Y. 181; *Claffin v. Ostrom*, 54 id. 581; *Pattison v. Hull*, 9 Cow. 747; *Distruff v. Crittenden*, 1 T. & C. 143; *Hosmer v. True*, 19 Barb. 106.

All the assignments of error are without merit and the judgment of the Circuit Court is affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

CONTRACT—CONSTRUCTION OF BOND OF INDEMNITY—EXPLANATION BY CIRCUMSTANCES—CONFLICT BETWEEN WRITTEN AND PRINTED PARTS—RATIFICATION BY ATTORNEY.—An execution issued by defendants herein to a marshal, contained three addresses of the judgment debtor, viz., on Sixth avenue, on Broadway and on Third avenue. The marshal made levies upon goods on Sixth avenue and on Broadway, for an amount more than twice that called for by the execution. After the levy the goods in one place were claimed by one Dickson as owner, and in the other by one Hunt. Thereupon, at the request of the marshal, defendants herein executed a bond of indemnity, which recited in writing that the property was claimed by "one Dickson" and "one Hunt." A printed clause in the bond set forth that its protection extended to any property which the marshal "shall or may judge to belong to the said judgment debtor." After the execution and delivery of the bond the property on the Sixth avenue was eloiigned and taken away from the marshal's possession. The marshal notified defendants of this, and they told him they should hold him responsible for the levy. Thereafter the marshal, without knowledge of defendants, levied upon and sold goods at the Third avenue address of the judgment debtor, as belonging to him. These goods were claimed by one Hunt as owner, who received a judgment for their value against the marshal. The proceeds of these goods were paid by the marshal to defendants, but received by them without knowledge as to where they came from. *Held*, that in this case the bond must be construed in reference to the circumstances, there being an ambiguity between the written recital and printed stipulations. This is a rule of interpretation merely, and does not permit the making of a new contract or a reformation of it, or a disregard of its terms. It authorizes only a just construction of their terms and a fair inference as to the common understanding of both the contracting parties. *Blossom v. Griffin*, 13 N. Y. 569; *Griffiths v. Hardenburg*, 41 id. 466; *Thomas v. Wurdott*, 53 Barb. 200; *Liddle v. Market Fire Ins. Co.*, 4 Bosw. 179. In this case the parties intended only that indemnity should be given as to the Sixth avenue and Broadway levies, and did not intend the bond to cover a future levy. Resort could be had also to the further rule that in the interpretation of the language of an instrument, greater weight should be given to the written than to the printed words, where they lead different ways and tend to contrary results. *Hill v. Miller*, 76 N. Y. 32; *Harper v. Alb. Mut. Ins. Co.*, 17 id. 194; *Benedict v. Ocean Ins. Co.*, 31 id. 397. *Held*, also, that the fact that defendants' attorney had knowledge that the money paid by the marshal to them was the proceeds of the

Third avenue levy, did not constitute a ratification of the levy. He had no authority, as attorney, to bind them by directing a trespass, or ratifying one when committed. *Welsh v. Cochran*, 63 N. Y. 181; *Averill v. Williams*, 4 Den. 295. Besides, he had the right to assume that the money had been collected by the marshal at his own risk. Judgment affirmed. *Clark, appellant, v. Woodruff et al.* Opinion by Finch, J. [Decided Jan. 18, 1881.]

CRIMINAL LAW—LARCENY—VARIANCE—OWNERSHIP IN CORPORATION—SURPLUSAGE—CONSTRUCTIVE PRESENCE OF ONE ENGAGED IN, MAKES HIM A PRINCIPAL—EVIDENCE—LETTERS WRITTEN BY ACCOMPLICE—TESTIMONY INTRODUCED OUT OF ORDER—WAIVER.—(1.) In an indictment for larceny the averment was that the property stolen was owned by a body corporate, organized and existing under the laws of the State of New York. The corporation was named by its true corporate name. The proof at trial was that the corporation was organized under the laws of the United States. There was no objection made to the evidence on the ground of variance. After the people rested, the prisoner moved to quash the indictment on the ground that there was no proof that the property was owned by a corporation organized under the laws of New York, as averred; and after a verdict of guilty an arrest of judgment was moved upon the same ground. *Held*, that the averment as to the laws under which the corporation was organized was surplusage, and the fact that the proof varied was not a ground for a discharge of the prisoner. If the name of the corporation which is averred to be the owner of stolen property is correctly stated it is sufficient. (2.) It was shown that the prisoner had part in planning a larceny in a warehouse, in spying out where the property was stored and in learning the ways of the keeper of it; that one who was engaged in the taking induced the porter of the warehouse for a reward to take a letter to a place where the prisoner met him and conversed about the whereabouts of the keeper. *Held*, that although the evidence was not strong to show that the prisoner laid in wait to aid and warn those engaged in the taking, it was enough to go to the jury and warrant them to find that the prisoner was a principal in the larceny. *Commonwealth v. Lucas*, 2 Allen, 170; *Commonwealth v. Knapp*, 9 Pick. 496. To constitute one a principal in a felony he must be present at the commission of it. But if he acted with another to the same preconceived end, and was so situated as to be able to give aid to his associate, it is sufficient. A waiting and watching at a convenient distance is enough, as if in a case of larceny he be placed where he may learn of the whereabouts and movements of the custodian of the property, and be prepared to lead him away. (3.) A decoy letter sent by one engaged in the larceny by the porter of the warehouse to lure him away from the place, *held*, admissible, prisoner having been shown to be connected with such larceny. (3.) A telegraphic message was taken in testimony without then or afterward connecting the prisoner with it; when it was offered by the people the district attorney said he expected to show prisoner's connection by further testimony, and if he did not, he would consent that the message be stricken out. Prisoner objected to the reception of the message. *Held*, that it was in the discretion of the court to vary the order of proof, and the reception of the message was not error. *Carr v. New York, etc., R. Co.*, 1 E. D. Smith, 525; *Murphy v. Baker*, 28 How. Pr. 263; *Chapman v. Brooks*, 31 N. Y. 88; *Doe v. Passingham*, 2 C. & P. 440; *Staring v. Bowen*, 6 Barb. 115; *Cotton v. Harkins*, Litt. Sel. Cas. 151; *Allen's Lessee v. Parrish*, 3 Ham. (Ohio) 107; *Dunn v. People*, 29 N. Y. 523; *Warren v. Wadsworth*, 17 Wend. 103; *Flynn v. Murphy*, 2 E. D. Smith, 278; *Philada., etc., R. Co. v. Stimpson*, 14 Pet. 463. It was necessary for the pris-

oner to ask that the evidence be stricken out on failure to connect it with him, and the fact that it was not stricken out, he not asking it, was not error. *People v. Parish*, 4 Den. 153, is not applicable here. See *Commonwealth v. Boyer*, 2 Wheel. Cr. Cas. 140. Nor is *Furst v. Second Ave. R. Co.*, 72 N. Y. 542. Judgment affirmed. *McCurney, Plaintiff in Error, v. People of New York*. Opinion by Folger, C. J. [Decided Jan. 18, 1881.]

PRACTICE—COSTS—EXTRA ALLOWANCE NOT PERMITTED WHEN AMOUNT OF CLAIM INDEFINITE.—By this action plaintiffs sought an accounting by the principal defendants, as trustees and executors of an estate from which, under a will, they might be entitled to legacies. They prayed that the amount found due to them under the will in question be paid out of the assets and property yet in the hands of the defendants, "so far as the same might be applicable." A defense was interposed, a trial had and at the close of plaintiffs' case there was a dismissal of the complaint. The estate in question was insolvent. *Held*, that there was no ground for an extra allowance, there being no basis existing to determine the amount. The plaintiffs' interest, when determined, would have been "the subject-matter involved." It could not be the nominal amount of plaintiffs' legacies nor the amount of the estate. See *Struthers v. Pearce*, 51 N. Y. 365; *Ogdensburg, etc., R. Co. v. Vermont & C. R. Co.*, 63 id. 176. Order reversed and judgment modified. *Weaver et al., appellants, v. Ely et al.* Opinion by Danforth, J. [Decided Dec. 1, 1880.]

SURETYSHIP—WHEN THE DEBTOR MAY BECOME SURETY BY AGREEMENT WITH CREDITOR—DEALING BETWEEN SURETY AND PRINCIPAL DEBTOR.—(1) While it is settled that one of several original debtors can so contract with the others for their assumption and payment of the common debt as to acquire the right of a surety, upon knowledge of the new arrangement being communicated to the creditor (*Millard v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 id. 95; *Calvo v. Davies*, 73 id. 216), such notice must be definite and distinct and so given as to fully and fairly apprise the creditor of the new arrangement. Accordingly where four partners were liable for rent and it was agreed between them that two should leave the firm and those remaining should assume the payment of the rent, a general statement to the agent of the landlord that two of the partners were going out and that the remaining two would stay and pay the rent, and the fact that there was an agreement to do so was not communicated, *held*, that there was not enough to render the outgoing parties liable as sureties only. (2) Where in such a case the note of the remaining partners was tendered to the agent of the landlord in payment of the rent, and he accepted it upon the express stipulation that the outgoing partners should not thereby be released, and expressly reserved the rights and remedies of the landlord against them, *held*, that even allowing the outgoing partners to be liable as sureties, they were not released. *Morgan v. Smith*, 70 N. Y. 515; *Calvo v. Davies*, 73 id. 211. Judgment reversed and new trial ordered. *Palmer, appellant, v. Purdy*. Opinion by Finch, J. [Decided Dec. 7, 1880.]

UNITED STATES SUPREME COURT ABSTRACT

JURISDICTION—OF UNITED STATES SUPREME COURT—SHARE OF LAND SOUGHT TO BE PARTITIONED LESS THAN \$5,000.—"We have no jurisdiction in this case. The suit was brought to recover one two hundred and fortieth part of certain lands, and for a partition so as to set off to the appellant in severalty that interest.

It is averred in the bill that 'the value of the property sought to be partitioned amounts to more than five thousand dollars,' but the matter in dispute on this appeal is only one two hundred and fortieth part of the whole property, as that is all the appellant claims. Our jurisdiction, therefore, depends on the value of that part, which certainly is not shown to be more than five thousand dollars." Appeal from U. S. Circ. Ct., Louisiana, dismissed. *McCarthy, appellant, v. Provost et al.* Opinion by Waite, C. J. [Decided Jan. 17, 1881.]

—ACT OF 1875 (18 STAT., PT. 3, CH. 137) DOES NOT ALTER LIMIT OF AMOUNT.—"Although the act of 1875 (18 Stat., pt. 3, 470, ch. 137) gave the Circuit Courts of the United States original cognizance of suits of a civil nature arising under the Constitution and laws of the United States, when the value of the matter in dispute exceeds five hundred dollars, it did not change our jurisdiction for the review of the judgments and decrees of those courts. That depends now, as it did before, on the value of the matter in dispute, which must exceed five thousand dollars. This record does not show in express terms or by fair implication that the value of the property in controversy reaches that sum, and the appeal is therefore dismissed for want of jurisdiction." Appeal from U. S. Circ. Ct., Colorado, affirmed. *Whitsitt et al., appellants, v. Union Depot & Railroad Co. et al.* Opinion by Waite, C. J. [Decided Jan. 17, 1881.]

PRACTICE—FAILURE TO FILE FEE-BOND UPON APPEAL IN TIME DOES NOT DEFEAT APPEAL.—The writ of error in this case was returnable to the October term, 1877. The return was duly made and a transcript of the record lodged in the office of the clerk of this court on the 27th of September, 1877. A citation in due form was issued and served in time. By an oversight of the counsel for the plaintiff in error no fee-bond was given, and the cause was not docketed during the term of 1877. No motion to docket and dismiss was ever made, and on the 3d of September, 1878, the attention of counsel having been called to the omission of the security for costs, an acceptable bond was given and the cause docketed in form. *Held*, that under the circumstances the suit would not be dismissed. In some of the cases it has been said that a writ of error or an appeal becomes inoperative if a transcript is not filed and the cause docketed during the term to which it is made returnable, but this has always been in cases where a return had not been made and a transcript had not been filed within the time. The language should therefore be construed in connection with those facts. In *Owings v. Tiernan's Lessee*, 10 Pet. 44, and *Van Rensselaer v. Watts*, 7 How. 784, leave was given to docket the cause after the term when the transcript had been filed in time but through inadvertence a fee-bond had not been given and there had not been in the meantime a motion to docket and dismiss. That is this case. In *Selma R. R. Co. v. La. Nat. Bank*, 94 U. S. 253, the transcript was filed in time, but the cause not docketed because of a failure to furnish a fee-bond. In this state of things, and while the default continued, a motion to docket and dismiss was made under rule 9 and granted. At the next term the appellant appeared and moved to set aside the order of dismissal and docket his appeal. This was refused under the circumstances of that case. After a cause has been docketed and dismissed it cannot be again docketed unless by order of the court. Such is the rule. If a return is made and the transcript deposited in the clerk's office in time, the jurisdiction of this court is kept alive. The docketing of the cause after that is mere procedure, and if unreasonably delayed, the parties may be subjected to the consequences of a failure to prosecute a suit, which rests largely in the discretion of the court when not

provided for by rules. Rule 9 is of that class. Motion to dismiss writ of error from U. S. Cir. Ct., W. D. Michigan, denied. *Edwards, plaintiff in error, v. United States ex rel. Thompson*. Opinion by Waite, C. J.

[Decided Dec., 1880.]

TRUST-DEED—TRUSTEE CANNOT DISCHARGE SO AS TO DEFEAT RIGHT OF CREDITOR BEFORE DEBT DUE.—Where a purchaser (and a mortgagee or trustee of a trust-deed stands in the same position) who takes a deed, has information at the time that a prior mortgagee or trustee of a prior deed has released the property from the mortgage or trust, without payment of the notes secured by such mortgage or trust, or their surrender, or express authority from the holder of them, such purchaser will take the property subject to any equitable right of the holder of the notes, to secure the payment of which the mortgage or trust-deed was executed. In this case, in November, 1871, Coburn executed to Ward a deed of trust upon real estate in Washington, D. C., to secure Coburn's three promissory notes for \$2,578.13, payable respectively in one, two and three years after date. This deed authorized Ward, upon default in payment of either of the notes, to sell the property, and upon full payment of the notes, and not otherwise, to release and reconvey the property to Coburn. It was recorded. In February, 1872, Coburn conveyed the property to Mayhew, subject to the deed of trust. Two of the notes were indorsed to Arstrop and Dudley, who in June, 1872, delivered them to Eldredge, the respondent, as collateral security for a loan from him to them. In October, 1872, the appellant was applied to by Mayhew for a loan upon the property, and appellant employed its agent, Bigelow, to examine the title. In compliance with Bigelow's wishes and in conjunction with Van Riskwick, who described himself as the holder of the first note of Coburn, but without the consent or knowledge of the respondent, then holding the other two notes, Ward executed a deed of release of the property. Thereafter appellant took from Mayhew a mortgage upon the premises. This action was brought to set aside the deed of release as a fraud upon respondent's rights. *Held*, that the deed of release was invalid as to the two notes held by respondent. The appellant was bound to take notice of the recorded deed of trust. The deed designated the notes and limited the power of the trustee to release the property. He was in terms authorized to release and reconvey it only upon the full payment of the notes, and not otherwise. The deed showed the time the notes had to run, and that by their terms they were not then due. Unless paid at the time, or what would be deemed equivalent, surrendered, the trustee had no authority to execute the release. It was not sufficient that the original payees of the notes joined in the instrument or consented to its execution. So far as they had parted with the notes they were denuded of power over the subject. Decree of District of Columbia Sup. Ct. affirmed. *Connecticut General Life Insurance Co., appellant, v. Eldredge*. Opinion by Field, J.

[Decided Jan. 17, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

EQUITABLE LIEN—UPON SALE OF REAL PROPERTY UPON CREDIT.—Upon the sale of real property on credit, without collateral security, equity raises a lien thereon in favor of the vendor as a security for the unpaid purchase-money; and this lien exists whether the property is conveyed to the purchaser or not. The vendee is considered the trustee of the vendor in re-

spect to the purchase-money until it is paid; and this lien continues and holds good against all subsequent purchasers with notice that the purchase-money is unpaid. *Mackreth v. Symmons*, 15 Ves. 320; *Bayley v. Greenleaf*, 7 Wheat. 49; *Chilton v. Braiden's Adm'rs*, 2 Black, 400; *Lewis v. Hawkins*, 23 Wall 125; *Giltman v. Brown*, 1 Mas. 212; *Pease v. Kelly*, 3 Oregon, 417; *Baum v. Grigsby*, 21 Cal. 175; *Garson v. Green*, 1 Johns. Ch. 308; *Champion v. Brown*, 6 Id. 402; 1 Wash. 602-4; *Adams' Eq. 126-9*; *Story's Eq. Jur.*, § 1217; 4 Kent, 151. As to the intention of the parties concerning this lien, it is to be considered that the lien is a natural equity, and arises and exists independently of their agreement. Neither is it waived or relinquished unless by an express agreement to that effect, or conduct plainly inconsistent with an intention to retain it, as by taking a mortgage on the premises, or a distinct and independent security for the purchase-money; and the burden of proof is upon the purchaser to show that the lien has been waived or relinquished. U. S. Cir. Ct., Oregon, Nov. 22, 1880. *Coca Bay Wagon Co. v. Crocker*. Opinion by Deady, D. J.

LEVY—UPON LEASEHOLDS AND PONDEROUS MACHINERY—ACTUAL POSSESSION NEEDED NOT BE TAKEN.—Leaseholds and ponderous machinery, being incapable of actual possession, any notorious act asserting title under a levy is sufficient. Such fixtures as would, if the leasehold were a freehold estate, pass as part of the realty, cannot be detached and sold separately. *Held*, therefore, that in such cases the marshal need not take actual possession either of the leasehold or machinery; that he need not keep a watchman in charge, nor otherwise manifest a continuing control, nor detach the fixtures; and his failure so to do cannot be treated as an abandonment of his levy. In Tennessee, leaseholds are by statute to be treated, for the purposes of levy and sale under execution, as real estate, and judgments are a lien upon them. But whether this be so or not, even at common law, and as chattels, they are to be levied on and sold substantially in the same manner as real estate is now levied on and sold, and the purchaser must bring ejectment to obtain possession. *Held*, therefore, that a paper levy, accompanied by such notorious claim of title as the nature of the case admits, is sufficient, and a failure to do more cannot be treated as an abandonment. Where the marshal, having levied on a leasehold, and machinery constituting a cotton compress, placed a watchman in charge to protect it from fire, but subsequently withdrew him, and returned his writ with his levies indorsed, and reasons for not selling as advertised, and without objection, the sheriff afterward, with an attachment from a State court at the suit of another creditor, took possession, *held*, that there was no abandonment by the marshal, and the execution creditor has a better title than a mortgagee to whom the debtor had in the meantime conveyed the property. *Williams v. Downing*, 18 Penn. St. 60; *Sowers v. Vio*, 14 Id. 90; *Dalzell v. Lynch*, 4 W. & S. 255; *Watson on Sheriff*, 178, 188, 208, 212; *Sewell on Sheriff*, 226; 2 Saund. 68, 70, 3 Bac. Abr. tit. "Execution," ch. 4, p. 690 (*Bouvier's Ed. A. D.* 1860); *Id.*, ch. 2, p. 688; 5 Id., tit. "Leases," p. 433; *Tay. Land. and Ten.*, § 435; *The Klug v. Dean*, 2 Show. 88; *Taylor v. Colo*, 3 T. R. 202; *James v. Brown*, 5 B. & Ald. 243; *Hughes v. Jones*, 9 M. & W. 372; *Playfair v. Musgrove*, 14 Id. 239; *Rogers v. Pitcher*, 6 Taunt. 207; *Porter v. Cocke*, Peck (Tenn.), 34; *Ewell on Fix.* 353, 357; *Tyler on Fix.* 159, 164, 192, 240, 416, 620; *Freeman on Ex.*, § 114; *Van Ness v. Pacard*, 2 Pet. 137; *Kutter v. Smith*, 2 Wall. 491; *Gue v. Tide-water Co.*, 21 How. 257; *Elwes v. Mawe*, 2 Sm. L. Cas. (7th ed.) 177, 212, 220, 222; *Pemberton v. King*, 2 Dev. Law, 376; *Couklin v. Foster*, 57 Ill. 104; *Pillow v. Love*, 5 Hayw. 109; *De Graffenreid v. Scruggs*, 4 Humph. 451; *Childress v. Wright*, 2 Cold. 350; *McDavid v. Wood*, 5 Helak. 95; *Canon v.*

* Appearing in a Federal Reporter.

Hare, 1 Tenn. Ch. 22, 25; *Boydell v. McMichael*, 1 Cramp. M. & R. 177, note a, p. 180; *Hallen v. Runder*, id. 266; *Stewart v. Lombe*, 1 Brod. & Bing. 506; *Barnard v. Leigh*, 1 Stark. 27; *Doty v. Gorham*, 5 Pick. 487; *Potter v. Cromwell*, 40 N. Y. 287; *Murdock v. Gifford*, 18 N. Y. 28. U. S. Circ. Ct., W. D. Tennessee, July 25, 1880. *Steers v. Daniel*. Opinion by Hammond, D. J.

PRACTICE—SUMMONS IN UNITED STATES COURT MUST BE SEALED AND SIGNED BY CLERK.—In the United States courts a summons must issue from the court and be signed by the clerk, and sealed with the seal of the court. Consequently a summons issued in an action purporting to be commenced in the United States Circuit Court for the Southern District of New York, following the form and requirements of the New York Code of Civil Procedure, signed by plaintiff's attorney without the seal of the court, held, invalid. Section 911, U. S. R. S., provides that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof." A summons is process. The principle decided in *Peaslee v. Haberstro*, 15 Blatchf. 472, is that where Congress has by statute pointed out a specific course of procedure, or has legislated generally upon the subject-matter embraced or involved in the proceeding sought to be pursued, such legislation must be followed, although opposed to the forms and modes of proceeding prevailing in the State courts, and established by State statutes. *Easton v. Hodges*, 7 Biss. 324; *Beardsley v. Littell*, 14 Blatchf. 102. In the United States courts a summons cannot be amended by the subsequent addition of the signature of the clerk, and the seal of the court. U. S. Circ. Ct., S. D. New York, July, 1880. *Dwight v. Merritt*. Opinion by Blatchford, C. J.

SET-OFF—COPARTNERSHIP—BANKRUPTCY.—V. and B. were copartners in the live-stock business. V. was adjudged a bankrupt. At the time of his adjudication he was indebted to B. upon transactions not connected with the partnership. Upon a settlement of the copartnership accounts there was a balance thereon due from B. to V. Held, that B. had the right to set off against the amount due from him to the bankrupt on the partnership transactions the independent debts due from the bankrupt to himself. *Holbrook v. Receivers*, 6 Paige, 220; *Gay v. Gay*, 10 id. 369; *Collyer on Part.*, § 1008; *Rose v. Hart*, 8 Taunt. 449; *French v. Fenn*, 3 Doug. 257; *In re Dow*, 14 N. B. R. 307. U. S. Dist. Ct., W. D. Pennsylvania, Nov. 23, 1880. *In re Voetter*. Opinion by Acheson, D. J.

MAINE SUPREME JUDICIAL COURT ABSTRACT.

FEBRUARY, 1880.*

COVENANT—IN LEASE—FOR QUIET ENJOYMENT—WHEN ACTION UPON NOT MAINTAINABLE.—The word "demise," in a lease, implies a covenant for quiet enjoyment. This word imports a covenant that the lessor had authority to make a valid lease of the premises (*Grannis v. Clark*, 8 Cow. 30); and a covenant for the quiet enjoyment of the premises leased. *Barney v. Keith*, 4 Wend. 502; *Crouch v. Fowle*, 9 N. H. 219. Though the covenant be an implied one, it may be stated according to its legal effect. *Dexter v. Manley*, 4 Cush. 14. In an action upon such covenant, when the declaration does not allege an eviction of the plaintiff, nor the taking of any thing from the premises leased, the action cannot be maintained. *Ware v. Lithgow*. Opinion by Appleton, C. J.

INNKEEPER—LIABLE AS SUCH FOR SAFETY OF CAT-

TLE DRIVEN ON ROAD, TAKEN TO KEEP.—An innholder receiving cattle, driven on the road, to keep over night, is responsible, as such, for the safety of the place provided for them. In the absence of any notice to the contrary from the innkeeper, at the time of receiving cattle to keep over night, the jury were warranted in finding that it was to him, as such innkeeper, that the property was delivered. Unless limited by statute, or unless the circumstances are such as to relieve the innkeeper at common law, his liability extends to the safe-keeping of all the goods and property of the guest, that are received within the protection of the inn. Default is to be imputed to him wherever there is a loss, not arising from the plaintiff's negligence, the act of God, or the public enemies; and the cases make no distinction, in this respect, between the loss of the goods of a guest and injury to them, while *infra hospitium*. 1 Chitt. on Cont. 675; *Shaw v. Berry*, 31 Me. 478, 486. The liability is not confined strictly to those goods which pertain to the guest as a traveller. It extends to all the movable goods and money of the guests placed within the inn. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, 426. *Hilton v. Adams*. Opinion by Symonds, J.

PRESUMPTION—AS TO DEATH BY SEVEN YEARS' ABSENCE.—The rule of law is, that upon a person's leaving his usual home and place of residence, for temporary purposes, and not being heard of, or known to be living, for the term of seven years, the presumption is that he is not alive. It must appear that he has not been heard of by those persons who would naturally have heard from him during the time had he been alive. The rule, however, does not confine the intelligence to any particular class of persons. It may be to persons in or out of the family. The mere failure to hear from an absent person for seven years, who was known to have had a fixed place of residence abroad, would not be sufficient to raise the presumption of his death, unless due inquiry had been made at such place without getting tidings of him. *Loring v. Steineman*, 1 Metc. 211; *Flynn v. Coffee*, 12 Allen, 133; *Doe v. Jesson*, 6 East, 80; *Doe v. Deakin*, 4 Barn. & Ald. 433; *Doe v. Andrews*, 15 Ad. & Ell. (N. S.) 700; *Bac. Abr. Evidence*, H. and cases; 2 Greenl. Ev., § 278, and notes; *White v. Mann*, 26 Me. 361; *Stevens v. McNamara*, 36 id. 178; *Kidder v. Blaisdell*, 45 id. 467; *Stinchfield v. Emerson*, 52 id. 465. See *Lessee of Scott v. Hatliffe*, 5 Pet. 81. *Wentworth v. Wentworth*. Opinion by Peters, J.

SALE—WHEN OFFER ACCEPTED BY LETTER—TITLE TO GOODS SOLD PASSES.—Plaintiff and defendant had correspondence in reference to a quantity of hay in plaintiff's barn which led to defendant causing it to be pressed by his men. Plaintiff had written to defendant asking him to make an offer for the hay, saying that if his offer was satisfactory plaintiff would accept of it, if not, he would send defendant the money for pressing. Defendant examined the hay, and on June 15 sent this card by mail to plaintiff, which plaintiff received about nine o'clock the same day: "Will give \$9.50 per ton, for all but three tons, and for that I will give \$5.00." Plaintiff lived 14 miles from where defendant lived, and there was a daily mail communication each way between the two places. On June 20, plaintiff, after trying to see defendant personally, wrote this. After expressing a hope that defendant would have paid more, he said: "But you can take the hay at your offer, and when you get it hauled in, if you can pay the \$10.00 I would like to have you do it, if the hay proves good enough for the price." Defendant received this card that night or the next morning, made no reply, and on the morning of the 23d the hay was burnt in the barn. Held, that the sale was completed. The title to the hay was in defendant at the time it was burned, and defendant was liable for the

* To appear in 71 Maine Reports.

price of such hay. See *Peru v. Turner*, 10 Me. 185; *Tarling v. Baxter*, 9 Dow. & Ry. 276; *Hinde v. Whitehouse*, 7 East, 558; *Rugg v. Minett*, 11 id. 210; *Adams v. Lindsell*, 1 Barn. & Ad. 681; *Maetier v. Frith*, 6 Wend. 103; *Dixon v. Yates*, 5 Barn. & Ad. 818; 2 Kent Com. 492; *Wing v. Clark*, 24 Me. 366; *Waldron v. Chase*, 37 id. 414. *Phillips v. Moore*. Opinion by Barrows, J.

VERMONT SUPREME COURT ABSTRACT.

FEBRUARY TERM, 1890.*

SEDUCTION—ADULT DAUGHTER LIVING WITH MOTHER DE FACTO SERVANT, AND MOTHER MAY HAVE ACTION FOR SEDUCTION.—In case by a woman whose husband had been more than seven years absent and unheard from, for the debauching of a daughter who was thirty-one years old, the testimony on the part of plaintiff tended to prove that the daughter had always lived at home with plaintiff, had assisted her about her household work, had done errands for the family, had worked in a neighboring factory most of the time since she was fifteen years old, and had paid her wages to plaintiff, who had used them in the support of her family. A verdict was directed for defendant. *Held*, that on the evidence the daughter was *de facto* plaintiff's servant, and that the direction of a verdict was erroneous. "It is not necessary to prove an actual contract for service, but the relation of master and servant must subsist, at least in some degree, though a very slight degree will be sufficient; proof of the most trifling acts of service, such as milking the cows, or making tea for the plaintiff, will enable the plaintiff to maintain this action for debauching the daughter." 3 Phil. Ev. 530-1; *School. Dom. Rel.* 354-359; 2 Greenl. Ev. 1672; 1 Chit. Pl. 69, note; 2 id. 558. In *Bennett v. Abbott*, 2 T. R. 168, the father brought the suit, and the daughter debauched was thirty years of age, and it was proved that she occasionally did acts of service. Butler, J., says: "In actions of this kind the slightest evidence [of service] is sufficient; even milking cows. Here instances of actual service were proved, and therefore it is immaterial whether the daughter were of age or not. Neither is it material whether the servant be or be not hired for a year; or whether she have any wages; it being sufficient that she be a servant *de facto*." In *Mauvell v. Thomson*, 2 C. & P. 303, the evidence of service was very slight. The niece was living in the family of her uncle, and occasionally assisted his children. Lord Denman, counsel for the defense, contended that there was no sufficient evidence that the niece at the time of the wrong complained of was a servant. But Abbott, C. J., said: "The smallest degree of service will do. It seems there was no servant kept, and it is reasonable to conclude that all the members in the family assisted, in turn, in the performance of household work." The case of *Moran v. Dawes*, 4 Cow. 412, is quite like this one. See, also, *Bartley v. Richtmyer*, 4 N. Y. 38. *Dawson v. Abbott*. Opinion by Redfield, J.

STATUTE OF LIMITATIONS—NOTE PAYABLE AT FIXED RATE BUT COLLECTIBLE ANY TIME.—A promissory note payable "five months from date," but bearing the written consent of the makers that the payee may collect at any time "by discounting a proportional amount of interest that shall have been paid in advance," may be sued, and the statute of limitations begins to run thereon at once, without demand and without tender of such "proportional amount." *Dawley v. Wheeler*. Opinion by Ross, J.

USURY—RIGHT TO RECOVER MONEY PAID AS, PERSONAL TO PAYER.—The right to recover money paid as

usury, is personal to the payer. Thus, the assignee of a mechanics' lien, which by due proceedings had been made to take effect as a mortgage, tendered a prior mortgagee the sum due under her mortgage after deducting a certain sum alleged to have been paid her by the mortgagor as usury. The tender was refused, and the assignee brought a bill to redeem. *Held*, that the assignee could not avail himself of such payment. *Ward v. Whitney*, 32 Vt. 80; *Churchill v. Cole*, id. 93; *Cady v. Goodnow*, 49 id. 400; *Lamelle County National Bank v. Bingham*, 50 id. 105; *Reed v. Eastman*, id. 67. *Richardson v. Baker*. Opinion by Ross, J.

CRIMINAL LAW.

JUROR—OBJECTION TO COMPETENCY WAIVED IF NOT TAKEN AT TRIAL.—An objection to a juror, which if seasonably made would have been valid, will not avail after verdict, without proof affirmatively that the objection was unknown to the party making it or his attorney at or before the trial. *Davis v. Allen*, 11 Pick. 466; *Tilton v. Kimball*, 52 Me. 500; *Russell v. Quinn*, 114 Mass. 103. When an objection to a juror is known to the party or his counsel when the jury is being impanelled, it must be taken then or it will be deemed waived. Parties are not to lie by and speculate upon the chances of a verdict, and if unsuccessful, claim a new trial because a partial and prejudiced juror, and known so to be, was on the panel, when, if they had subjected him to examination or had disclosed their knowledge of existing facts, he would not have been permitted to sit on the cause. By proceeding to trial, the defendant must abide the result. *Jameson v. Andruscoggin R. Co.*, 52 Me. 412; *Fessenden v. Sager*, 53 id. 531; *State v. Fuller*, 34 Conn. 290; *Wassum v. Feeney*, 121 Mass. 93. Maine Sup. Jud. Ct., March 15, 1890. *State of Maine v. Bowden*. Opinion by Appleton, C. J.

RENDITION OF FUGITIVES—CONFLICT OF LAW—FUGITIVE DELIVERED UP BY REASON OF ERROR IN COURT OF STATE DELIVERING UP.—The perpetrator of a burglary in Washington county, Vermont, was arrested in New York on an order issued by the governor of New York to the sheriff of the county of New York in answer to a requisition from the governor of Vermont. *Habeas corpus* was instituted before a judge of New York, but a discharge was refused. *Certiorari* was thereupon brought before another court for a revision of that decision, and an order of stay was made upon the sheriff. The order was discharged by still another judge while the *certiorari* was yet pending, and the criminal was delivered by the sheriff to the agent of Vermont, and by him brought into Vermont, where he was arrested by the sheriff of Washington county on a warrant issued on indictment for said burglary, and imprisoned to await trial on the indictment. *Habeas corpus* was then instituted on the ground that the discharge of the order of stay was procured by fraud, and a copy of the record of proceedings, showing a discharge of the order, was produced. *Held*, that the lawfulness of the arrest and detention in Vermont was unaffected by the character of the means employed to bring the retractor within the reach of process in Vermont; that the record showing a discharge of the order could not be impeached in such proceeding by evidence *alibi*; and that as the requisition and the order for arrest and extradition in New York were pursuant to the Constitution of the United States and the laws of Congress, the proceedings for *habeas corpus* in and under the laws of New York could not affect the lawfulness of the arrest and detention in Vermont. See *State v. Brewster*, 7 Vt. 118. Vermont Sup. Ct., February term, 1890. *In re Miles*. Opinion by Bassett, J.

*To appear in 98 Vermont Reports.

RULES OF DESCENT IN THE UNITED STATES.

AS LAID DOWN BY KENT IN 1831.

1. If one dies owning an estate,
It lineally must gravitate!
If but one heir, it will annex
To him or her in spite of sex;
If there be more, as well there may,
They all shall take "per capita."
2. But if degrees, perchance there be,
Of different consanguinity:
As sons and grandsons, all shall take,
And an estate in common make,
But such grandsons have cause to fear it,
They'll not an item more inherit,
Than would have been their father's share,
Had he been the living heir.
3. But if the owner meets his fate—
No lineal heir to his estate:
We've dared the Common Law to mend,
And his estate shall now ascend.
4. Again—in case the owner do,
Lack issue and lack parents too,
His brothers and his sisters shall
Succeed by rules collateral.
If brothers—sisters—nephews—nieces,
They then will take in equal pieces:
If some be dead, some living be,
They'll take by nearness of degree.
5. And in default of father, mother,
And nephews, nieces, sisters, brother,
Or issue, the estate can't fall,
But yet it will rise above them all.
6. Again:—and if perchance there shall
Be no descendants lineal—
If parents, brothers, sisters, none,
With their descendants 'neath the sun.
Nor the grandparents, the estate
Shall by unerring legal fate,
Unto the aunts and uncles wend,
And those who from them may descend:
If equally related, they
Will take their part "per capita."
But if in different degrees,
They all, shall then, take "per stirpes."
7. Provided, if the intestate had
Derived his living from his Dad,
It shall to aunts and uncles slide,
And issue on the father's side:
And issue on the father's side;
And if none such there be perchance,
Then to the uncles and the aunts,
On the maternal side 'twill go;
And this rule works "e converso."
8. This 8th last rule, it seems to me,
Is rather stiff for poetry.

—T. D. Davidson, Lexington, Virginia,
in *Southern Law Journal*.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday,
February 8, 1881:

Judgment affirmed with costs—*Leonard v. Columbia Steam Navigation Co.*; *Hart v. The Hudson River Bridge Co.*; *Palmer v. Phoenix Mutual Life Ins. Co.*; *Muldoon v. Blackwell*.—Judgment affirmed—*The People v. Fry*.—Judgment reversed and new trial granted, costs to abide event—*Wiseeman v. Lucksinger*; *Root v. Wright*; *McCosker v. The Long Island Railroad Co.*; *Riceman v. Havemeyer*; *Boone v. Citizen's Savings Bank*; *Denike v. Harris*.—Judgment affirmed without costs to any party in this court—*Lefever v.*

Toole.—Judgment affirmed with costs on authority of *Coit v. Campbell*—*Greene v. Martine*.—Judgment of General Term affirmed, except as to costs, and as to them reversed, and the case remitted to General Term to determine whether the costs shall be paid by the respondent personally or out of the estate of the deceased; costs of appeal to this court of both parties to be paid out of the estate of the deceased—*Sheridan v. Houghton*.—Order affirmed with costs—*In re Pinckney*; *Williams v. Barber*; *McKernan v. Robinson and Frazer*.—Order affirmed on opinion below, with costs—*Holyoke v. Union Mutual Life Ins. Co.*.—Appeal dismissed with costs—*Harrington v. Bruce*; *Sprague v. Butterworth*; *Chambers v. Appleton*.—Motion denied with \$10 costs—*Baird v. Mayor, etc., of New York*.—Motion granted without costs—*Schultz v. Hoagland*.—Motion granted with \$10 costs—*Peyser v. Wendt*.

NOTES.

THE *Southern Law Journal* (formerly *Southern Law Journal and Reporter*) for December, has a paper on Judicial Delay, read by Mr. George F. Moore before the Alabama State Bar Association. — The February number of the *American Law Review* has for leading articles the third part of *Bedingfield's Case*; declarations as part of the *res gestae*, by James B. Thayer; Deviation, by Simon Greenleaf Crosswell; and Mortgages of Future Personal Property, by S. F. Douglass. — We have received from Mr. Marcus T. Hun, Supreme Court Reporter, a copy of the "Rules of all the Courts of Record of the State of New York, as revised and amended in convention of judges, December 15, 1880, and as in force March 1, 1881, with notes, references and an index," prepared by Mr. Hun. This publication is indispensable to every lawyer in this State. It is prefaced by a table showing the numbers of the corresponding rules of 1858, 1871, 1874 and 1877; it is very copiously, systematically and thoroughly annotated, and it has an excellent index. It is published by Banks & Brothers of Albany. — Here is a blow at a New England institution transplanted in the west. The Michigan Supreme Court, in *Winfield v. Dodge*, January 19, 1881, held that a horse-trade on Sunday is void. By and bye they will tell us that it is wrong to whittle a stick on Sunday—for this is an essential of every horse-trade.

In *Darling v. Barsalov*, it has been decided by the Canadian Queen's Bench, that the Canadians know enough to tell the difference between a horse's head and a unicorn's head on trade labels. This knowledge probably comes from early study and long acquaintance with the British national arms. — Mr. R. V. Rogers, Jr., has an amusing article in the *Canadian Law Times* on the Value of the Human Body and Bones. — At the recent banquet of the State Medical Society, in this city, the following toast was given: "The legal profession; they worry lots of fellows into becoming our patients." We should have liked to make a few remarks on the effect produced on the legal profession by medical witnesses.

Judge Lynch and Lynch law have been usually supposed of American origin; but some doubt is thrown upon this by the *Pall Mall Gazette*, which says that the Virginian farmer named Lynch who flogged a thief with his own hands "has probably no claim to the honor ascribed to him by a doubtful tradition." There was a Judge Lynch who was sent to America in 1687-88 to suppress piracy; but the real Lynch is said to have been a certain mayor of Galway, at the close of the fifteenth century, who became famous "for hanging his son with his own hands, out of an upper window, in execution of a death sentence passed upon him for robbery and murder." In this country the Virginia Lynch has usually had the credit of originating extra-judicial proceedings, and the name which has been given to them probably did not come into general use until a time comparatively modern.

The Albany Law Journal.

ALBANY, FEBRUARY 19, 1881.

CURRENT TOPICS.

IN Illinois and New Jersey the question of adopting a Code of Practice similar to our own is under discussion. The *Chicago Legal Adviser* says: "There is some agitation in the Legislature and among the lawyers in this State as to a reform in the laws relating to practice in courts. There seems to be a growing sentiment in favor of adopting the principles of the New York Code. Our laws on the subject of practice have been amended from time to time, until they are fast approaching the general features of the Code in many respects; and other States having so generally adopted it that it is claimed that it is better that Illinois should fall into line with the general sentiment on the subject elsewhere prevailing. That we should forego our prejudices in this regard, if we have any, and put ourselves in harmony with our neighboring States."

A correspondent of the *New Jersey Law Journal* says: "When Great Britain and all her colonies, as well as the most populous and influential of the United States have felt constrained to avail themselves of, and profit by, the labors of Bentham, Field, Bliss, and Throop, is it not a shame that New Jersey continues to tolerate the hampering clogs and distorted reasoning which so long made justice and law a farce and a mockery throughout the Anglo-Saxon speaking world? She has stripped off the senseless fictions already; why not go further? Why not throw aside the useless forms of action? Why not make the pathway to the issue of right and wrong broad and level, and smoothly graded, that all the injured may enter with celerity and ease? Why do courts of justice exist? Why do court-houses stand? For what purpose are judges appointed? Why do licensed attorneys and counselors attend upon them? Are not all these to facilitate the unfortunate in obtaining the right which the law declares every injured person may demand and receive? Do they accomplish this thoroughly and easily, or do they achieve it but partially, clumsily, and imperfectly? The Code has been adopted more than thirty years in the great State of New York. Its use has been followed by beneficial results. The world has seen them and accepted them. Why does New Jersey hold aloof? The editor is careful to explain that he does agree with these views in full, but he says for himself: "A very important step in the simplification of our legal proceedings might be made by the simple expedient of permitting equitable defenses to be pleaded in suits at law. We are not in favor of uniting the courts of law and equity, because the court of equity has functions wholly apart from those of courts of law which the court of equity is best adapted to perform; but we think that when a man has a defense

to an action it is best that the defense should be heard in the court in which the action is brought, and that he should not be driven to the expense of another suit in another court to establish it. If the friends of the double system do not yield their point they will soon have to surrender every thing. The equitable plea has been fully tested in England and found to be simple and efficacious." This modification would still leave the plaintiff subject to the greatest inconvenience and hardship of the system of separate courts, namely, the liability to be turned out of the temple of justice for entering at the wrong door—bringing his suit in the wrong court. The remedy suggested is good as far it goes, but even England has found that it does not go far enough, and has abolished the separate system. It must be said that New Jersey has excellent courts, and that their decisions are of very high authority. The uncertainty attending the separate system is there reduced to the minimum, but it might well be wholly avoided.

According to Governor Plaisted's late message Maine is an inconvenient community for a debtor to live in. They have no usury law, and they have a law of imprisonment for debt. We know that Maine is a thickly timbered State, but we did not know that it is so thoroughly in the woods as this disclosure indicates. Political economists have always differed and always will differ in regard to the policy of usury laws, without being able to tell why. But in regard to imprisonment for debt there has long seemed to be little difference of opinion. Certainly, if a State has no usury laws, it ought not to imprison for debt, for otherwise a double power is put in the hands of the creditor. Governor Plaisted says that the borrowing class are seeking the natural relief from this state of the law—emigration. His recommendation to institute laws against usury, and abolishing imprisonment for debt will probably meet general approval, outside his own State, at least. In Maine, too, we should think they would meet approval, for it seems that Maine has the largest municipal debt, *per capita*, of any of the States save one, and when the government is so much in debt it ought not to treat the citizen so harshly on the same offense.

In *Leggott v. Barrott*, 43 L. T. (N. S.) 641, the English Court of Appeal have reversed the decision of Jessel, M. R., and hold that where a business is sold, with an agreement not to resume the same business within a certain time and certain limits, the vendor may be enjoined from soliciting the old customers, but not from receiving their unsolicited patronage. This court in this decision disapproves *Ginesi v. Cooper*, 14 Ch. Div. 596; 22 Alb. L. J. 171, on this point. This decision sustains the views we expressed, 22 Alb. L. J. 181, 262.—The same court, in *Capital and Counties Bank v. Henty*, 43 L. T. (N. S.) 651, have also reversed the decision of the Common Pleas, 21 Alb. L. J. 443; 42 L. T. (N. S.) 314. This was an action of libel, for issuing a circular to

defendant's customers announcing that the defendant would not receive the plaintiff's checks in payment. The innuendo stated that the circular meant that the plaintiff was not to be relied on to meet checks drawn on it. The ultimate court now hold that the primary meaning would not support the innuendo; that the circumstances afforded no evidence of any other meaning; and that the communication was privileged. Thesiger, J., dissents. This decision seems right.

The General Term of the New York city Superior Court have held, in one of the three pending suits involving the same question, that a marriage made out of this State, by a party forbidden by a divorce here to remarry during the life of the other party, is void here when the departure from this State was simply to evade the decree, and the opposite party is still alive. This is in harmony with the majority of the Supreme Court, in *Marshall v. Marshall*. Last winter, we believe, a bill was introduced in our Legislature, doing away with the prohibition against remarriage in decrees for divorce. Such a bill ought to be enacted. This provision is a perfectly senseless and mischievous one. It proposes to punish adultery by holding out a premium for more adultery. Men have passions, and cannot lay them aside at the command of courts. Marriage is the only fit and safe state for men, and for women, too. Our policy should be to encourage, not to restrain marriage. Marital infidelity is frequently the result of the particular yoking of the parties, and might not occur in a new assortment. Marriage is a civil contract, too, and it seems just as absurd to prohibit a remarriage in case of adultery and divorce, as it would seem to prohibit a man from forming a new commercial partnership because he had overreached his partners and a dissolution had ensued. The prohibition against remarriage, we have no doubt, tends to increase adultery and to produce illegitimate children. Our Legislature have done something to improve on this law by enacting that the prohibited party may remarry, upon permission of the court, on showing five years of chastity and the remarriage of the other party. But this only serves to emphasize the absurdity of any prohibition. The presumption that one will continue chaste because he has been for five years is a violent and unnatural one, and it would seem a poor assurance to the new partner. Marriage should not be denied as a punishment nor permitted as a reward as between particular parties, but should be encouraged as a matter of State policy.

The interesting case of *Kopper v. Willis*, ante, 128, which holds that one is estopped, when sued as an innkeeper, by his affidavit that he keeps an inn, made to procure a license to sell liquors on the premises, yet admits that one may carry on the business of innkeeper and that of restaurant keeper, on the same premises, provided the two are separately conducted. On the same principle it was held, by the Supreme Court, in *Minor v. Staples*, Au-

gust 4, 1880, that one who keeps an inn, and also, separate from the inn, keeps a bath-house where persons bathing in the sea change their garments and leave their clothes, is not chargeable as innkeeper for property stolen from the bath-house. The court, by Walton, J., observed: "It seems to us that the keeping of the inn and the keeping of the bath-house are separate and distinct employments, and involve separate and distinct duties and liabilities. One may be an innkeeper without being a bath-house keeper, or he may be a bath-house keeper without being an innkeeper; or the same person may engage in both employments; just as a livery-stable keeper may also be a common carrier of passengers; but we do not think his doing so will make him responsible in the one capacity for liabilities incurred in the other. We are not now speaking of bath-rooms attached to or kept within hotels, but of separate buildings, erected upon the seashore, and used, not as bath-rooms, but as places in which those who bathe in the sea change their garments and leave their clothes, and other valuables, while so bathing. It seems to us that such an establishment is as distinct from an inn as a wharf or a boat-house would be; and that an innkeeper, as such, can no more be made responsible for property stolen from such a bath-house than he could be for property stolen from a wharf, or a boat-house, if he happened to be the keeper of the latter as well as the former."

NOTES OF CASES.

THE Austrian laws prescribe that marriages shall be contracted by a solemn declaration of the consent of the parties either before their "ordinary or regular pastor" (*ordentlicher seelsorger*), or before the proper officer appointed under the "civil marriage" laws. Mrs. F. L., a widow, an English citizen, and a member of the Church of England, while temporarily staying in Vienna, became acquainted with one C. S., an Austrian subject, domiciled in Vienna, a Catholic, and they agreed to marry in pursuance of the "Consular Marriage Act," 12 and 18 Vict., cap. 68. They made the proper declarations before the secretary of the British legation, which were entered in the proper register, and on July 18, 1878, the marriage ceremony was performed in the chapel of the British legation, and the marriage solemnized by a duly authorized substitute or vicar of the chaplain of the legation. The chapel is not situated in the palace of the legation, which on the real estate records appears to be owned by the State of Great Britain and Ireland, but lies opposite the palace, from which it is divided by a street, and the lot on which it stands appears on the records to be owned by "the Lord Bishop of London." The chapel is used by the ambassador and the members of the legation, and other British citizens. Mrs. F. L. afterward sued for a nullification of this marriage, and it was declared void by courts in all instances. The Imperial Court of Appeals remarks: "The validity of

invalidity of this marriage, as far as it affects civil rights within the Austrian dominions, must be judged of alone by the laws of Austria, as the chapel of the British legation and the ecclesiastical acts performed therein are not to be deemed in the situation of extra-territoriality, and therefore the inquiry only was whether the chaplain of the legation, or his substitute who solemnized the marriage, was the proper public functionary to give the acceptance of the consent to the marriage that quality of solemnity which we require in the public interest for the validity of a marriage contract. This question must be answered in the negative, because by the term 'ordinary or regular pastor,' only that priest is to be understood who, under the Constitution (as ordered by the State) of a church existing within the dominion of the general Civil Code and recognized by the State, conducts the acts of worship for the professors of the same faith, having a domicile or quasi-domicile in a locally circumscribed parish, according to the tenets of this faith, and who exercises the respective ecclesiastical power, and has to keep the civil registers of marriages under the authority of the Austrian State. The members of the Anglican church form no body or church in Austria, recognized by the State, either in established parishes, or for the whole territory of the State; to the priests of this church is not granted any organized ecclesiastical power, nor the administration of acts of public right, which would be effective in Austria. In the case at bar, the betrothed couple, in order to enter into a marriage valid by the laws of Austria, must go either before the Catholic priest of the parish in which the bridegroom was domiciled, or if the bride's religious scruples would not permit this, then they had to apply to the civil office in Vienna."—*Juristische Blaetter*.

The Austrian laws make it the duty of a father to provide for the maintenance of his children "till they can support themselves." The appellate and supreme appellate courts now decide, that where a child has become self-supporting, but afterward by insanity loses the capacity to support itself, the duty of maintenance in the father revives, although the child has long been of full age. The duty is a natural one. The reason of it is the helpless condition of the child.

In *Reavis v. Cowell*, California Supreme Court, December 17, 1880, 6 Pac. Coast L. J. 846, it was held that an attorney, who is also a notary, may take an affidavit of his client in a pending suit. The court say: "There is no such limitation found in the act, to the power of a notary, as is contended for in this case, and there is nothing in the rules of the court, to which our attention has been directed, prohibiting the notary from administering an oath to, or taking the affidavit of, his client. In the case of *Kuhland v. Sedgwick*, 17 Cal. 128, the court say: 'We are not aware of any provision of law making the attorney incompetent to take it' (the verifica-

tion of his client). In the case of *Davis v. Glasgow*, 1 Burnett (Wis.), the Supreme Court of that State uses the following language: 'Although there is an obvious impropriety in the practice, and this court is much disposed to discountenance it, yet there is no rule of law in court, under authority of law, against the exercise of such a power by an attorney in the case.' This was a case involving the precise question now before us. In the case of *Young v. Young*, 18 Minn. 94, already referred to, the court say: 'The answer to the objection that the affidavit of service was sworn to before one of the plaintiff's attorneys of record is similar. The attorney was a notary public, and therefore, under section 4, ch. 26, Gen. Stats., which confers upon 'each notary public power to administer all oaths required or authorized by law to be administered in this State,' was empowered to administer the oath in this instance, notwithstanding rule 5, district court rules.' We are of the opinion that an attorney who is a notary may take the affidavit of his client. It is now, and has been, for many years, the practice in this State, and however improper or reprehensible the practice may be, there is nothing in the law which prohibits it." The rule is different with us. *Taylor v. Hatch*, 12 Johns. 340; but the partner of the sole attorney of record may take the affidavit; *Hallenbeck v. Whittaker*, 17 Johns. 2; and so of mere counsel; *Willard v. Judd*, 15 Johns. 531; and the rule does not extend to affidavits preparatory to a suit. *Vary v. Godfrey*, 6 Cow. 587.

The *Solicitors' Journal* says: "The judgment of the Common Pleas Division, delivered on Tuesday, in the case of *Tanner v. Swindon & Marlborough Railway Company*, in which an inquisition for damages in a compensation case was set aside on the ground that a champagne luncheon had been given to the jury by the claimant, has introduced some novel distinctions into that branch of law (more developed in the United States than in this country) which relates to 'treating' jurors. Thus Mr. Justice Grove distinguished between an unpremeditated luncheon and a luncheon prepared beforehand, and between a champagne luncheon and a luncheon of every-day occurrence. If the only reason for upsetting the verdict of a 'treated' jury is that stated by the court—viz., the fear that a tendency to favor the person providing the luncheon will result—then the distinctions suggested are reasonable. A premeditated luncheon will usually be a better luncheon than an unpremeditated one, and a champagne luncheon will generally be more popular than a non-champagne luncheon. But is it clear that this is the only ground for setting aside the verdict? Would it not be reasonable to hold that, whether the luncheon did or did not influence the minds of the jury in favor of the provider, it had a tendency to render their minds unfit for the proper performance of their duties? This is the doctrine of the United States courts, or some of them; but on the ground that it would be difficult and dangerous to lay down any rule by which it should be determined

whether a juror had drunk too much or not, they seem to have pushed the doctrine to an absurd length, and to hold that even the slightest indulgence in drink will incapacitate a juror. Thus, in *State v. Baldy*, 17 Iowa, 39, the verdict of a jury was set aside because one of the jurors, who had been permitted to retire for a few moments, drank a glass of ale at a grocery store. And in *Brant v. Fowler*, 7 Cow. 562, the court upset a verdict because one of the jurors had taken one-third of a gill of brandy 'to check diarrhœa.' Subsequent cases have modified the stringency of this rule, and it appears that now a sick American juryman may safely resort to a glass of spirits." It is now well settled in this country that the drinking is immaterial, unless shown to have amounted to intoxication, or otherwise to have affected the verdict. *State v. West*, 69 Mo. 401; S. C., 33 Am. Rep. 506; *State v. Bruce*, 48 Iowa, 530; S. C., 30 Am. Rep. 403; and cases there cited. See, also, 6 Alb. L. J. 395.

LEGAL DEFINITIONS OF COMMON WORDS.

VII.

A "WOMAN with child" is a "pregnant woman." This was held by our Court of Appeals, in *Eckhardt v. People*, January 18, 1881. The defendant was indicted for an assault, "with intent to produce miscarriage," upon the body of a "woman with child." The statute uses the words "pregnant woman." The prisoner's counsel argued that the language employed was not absolutely equivalent, because it might sometimes mean a woman accompanied by a child. We extract the following from the counsel's brief:

"Time was when the expression '*with child*' was synonymous with '*pregnant*,' but we are not living in the days of Shakespeare, nor is our vocabulary what it was when the seventy translated the Bible into the language of the people. Hundreds of words and expressions used by them were long ago relegated to the limbo of *verba fata*—fated words, words doomed to die at the moment better ones come to take their places. 'Obsolete words,' says Dryden, 'may be laudably revived when they are more sounding or more significant than those in practice.' The day has come when we have no reason to be ashamed of our language, when it is unnecessary for us to resort to the waste-paper basket of the past for 'sounding' or 'significant' symbols of our thoughts. 'Those that affect antiquity,' says Milton, the mint-master of words, 'must follow the square thereof.' The authors of our revised Code did not feel called upon to apply for words to Walker, who preferred *chany* to *china*; to Dr. Ash, who defined *curmudgeon* as 'an unknown correspondent'; and to that monument of verbal ponderosity who taught the English-speaking world that *network* was 'a thing decussated and reticulated, with equal interstices between the intersections.' While well aware that there is but a point between 'man's laughter' and 'manslaughter,' they knew

that in face of the professional lexicographer's dictum, the people saw a greater difference between '*with child*' and '*pregnant*'; and therefore, when they prepared the statute under which the quoted indictment should have been framed, they used the word which alone could convey the idea they designed to present. Had the framer of the indictment used that word, it could not have been ambiguous, indefinite, vague or uncertain, and the statute offense and the party indictment would have been brought '*precisely* within the provisions of the statute.'"

"The word '*pregnant*' was used because it is the only word universally recognized as significant of the central idea presented by the statute. The revisers did not use the expression '*with child*,' for the reason that it does not convey the precise meaning of '*pregnant*,' not being exactly synonymous with that word. And because in general use the expression '*with child*' frequently conveys a meaning entirely different from that always conveyed by '*pregnant*,' when applied to a woman. It is an expression not uncommon in the business columns of our newspapers, where in no case does it mean pregnant. It is a contracted expression, the phrase '*with a child*,' with the article (*a*) omitted for reasons of economy. Witness this '*Personal*' from the *Herald* of a recent date:

"'Will blonde young lady *with child*, who left car at Third avenue and Twenty-seventh street last night, seven one-half o'clock, please send address to HONORABLE, who would be proud to make her acquaintance?'

"In this short paragraph, from which no fewer than five words, not absolutely necessary to the sense, have been omitted, the expression '*with child*' could not be tortured to signify pregnant.

"Here is another '*Personal*' from a later issue of the *Herald*:

"'Black-haired young lady with child sat behind advertiser at Aquarium, Tuesday evening, and dropped glove, which was picked up and handed to her by an admirer, who desires to form her acquaintance with honorable intentions.'

"Did the advertiser with honorable intentions believe, when he penned this notice, that the object of his admiration was pregnant? Is it customary for young ladies in a state of pregnancy to exhibit themselves at places of amusement?

"If the expression '*with child*' is really synonymous with the word '*pregnant*,' then, surely, nature sometimes indulges in queer freaks. I beg leave to call the honorable court's attention to this advertisement from the *Herald*:

"'Tall gentleman with child who bowed to young lady in dress circle, Booth's, last night, would like to form her acquaintance. WIDOWER, box 112, *Herald* office.'

"A tall gentleman with a child is certainly not a curiosity, even should he be a widower, and in the dress circle at Booth's theater. But a tall gentleman about to become a—well, about to suffer the pains of labor, would be a puzzle, even to the wise

women who help to bring new members of the human family into this world of trouble. It is a matter of very grave doubt, whether, in the whole length and breadth of Manhattan island, there can be found a midwife who can swear that she has ever delivered a tall gentleman of a child. Yet many a tall gentleman has been 'with child,' as can be proved by thousands of witnesses, notably those who are adepts in the use of newspaper English.

"If 'with child' means 'pregnant,' then, surely, maternity is not the exclusive privilege of women; and many a man is in the anomalous position of being obliged, not only to father, but to mother, his offspring."

Catera desunt; or rather, they are *not* decent, and so we omit what Judge Barrett, at General Term, pronounced "inapt analogies and grotesque illustrations."

On the other hand, the prosecuting attorney observed:

"The terms '*big with child*' and '*great with child*' (which, though somewhat antiquated, are still good English); the word '*pregnant*,' unaccompanied by the words '*with child*'; the words '*with child*,' unaccompanied by the word '*pregnant*,' and the phrase '*pregnant with child*,' are all unmistakably of the same import.

"*To be with child*—to be pregnant.' See both Worcester's and Webster's dictionaries, under the heading 'child.' 'The queen was with child.' Macaulay's History of England, Vol. 3, p. 133. 'This blue-eyed hag was hither brought with child.' Tempest, Act 1, Scene 2. 'She is with child.' Measure for Measure, Act 2, Scene 3. 'Kate Keep-down was with child.' Id., Act 3, Scene 2. 'The Moor is with child by you.' Merchant of Venice, Act 3, Scene 5. 'Getting the sheriff's fool with child.' All's Well that Ends Well, Act 4, Scene 3. 'I am with child, ye bloody homicides.' First Henry VI, Act 5, Scene 4. 'His queen with child makes her desire,' etc. Pericles, Act 3, Induction. 'Am I with child?' Genesis, 38, 25. 'Pharaoh's wife was with child.' 1 Samuel, 4, 19. 'All the women that were with child.' 2 Kings, 15, 16. 'Her that is with child.' Ecclesiastes, 11, 5. 'Woman with child.' Isaiah, 26, 17; Exodus, 21, 23. 'We have been with child.' Isaiah, 26, 17. 'Women with child.' Hosea, 13, 16; 2 Kings, 8, 13; Amos, 1, 13. 'She was found with child.' Matthew, 1, 18. 'A virgin shall be with child.' Id., 1, 23. 'Woe to them that are with child.' Id., 24, 19; Mark, 13, 17; Luke, 21, 23. 'And she being with child.' Revelation, 12, 2.

"It is claimed by counsel for plaintiff in error that the phrase '*a woman with child*' may fairly be interpreted to mean '*a woman accompanied by a child*.' It may perhaps be conceded that the words in question might, under conceivable circumstances, be regarded as awkwardly expressing such an idea.

"But '*Noctiter a Sociis*' may be said quite as aptly of words as of men. And no person having the slightest acquaintance with the English language who should be informed that 'with intent to

procure the miscarriage of a woman with child one willfully inserted a metallic instrument into her womb and body,' could fail to understand the precise significance of those words."

The court preferred the authority of Shakespeare and the Bible to the *Herald*, and affirmed the conviction.

As we have seen, 21 Alb. L. J. 205, there is some difference of opinion as to what is a "pistol." In *Hutchinson v. State*, 62 Ala. 3, it was held that one who conceals on his person the various parts of a pistol, incapable of use while thus separate, but capable of being readily and effectively put together as a pistol, is guilty of carrying concealed weapons. This was where the prisoner thought to evade the law by carrying the cylinder separate from the rest of the fire-arm. And in *Williams v. State*, 61 Ga. 417, under a similar statute, it was held that a pistol was within the law, although the main-spring was so disabled that the weapon could not be discharged in the ordinary mode. The court said: "An object once a pistol does not cease to be one by becoming temporarily inefficient. Its order and condition may vary from time to time, without changing its essential nature or character. Its machinery may be more or less perfect; at one time it may be loaded, at another empty. It may be capped or uncapped; it may be easy to discharge or difficult to discharge, or not capable, for the time, of being discharged at all; still, while it retains the general characteristics and appearance of a pistol, it is a pistol, and so in common speech would it be denominated." "In this ruling we decide differently from what was held by the Supreme Court of Alabama on a similar point, in *Evans v. State*, 46 Ala. 88; but while we regret to have so respectable a precedent against us, we have convictions both as to the meaning and policy of our statute which, for us, are decisive."

In *Ray v. Burbank*, 61 Ga. 505, we have a definition of "prescription." It was held that when a druggist, in good faith, recommends a prescription not as his own, but as that of another named person, and thereupon is ordered by his customer to fill it, and does so, charging only for the medicines and for compounding them, he is not responsible to the customer for any damage which may result from the use or administration of the remedy by the latter. The prescription was of a remedy for a disease of horses. The court said: "To fill a prescription is to furnish, prepare and combine the requisite materials in due proportion as prescribed. It is urged that prescriptions refer to medical provision for human beings, and do not appertain to the medication of animals, or at least, that they can proceed only from professional sources, and are not prescriptions if they emanate from common persons. Why a recipe or formula for the treatment of horses may not be called a prescription we do not see, from whatever source it may proceed. Life and health are physical, and are common to man and brute, and a plain, unscientific person may prescribe with less skill than a physician or a veterinary surgeon, but at times, perhaps, with equal efficiency."

OBSERVATIONS ON THE PARTICULAR
JURISPRUDENCE OF NEW YORK.

VII.

(1777—1821.)

THE preceding paper was more particularly addressed to a brief consideration of the frame of government established in 1777, by the convention of the representatives of the State of New York.

The government thus established was, for a number of years afterward, not regarded other than as a *de facto* government by the inhabitants of the counties of New York, Westchester, Richmond and Long Island, by far the richest and most populous part of the province. When the Continental forces abandoned the city of New York on the 15th of September, 1776, the British, under General Howe, re-established their authority in the counties named, and continued to exercise a jurisdiction over them until the 25th of November, 1783, when the formal evacuation took place in accordance with the definitive treaty of peace with England. During this entire period there were two actual governments existing side by side within the limits of this State. Both invoked virtually the same law and both claimed the rightful jurisdiction of the entire province or State, but one, in the name of the Crown, the other in the name of the State, or its inhabitants. The judicial records of each of these governments are equally authoritative and entitled to recognition within the sphere of its actual jurisdiction. Though often overlooked, the fact that this dual government existed, is of importance to the conveyancer and the lawyer, searching an ancient title, or examining a question of probate, for the records of their respective judicatories are distinct.

A glance at the Royalist government established over the lower counties, from 1776 to 1783, will suffice: The former civil courts, with two exceptions, the Prerogative Court and the Admiralty Court, remained closed, and in their stead was erected by proclamation on the first of May, 1777, a quasi-civil judicatory called a Court of Police, which had cognizance of all causes arising thereafter. (Jones' Hist. N. Y., generally.)* With a view to the re-establishment of civil authority, thus superseded by the military within the British lines, and also with the hope to extend such authority throughout the entire province, the crown, in 1780, commissioned Lieutenant-General Robertson as civil governor of the "Province of New York," and on March 23d of this year his commission was read with the usual ceremonies, at the City Hall in New York. (N. Y. Gazette, March 27th, 1780.) A council with the usual powers, legislative, judicial and executive, was again designated, and the greater part of the former civil machinery was re-established. The records of the Prerogative Court, held by the English governor during this period, remain the repository of wills and probates affecting property within the lower counties.

To resume the consideration of the State government established at Kingston on the 20th of April, 1777: Until 1783 its actual jurisdiction was limited to the upper river counties beyond Westchester, but with a sublime confidence in its future destinies, its legislation was general in character and intended to ultimately embrace the entire State. The convention which had framed the Constitution before its adjournment designated a committee to report a plan for organizing the government agreed to by the convention. This committee, in order to provide for the representation of those counties within the British lines, reported a plan, subsequently acted on, by which

delegates to the assembly and senate were elected by the rest of the Legislature to represent the lower counties until they should be enabled to elect their own members. The convention continued in session until May 13th, 1777, when it was finally dissolved. Previous to such dissolution, the convention appointed a committee or Council of Safety, to administer the State government until the organization contemplated by the convention should be perfected. (1 Journ. Prov. Con., p. 916.) A temporary judiciary, consisting of Robert R. Livingston as Chancellor, John Jay as Chief Justice, and Robert Yates and John Sloss Hobart as puisne justices of the Supreme Court, was designated to hold office until a permanent selection should be made by the council of appointment, pursuant to the new Constitution.

The proceedings of the Council of Safety intrusted with the temporary government of the State, though historically interesting, are unimportant to a consideration of the jurisprudence of this State. But the "resolves" of the Provincial Congresses and Convention, the purely Revolutionary governments, were, by the 35th section of the Constitution of 1777, made a part of the organic law of the State. Yet even these "Resolves" were not, in a futuristic sense, important to the jurisprudence of the State, for we find that as late as 1818 no authentic copy of them was to be found among the archives of the State. (Assembly Journ., 1818, Feb'y 11, p. 156.) It was not until 1842 that the Legislature directed the resolves referred to in the 35th section of the Constitution of 1777, to be printed, so that the legislative records of the State might be complete. The purpose of the framers of the government in making the "Resolves" of the Provincial Congresses part of the law of the State was doubtless to confirm and ratify the action of the Revolutionary governments, rather than to influence thereby the future jurisprudence, for most of these "resolves" had been of a purely temporary character. The "resolves" of the Provincial Convention were on another and a higher footing, for they included the proceedings of that Convention which adopted the Constitution and organized the State government. Several "Resolves" of the latter body were of a permanent character; among them that vesting in the State government the quit-rents due to the Crown. (1 Vol. Journ. Prov. Conv., p. 554.) By this last resolve the feudal relations between the land-holders in the State and a lord paramount, including fealty and the payment of rent, were changed, but preserved. Although ultimately the quit-rents were diminished by commutation, this Resolve, at least for a time, preserved tenures and prevented that great confusion which must have ensued in the administration of a land law based wholly on the feudal system, had the lord paramount continued an alien enemy, or an indefinite or unascertained person. This resolve, therefore, served a double purpose; it was an act of confiscation and an act preserving feudal tenures. It was further confirmed by an enactment of the same tenor, passed by the State Legislature in 1779. (§ 14, 1 J. & V., p. 44; 6 N. Y. 503.)

At an early period of the State government the condition of the laws attracted the attention of the authorities. At the opening of the Second Session of the State Legislature (October, 1778), Governor Clinton, in his annual message, said: "By the 35th section of our Constitution the laws of this State are necessarily become complicate, and as every member of society is materially interested in the knowledge of the laws by which he is governed, I am induced to believe a careful revision of the laws of this State would be an acceptable service to your constituents, and attended with the most salutary effects." (Assembly Journ., Oct. 13, 1778.) In pursuance of this recommendation a committee was appointed to see what laws were expiring and what new laws were

* This curious Tory history, lately published, is certainly authentic in this particular.

necessary to be passed. The senate, on the next day, added Mr. Yates to a former committee, which had been appointed at the first session of the Legislature to consider the same subject. (Sept. 16, 1777; Senate Journ.) Nothing of importance, however, was done toward the revision of the laws until after independence was assured by the Treaty of Peace.

In 1779 long, but confidently, anticipating the time when the kingly power should be broken and destroyed, and the entire State surrendered to its proper authorities, the State Legislature, sitting at Poughkeepsie, passed an act providing for the temporary government of the Southern District of the State, by a commission. But not until 1783 could this measure be effected, and then for several months it was in operation and the southern counties were governed by the legislative commission appointed some years before. The powers and duties of this commission terminated with a general election of the proper representation demanded by the Constitution.

After the establishment of the State government and until the peace of 1783, the Court of Probate, organized by the act of 1778, exercised within the upper counties only, the usual jurisdiction of Prerogative Courts. Subsequent to 1783 it superseded the Prerogative Court in the lower counties and thus accomplished its original mission, the entire probate jurisdiction of the State.

During the Revolution the State Legislature was too much engrossed with the perils of the times to institute any sensible change in the ancient law of the Province, amended and perpetuated by the new Constitution. The thirty-fifth section* of the State Constitution, declaring that the former law should continue in force in so far as it was not repugnant to that great statute itself, had done little more than amend the former law. Any change which has since then ensued in the structure of that law is the result either of statute (in which constitutional changes are included), or of juridical interpretation, or indirect legislation. The most important enactment of the State Legislature during the Revolution was that acceding to the Articles of Confederation between the American Colonies, or States. (Feb'y 6th, 1778; 1 J. & V. 15.) Whatever doubts arose concerning the wisdom of acceding to a formal and permanent confederation — and there were many — were allayed by its practical expediency as a war measure, and because it was argued that the confederation did not affect the practical autonomy of the State. The articles of confederation did not affect the particular jurisprudence of the State in a greater degree than a treaty of perpetual alliance ordinarily affects the private law of a high contracting party. Certain limitations were imposed by the articles on the exercise of several of the powers ordinarily incidental to sovereignty. Precisely what these limitations were it is beyond the scope of these papers to discuss; there always has been, among those whose intelligence, at least, demands the consideration of the lawyer, a vital and fundamental difference of opinion concerning their precise nature. The "act to organize the government of this State," was another of the more important acts passed during the Revolution by the State Legislature. (1 J. & V., p. 22.) It declared, among other things, the jurisdiction of the Court of Probates to be that exercised formerly by the Governor of the Province, except that the appointment of Surrogates was declared to be vested in the council of appointment; it directed the judges of the "four great courts" (Chancery, Supreme, Probate and Admiralty), to cause seals to be made for their respective courts; it provided that the terms of such courts should be

held on the same days on which they had been held when under the authority of the Crown.

With the cessation of hostilities, the Legislature of New York began to turn its attention more vigorously to the state of the laws, and to institute most important reforms. In 1782, the first of the series of laws, affecting the common law of real property, was passed. (Ch. II, Laws of 6th Session, 1782.) Estates tail were altered into estates in fee simple absolute; the law of primogeniture was abolished, and the law of descents was made to conform to the more democratical institutions of the new government. Many writers have commented on the political effects of partible inheritances, conceding that when institutional they conduce to perpetuate democratical forms of government. In 1784 several acts were passed repealing, as repugnant to the Constitution, the immunities, emoluments and privileges accorded to the Ecclesiastical Church establishment, sometimes called the Church of England, in New York. (Ch. 33; ch. 38, Laws of 1784.)

The journals and records of the Legislature show that with the year 1786 a new era in legislation began; the act of 1782, abolishing entails and altering the law of descents, was more carefully re-enacted; Samuel Jones and Richard Varick were appointed to collect and to reduce into proper form for re-enactment all such statutes of Great Britain and England and of the Colonial Legislature as were continued in force by virtue of the 35th section of the Constitution of 1777. (Ch. 35, Laws of 1786.) The proposed revision was, in some respects, the most important ever contemplated in New York; the whole Statute Law of England and of the provincial government was now to be revised with the intent that when the revision was completed all such statutes as were not contained in the revision should cease to be operative as laws of New York under the 35th section of the Constitution. And by the provision of the act designating the revisers, when all such statutes had been revised and re-enacted, the acts of the State Legislature passed since the Revolution were also to be revised and inserted in the revision. The revisers, in the course of their work, reported from time to time to the Legislature the various revised bills, containing the substance of those English Statutes which they deemed in force in New York by virtue of the constitutional adoption. The bills thus reported were generally adopted by both the Legislature and the Council of Revision without dissent or modification. When the necessary English Statutes had been recast and re-enacted, the Legislature in 1788 passed an act declaring that after the first of May following "none of the Statutes of England or of Great Britain should operate or be considered as laws of this State." (Ch. 46, § 37, Laws of 1788; 2 J. & V. p. 282; 10 N. Y. 74.)

The revision of Messrs. Jones and Varick thus became the final and authoritative legislative interpretation of the 35th section of the Constitution of 1777, because it determined what part of the Statute Law of England and Great Britain had been confirmed and continued by the section in question and what part was repugnant to the Constitution. The importance of the revision, therefore, cannot be over-estimated in a consideration of our jurisprudence; not only is this true in respect of the specific enactments it contained, but also in respect of the spirit in which the revision was approached. An examination of the various English Statutes thus re-enacted because they were deemed to have been operative as statutes of the province, shows that the phraseology of the original acts was preserved where it was not plainly repugnant to local conditions. This last fact indirectly evinces, also, the construction which the revisers placed on the legislative power to alter the fundamental law established by the Constitution. The object of the revision was

*The sections of the first Constitution are sometimes termed "articles," but most frequently "sections."

not innovatory or hostile to the provincial law, but was simply intended to make the former legislation more accessible to the profession of the law and to the public.

To enumerate in a brief space the various English Statutes substantially incorporated in Messrs. Jones and Varick's revision would be impossible; they illustrated and embodied many of the most important constitutional and legal reforms which had been instituted in the previous history of England, thereby again demonstrating the principal canon of our constitutional revolution — that the American colonists had as high a right to the legal achievements and developments of their common race as the English across seas. Among the various important bills reported by Jones and Varick and incorporated in their revision, were the following: a bill of Rights (ch. 1, vol. II, J. & V.), containing the substance of the most important sections of Magna Charta, the "Bill of Rights," the Habeas Corpus Act, 31 Car. II, and other acts which composed the English Constitution; an act concerning tenures, containing the substance of 12 Car. II, ch. 24, which had abolished most of the burdens of feudal tenures; the New York act contained also a new provision, that the tenure of all grants by any letters patent under the great seal of the State should be allodial and not feudal. The latter provision was the beginning of the acts converting feuds into allods, and is sometimes thought to have been a reform of great consequence to political liberties, but the difference between allodial lands held only by those in allegiance to the State, and free socage tenures with the incidents of fealty and the payment of a nominal rent, is, after all, greater in theory than in practice.

Among the other more notable of the English Statutes contained in Jones and Varick's revision were the Statute of Uses (27 Henry VIII, ch. 10), the Statute of Distributions (22 & 23 Car. II, ch. 10), the Statute of Frauds, including among other statutes the substance of 13th and 27th Elizabeth against fraudulent conveyances, and of 29 Car. II, ch. 3, concerning the memoranda requisite to enforce certain undertakings; a Statute of Wills taken from 32 Henry VIII, and 29 Car. II; a Statute of Limitations, incorporating the substance of the former English acts on the same subject. The greater part of the substituted or revised English statutes are to be found in the second volume of Jones and Varick's revision; and they continue, in some form or other, to be the basis of the law of this State touching the subjects to which they refer.

Although the "act for revising and digesting the laws" directed Messrs. Jones and Varick to correct and reduce all the public acts of the Legislature of the late colony which remained in force under the 35th section of the Constitution, yet this part of their work was not accomplished. In the preface the revisers assert "that in the course of the revision they found 'that several of the public acts of the late colony 'could not with any degree of propriety be re-enacted or repealed.'" They however reported in 1788 a bill, contained in the revision (2d vol., p. 354), repealing a large number of those acts of the Provincial Assembly which conflicted with later legislation. Obviously, and indeed the revisers so state, the acts of the Colonial Assembly, neither repealed expressly nor by implication, remained operative under the 35th section of the Constitution, and yet with several exceptions contained in an appendix to the first volume, the colonial acts thus remaining operative are not embodied in this revision. As a consequence there remains some uncertainty concerning the Provincial acts ratified by the 35th section of the first Constitution. It is not improbable that the revisers were induced to this omission by reason of the great uncertainties involving the records of colonial legislation. (See ante,

p. 288, *et seq.*, 22d vol. L. J.) The provincial acts were the only part of the Statute law of the State left unrevised, as Messrs. Jones and Varick besides completely remodelling the English Statutes, revised the entire legislation of the State from its foundation. The preceding acts of the State Legislature had been printed in folio, session by session, by the different printers to the State. The revision by Messrs. Jones and Varick may be regarded as the only marked and comprehensive reform of the Statute law of New York during the first period of the State government, or that period from 1777 to 1821.

As the various revisions which succeeded each other in the first period of our State government contain only the more permanent legislation, they attract greater attention than even those editions of the Session Laws which were published by authority. The second revision of the acts of the State Legislature was undertaken as a private, or commercial venture, by Thomas Greenleaf. The second edition of Greenleaf's work brought the revision of the State laws to a period nine years later than that of Messrs. Jones and Varick, and as it was recognized by the courts as a faithful work it received a judicial sanction accorded to no other private edition of the laws excepting perhaps the Webster publications from 1802 to 1812 inclusive. The next revision of the laws was undertaken by Justices Kent and Radcliff, pursuant to an "Act of the Legislature" (Ch. 190, Laws of 1801); it became the corrected version of the public and private acts of the State. This revision simply omits the abrogated laws or parts of laws, and pursues a chronological arrangement of the first volume and a subject arrangement of the second.

The New Revised Laws of 1813 next superseded Kent and Radcliff's revision. By an act of the Legislature (ch. 150, Laws of 1811; ch. 195, N. R. L. of 1813) William P. Van Ness and John Woodworth were directed to arrange the laws of a general and permanent nature systematically in divisions under proper heads, with such marginal notes as appeared to be best calculated for public information. As the revision of Jones and Varick was the first of the State revisions in point of time, so that of Van Ness and Woodworth was *facile princeps* in point of method and arrangement; the marginal notes prepared by John V. N. Yates, and included in the revision of 1813, are among the most valuable expositions of the laws of this State; they oftentimes, by enumerating the various English and Colonial acts which contained like provisions, embrace a succinct history of the statutes to which they refer. Even at the present day the history of many legislative measures may be more easily gathered from this revision than from any other single work; and it remains a profound example of faithful professional service.*

The revisers of 1813, imitating the example of Messrs. Jones and Varick, did not include in their revision the Colonial acts which remained in force under the 35th section of the State Constitution. Printed as an appendix to the revision of 1813, are several acts of the Colonial Assembly which the revisers thought would be useful to the profession. Among these is the "Charter of Liberty," enacted by the first regular Legislature of New York in 1683. The Ordinances of Lord Bellomont and Viscount Cornbury — continuing the Supreme Court of New York after the act of the Legislature passed in 1691 had expired by limitation — are also included in this appendix. As illustrating several questions concerning the former provincial law of inheritances which long retained some elements of the Dutch Jurisprudence, the revisers have also ap-

* See, however, the commentary on the Revision of 1813, by Samuel Jones, co-author of Jones & Varick's Revision. (N. Y. Hist. Society's Col., III.)

pendent the Articles of Capitulation between the Dutch and English, signed in 1664. These revisers might, with equal propriety, have included in the appendix the definitive Treaty of Peace between Great Britain and the United States in 1783, for it was, with unusual particularity, made part of the State law by an act of the Legislature passed in 1788 (ch. 41), repealing all acts and parts of acts which conflicted with the treaty in question.*

*The entire collection of the imprints of the State session laws from 1777 to 1821 can now be found in several public libraries only, at least two volumes of them have become so rare as to occasion great inconvenience in referring to them. The library of the New York Law Institute, through the exertions of its custodians, has become especially rich in the department of statute law of the various States. Mr. Winters, the assistant librarian of this institute, has kindly furnished, with permission to use it, the following interesting sketch of the New York laws: "Greenleaf's Compilation of the laws from 1777 to 1792 was printed in New York city in two volumes, octavo, in 1792. A supplemental volume, published in 1797, contains the laws enacted from 1792 to 1797. A second edition of Greenleaf's Compilation was printed in 1798. Messrs Charles R. and George Webster, of Albany, also issued an edition of Greenleaf's laws under their imprint, to which they added, in 1800, a supplement containing the laws from 1792 to 1799, inclusive. This supplemental volume of Webster's edition differs from that of Greenleaf's in several respects. It was printed originally in parts, which are occasionally met with, but it is now difficult to find a copy of the completed volume, even in a public library.

"In 1797 the session laws were first printed in octavo form. The State printer's editions of these laws, from the November session, 1798, to the January session, 1799, inclusive, were issued with a continuous pagination, as it was probably intended to have such form a supplemental volume to the Greenleaf edition—the legislation of the three sessions making a volume of 844 pages, exclusive of the index.

"Since 1800 the laws of each session, except those of the May session, 1812, and the November session, 1824, have been printed, as to pagination, indices, and arrangement of chapters, in a separate or independent form.

"The office of public or State printer, which was instituted with Wm. Bradford in 1693, and abolished in 1846, was held from 1796 to the adoption of the Constitution of 1821, as follows, viz.: William Robins, 1796-97; Loring Andrews, 1798-1801; John Barber, 1802-03; Solomon and H. C. Southwick, 1803-14; Jesse Buell, 1815-20; and Moses I. Cantline and Isaac Q. Leake in 1821.

"The laws printed by Andrews, Barber, and the Messrs. Southwick, are frequently cited by the names of their respective printers, in order to distinguish their editions from that which was issued by the Messrs. Webster, and which includes the laws enacted subsequent to the Revision of 1801, and prior to the Van Ness and Woodworth Compilation or Revision of 1813. At the November session of 1800 but one law was proposed, and none were enacted, the business of the Legislature being confined to the election of the various State officers. Nor were any laws enacted at the short session of the Legislature in August, 1824, and June, 1827. The laws of the session of 1801 not included in the Revised Acts of that year, were printed in a separate volume, by Loring Andrews, the State printer.

"The Revision of 1801 was published by Messrs. Charles R. and George Webster, in two volumes, octavo, in Albany, in 1802. This Revision was provided for by the act of March 28, 1800, and was prepared under the supervision of the then Chief Justice Kent and Mr. Justice Radcliff, and is commonly known as Kent and Radcliff's Laws. Messrs. Webster and Skinner issued a reprint of the same in Albany in 1807. Previous to this, and subsequent to the Revision of 1801, the same firm printed an edition of the laws which was intended to form supplemental volumes to the Revision of 1801.

"These volumes, numbered 3-6 (the Revision of 1801 being Vols. 1 and 2 of the series), contain the laws from 1801 to 1813. They are cited and known as the Webster Laws, and form a part of almost all of the private acts of the New York session laws. As the Webster edition does not contain the private acts of the sessions of 1808, 1809, and 1810, and as the fact is not generally known to the profession, the failure of a careful examination or use of this edition has led occasionally to serious error and inconvenience.

"In some of the States the private or local acts have been uniformly printed in a form separate from those of a public or general nature, but such has not been the case in New York, with the exception of the sessions of the three years referred to. The private acts of the January session, 1808, were printed by Jean Baraar, and those of November session, 1808, including the January session, 1809, and the January session, 1810, by Solomon Southwick.

"The Southwick volume of the sessions of 1808-09 has become so scarce as to attract special attention, and to make it thought advisable for the Legislature to provide for a reprint. Probably not a dozen copies are now known to be extant. Of these the libraries of the New York Law Institute and the Bar Association of New York city possess each a copy. The copy of the Bar Association was secured by its librarian, Mr. Berry, only after several years of inquiry and diligent search, and that of the Law Institute many years ago, through the intelligent interest and zeal of its then librarian, Mr. Charles Tracy.

"The extraordinary scarcity of certain volumes of American statute law has recently excited considerable interest. At the present time there are in the library of the Law Institute several volumes of the session laws of the different States, which are the only copies extant, so far as the writer could learn from inquiry and investigation.

"A cursory glance at the Southwick volume of 1808-10 shows that it contains, among other acts which are still of importance and interest, the following, viz.: The act for the separation of the First Presbyterian Church of the city of New York, the act of incorporation of the New York Historical Society, the act of incorporation of the Mutual Life Insurance Company of New York; an act enlarging the powers of the Orphan Asylum of New York city; an act affecting the title to certain lands in Cayuga and Onondaga counties, act of incorporation of the Brooklyn, Jamaica and Flatbush road; an act in regard to the investment of the funds of the New York Missionary Society, and an act to enable the Cedar Street Presbyterian and Grace Churches in the city of New York to hold real and personal estate, etc. It would be commendable on the part of the Legislature to provide for the republication of this volume, and thus guard against the contingency of the loss or destruction of the few printed copies now extant.

"It is a well-known fact that in some of the States the manuscript or parchment copies of a few of the early laws have been lost. This contingency happened in Virginia previous to the printing of the laws of that colony in 1733. Before that time, the laws had been preserved in manuscript volumes, which were deposited at the county seats. Jefferson alludes to several of them as being in his time so decayed that the leaves could not be opened but once without their falling into powder. As manuscript revisions of the laws were proposed, the original session acts were thrown aside as waste paper, and in a few years the original acts were wholly forgotten. The temporary loss of the laws of 1691, in which year it was enacted that 'no native American Indian brought into Virginia since 1691 could under any circumstances lawfully be made a slave,' and which was printed in the revision of 1733, as of the date of the revision of 1705, led the courts into serious error, and 'under the influence of their first opinions, arising from the want of access to the laws, thousands of the descendants of Indians were unjustly deprived of their liberty.' This act, in its original form, was accidentally discovered in 1807, and its production and proved authenticity in a reported case (*Pallas et al. v. Hall et al.* [1808], 2 H. & M. 149) established the claim and secured the liberty of a dozen human beings.

"Massachusetts, Virginia, Ohio, and a few of the other States, have exhibited a commendable spirit in providing for the republication of their early laws, and thus securing in a permanent, accessible form the materials for the proper understanding and illustration of the legislative history and enactments of their respective States. And in this view it has been well observed, 'that the preservation of the ancient laws of a country is very essential to the correct view of its history, besides upon these laws just property interests have depended.'

"The Revision of 1813, or the Van Ness and Woodworth Revision, was printed in Albany, by H. C. Southwick & Co., in two volumes, octavo. To this Revision the Websters printed, in Albany, in 1815, a supplemental volume (Vol. 3, Laws 1813-15), and the State printer's copies of the laws from 1815 to 1825, under the imprint of Gould & Co., Albany, 1818, 1821, and 1825, form volumes four, five, and six, of the series."

DEPOSIT OF AMOUNT DUE IN BANK WHERE
NOTE PAYABLE, DISCHARGES MAKER.

IOWA SUPREME COURT, DECEMBER 9, 1880.

LAZIER v. HORAN, Appellant.

Where a note is made payable at a bank and the maker, before it is due, deposits and leaves in such bank the amount necessary to fully discharge the note, and the bank, some time after the maturity of the note, fails, the note not having been presented for payment, such deposit is a complete defense to an action against the maker upon such note.

ACTION upon a promissory note and for the foreclosure of a mortgage. The facts appear in the opinion.

Cole & Cole, for appellant.

Wright, Gatch & Wright, for respondent.

ROTHROCK, J. The promissory note which is the foundation of the action is in these words:

"\$1,250. DES MOINES, IOWA, March 21, 1872.
"On or before the twenty-first day of March, 1874, I promise to pay to William Braden or order \$1,250, with interest thereon from this date until paid, at the rate of 10 per cent per annum, payable annually on the twenty-first day of March in each year, for value received, principal and interest payable at B. F. Allen's bank in the city of Des Moines. Should any of said interest not be paid when due, it shall bear interest at the rate of 10 per cent per annum from the time the same becomes due, and a failure to pay any of said interest within 30 days after due shall cause the whole of this note to thereupon become due and collectible at once.

"TIMOTHY ^{by}
X _{mark} HORAN."

The mortgage securing this note is duly stamped with United States revenue stamp, legally cancelled; indorsed on the back as follows, to wit: "Pay to the order of Jesse Lazier. WILLIAM BRADEN."

The note was given for part of the purchase-money of certain real estate situated in Madison county. The land was owned by the plaintiff, and the sale was made through Braden, and the note was taken payable to the order of Braden, for the plaintiff's benefit.

On the 21st day of March, 1874, the defendant, who is a resident of Madison county, went to B. F. Allen's bank to pay the note. The note was not at the bank, and the defendant deposited the amount required to pay the same, to wit, \$1,512.50, and took from the bank a deposit ticket, of which the following is a copy:

"B. F. ALLEN'S BANK,
"To Timothy Horan. Des Moines, March 21, 1874.
Currency to pay note favor William Braden
for - - - - - \$1,250 00
Interest - - - - - 262 50
\$1,512 50

"Duplicate."

Some efforts were made by the defendant, by way of correspondence through Percival & Hatton, real estate agents at Des Moines, to have the note sent to the bank, but they were unavailing. The money thus deposited remained with the bank, and on the 19th day of January, 1875, the bank and B. F. Allen failed, and it does not appear from the evidence what, if any thing, will be realized on account of said deposit. That it is a total loss does not seem to be seriously disputed.

We are required to determine whether the foregoing facts are a defense to an action on the note, or in other words, where a note is made payable at a bank and the maker deposits the amount necessary to fully discharge it and leaves the same there, and the bank afterward fails, is such a deposit a complete defense to an action by the payee or indorsee against the maker?

It is well settled that as to the acceptor of a bill of exchange or the maker of a promissory note, payable at a bank or other specified place, no presentment nor demand of payment need be made at the specified place to entitle the holder to maintain an action against the maker or acceptor. Story on Promissory Notes, § 228; 1 Dan. on Neg. Inst., § 643; 1 Pars. on Notes and Bills, 308; Wallace v. McConnell, 13 Pet. 136; Fuller v. Beckley, 2 W. & S. 458; Armstead v. Armstead, 10 Leigh, 525.

In Parsons on Notes and Bills, it is said: "The courts in this country have, with the exception of Louisiana and Indiana, held that such acceptances were not conditional; that demand need not be averred by the plaintiff, but that if the acceptor was at the place at the time designated, and ready to pay the money, it was matter of defense to be pleaded on his part, which defense, however, is no bar to the action, but goes only in reduction of damages and in prevention of costs."

That the maker of a promissory note and the acceptor of a bill of exchange payable at a particular place are under the same obligation in this respect, and their rights and liabilities are the same, seems also to be well established. See the authorities above cited. What are the rights of the parties, however, where the maker of a note or the acceptor of a bill deposits the money in the bank designated as the place of payment, and leaves it there, is another question, upon which there is a surprising paucity of adjudicated cases. The learned counsel for the respective parties in this cause have cited to us no case which is exactly in point.

It is true that in Wallace v. McConnell, supra, there is language used from which it may fairly be implied that in such case, if the holder of the note or bill should neglect to present it at the specified place, by reason of which the money should be lost by the failure of the bank or the like, this would be a defense; and in Armstead v. Armstead, supra, it is said "that the maker, if he was ready at the time and place to make the payment, may plead the matter in bar of damages and costs; but he must at the same time bring the money into court which the plaintiff will be entitled to receive. A further consequence, indeed, might follow if any loss had been sustained by his failure to present, but this must be set up as a matter of defense. In Fuller v. Beckley, supra, Houston, J., said: "I incline to the opinion in 13 Peters, 144, as above, that if the maker or acceptor, where the money is payable at a bank, pays the money into the bank to the credit of the payee on such note or bill and leaves it there, it will be a complete discharge, though the money should be lost by robbery of the bank or otherwise; but this case does not call for an opinion of the court on this point."

In Nichols v. Pool, 2 Jones' L. (N. C.), in discussing the question whether a demand at the place of payment is necessary to maintain the action, it is said: "The more reasonable construction that they (the words 'payable,' etc.) were used to convey the idea that the parties had made an arrangement, suggested by considerations of convenience to both sides, according to which the money is to be paid at a particular place on a given day; or in other words, assurance given by the debtor and accepted by the creditor, that the money will be then and there paid. * * * Considered in this sense the effect is that the creditor does not lose his debt by failing to apply for it at the precise time and place, but may afterward recover it; while on the other hand, the debtor may, if in fact he had the money at the time and place, use that as a defense and defeat the action by bringing the money into court, or if he deposited it and it was lost by the failure of the bank, he can put the loss on the creditor because of his laches in not calling to get it."

In Rhoades v. Gent, 5 B. & A. 244, language to the same effect is used in the opinion of one of the judges.

An examination of these cases will show that the question of the rights of the parties, where there has been actual deposit made by the maker or acceptor, is not directly involved. They are all cases upon the question as to whether an action may be maintained without a demand having been made at the place of payment. The language which we have quoted is however germane to the question which was before the courts in the several cases involving the rights of the parties to written instruments of this character, and if nothing more, serves to indicate the views of learned writers of the opinions cited.

In *Story on Promissory Notes*, § 228, this language is used: "If by such omission or neglect of presentment and demand, he (the maker or acceptor) has sustained any loss or injury, as if the bill or note were payable at a bank, and the acceptor or maker had funds there at the time, which have been lost by the failure of the bank, then and in such case the acceptor or maker will be exonerated from liability to the extent of the loss or injury so sustained." To the same effect see *Story on Bills of Ex.*, § 356; 1 *Pars. on Cont.* 272-3; 1 *Dan. on. Neg. Inst.*, § 643.

It is correct, as claimed by counsel for appellee, that these writers cite no authority which supports the proposition announced by them. But notwithstanding this, the views of these learned authors are entitled to proper consideration. On the other hand, no case has been cited which announces the opposite view from that given in the above citations. With the limited time at our disposal, we are unable to make an exhaustive search for authorities, and in this case we have found none which are fairly in point. In *Howland v. Levy*, 14 La. Ann. 223, it was held when a note was payable at the office of a commercial firm in New Orleans, and at maturity it was presented by the holder at the place named for payment, and payment refused, and a few days after maturity the maker remitted part of the sum to the mercantile firm to be applied on the note, that this was no payment. It will be observed from this statement that the case is wholly different from that at bar. Here, if the note had been presented at maturity it would have been paid, for the money was in the bank for that very purpose. It would, perhaps, be an unreasonable requirement to hold that the holder of the note or bill should present it again for payment.

We think that, upon principle, the defendant in this case should be wholly discharged, and we will briefly state our reasons therefor. The note was made payable at a bank. These institutions are depositories of money. They are also collection agencies, through which by much the larger part of that branch of the business of the country is transacted. When a note is made payable at a bank the parties expect the collection to be made through the bank. It is true when the defendant deposited the money, the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. "If the customer of a banker accept a bill and make it payable at his banker's, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill." *Byles on Bills*, 151. And if money be deposited for the payment of such a bill or note, the holder may maintain an action against the bank therefor. *Parsons on Com. Law*, 130. By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank it means that payment is to be made to the bank. The parties to this note did not contemplate that the payee should make a journey from Indianapolis and meet the maker at Allen's bank, and there

receive his money from the hands of the maker and deliver him the note.

This court has three times determined that when the maker of a promissory note payable in personal property, to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged and the title to the property passes to the creditor. *Gainey v. Manney*, 2 Green, 251; *Williams v. Triplett*, 3 Iowa, 518; *State v. Shripe*, 16 id. 36. Now, while it is held in these cases that upon designating the property and setting it apart for the creditor the title of the property passes, and it may be said that by the deposit of the money in the bank for the holder the right of property in the money does not pass because the depositor may withdraw it, yet this distinction is really not an important one, for as we have seen if the money remains on deposit the holder of the note may present his note and take the money, or if necessary maintain an action for it. In one of the cases cited the note provided for payment in brick. Now, if that could be discharged by delivering the brick set apart for the creditor at the time and place designated, it is difficult to see why, if the note was payable in dollars it would not equally be a discharge to set apart and deposit the dollars for the holder of the note.

In our opinion, there should have been a judgment for the defendant for costs, and the mortgage should have been cancelled, as prayed in the answer.

Judgment reversed.

FEDERAL CONTROL OF COMMERCE ON HIGH SEAS BETWEEN PORTS IN SAME STATE.

SUPREME COURT OF THE UNITED STATES, JANUARY 10, 1881.

LORD, Plaintiff in Error, v. GOODALL, NELSON & PERKINS STEAMSHIP CO.

Congress has power to regulate the liability of the owners of vessels navigating the high seas, although such vessels are engaged only in the transportation of goods and passengers between ports and places in the same State. Consequently the provisions of section 4283, United States Revised Statutes, limiting the liability of the owner of a vessel, in certain cases, to the value of his interest in such vessel, applies to a vessel navigating upon the high seas between two ports in California, upon the ocean.

IN error to the Circuit Court of the United States for the District of California. The facts appear in the opinion.

WAITE, C. J. Sections 4283 and 4289 of the Revised Statutes are as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damaged or forfeiture done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount of the value of the interest of such owner in such vessel, and her freight then pending."

"Sec. 4289. The provision of the seven preceding sections relating to the limitation of the liability of the owners of vessels shall not apply to the owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation."

Section 4283 was one of the seven sections referred to in section 4289.

The steamship *Ventura*, owned by the defendant in error, was employed in navigation between San Francisco and San Diego, in the State of California, touching at the intermediate ports on the coast. In making her voyages she ran a distance of four hundred and eighty miles on the Pacific ocean. She formed part of a transportation line which was largely engaged in foreign and inter-State commerce, but was herself only employed on her own route and neither took on nor put off goods outside of the State of California. While on one of her regular voyages from San Francisco to San Diego she was totally lost, with all her pending freight and cargo, on the coast of California, without the privity or knowledge of her owner. This suit was brought against her owner as a common carrier to recover the value of the goods lost. The cargo was mostly owned by retail merchants in San Diego and other places in California, who had made purchases for their business from wholesale merchants in San Francisco and was in transit from there. The steamship company pleaded its exemption from liability as owner of the vessel, under section 4283 of the Revised Statutes. On the trial the court instructed the jury "that if the jury believed that the said losses occurred solely by reason of the negligence of the master of said ship and without the privity or knowledge or neglect of said defendant, that said section 4283 of the Revised Statutes fully exonerated the defendant from liability for any such losses, notwithstanding the goods so lost were being transported on a journey when lost, the final termini of which were different points in the State of California." To this charge an exception was duly taken. The jury found in favor of the defendant and judgment was rendered accordingly. To reverse that judgment the present writ of error has been sued out.

The single question presented by the assignment of errors is, whether Congress has power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of goods and passengers between ports and places in the same State. It is conceded that while the *Ventura* carried goods from place to place in California, her voyages were always ocean voyages.

Congress has power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes" (Const., art. I, § 8), but it has nothing to do with the purely internal commerce of the States, that is to say, with such commerce as is carried on between different parts of the same State. If its operations are confined exclusively to the jurisdiction and territory of that State and do not affect other nations or States or the Indian tribes. This has never been disputed since the case of *Gibbons v. Ogden*, 9 Wheat. 194. The contracts sued on in the present case were in effect to carry goods from San Francisco to San Diego by the way of the Pacific ocean. They could not be performed except by going not only out of California, but out of the United States as well.

Commerce includes intercourse, navigation, and not traffic alone. This also was settled in *Gibbons v. Ogden*, *supra*, p. 189. "Commerce with foreign nations," says Mr. Justice Daniel, for the court, in *Veazie v. Moore*, 14 How. 573, "must signify commerce which, in some sense, is necessarily connected with these nations; transactions which either immediately or at some stage of their progress must be extra-territorial."

The Pacific ocean belongs to no one nation, but is the common property of all. When, therefore, the *Ventura* went out from San Francisco or San Diego on her several voyages, she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character only was recognized, and she was subject to such laws as the commercial nations of the world had, by usage or otherwise, agreed on for the government of the vehicles of trade occu-

pying this common property of all mankind. She was navigating among the vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.

Navigation on the high seas is necessarily national in its character. Such navigation is clearly a matter of "external concern," affecting the nation as a nation in its external affairs. It must therefore be subject to the National government.

This disposes of the case, since by section 4289 of the Revised Statutes, the provisions of section 4283 are not applicable to vessels used in rivers or inland navigation, and this legislation, therefore, is relieved from the objection that proved fatal to the trade-mark law which was considered in *United States v. Steffens*, 100 U. S. 82. The commerce regulated is expressly confined to a kind over which Congress has been given control. There is not here, as in *Allen v. Newberry*, 21 How. 244, a question of admiralty jurisdiction under the Laws of 1845, but of the power of Congress over the commerce of the United States. The contracts sued on do not relate to the purely internal commerce of a State, but impliedly, at least, connect themselves with the commerce of the world, because in their performance the laws of nations on the high seas may become involved, and the United States compelled to respond.

Having found ample authority for the act as it now stands in the commercial clause of the Constitution, it is unnecessary to consider whether it is within the judicial power of the United States over cases of admiralty and maritime jurisdiction.

Affirmed.

ADMINISTRATOR NOT AUTHORIZED TO SUE BY LAW OF ANOTHER STATE.

UNITED STATES CIRCUIT COURT, S. D. NEW YORK,
NOVEMBER 8, 1880.

MACKAY, Administratrix, v. NEW JERSEY CENTRAL
RAILROAD CO.

A statute of New Jersey, authorizing a suit for damages for the death of a person by negligence to be brought in the name of the personal representative of such deceased person, held, not to authorize a suit by an administrator of such person appointed in New York.

ACTION for death of plaintiff's intestate, alleged to be caused by the negligence of defendant's servants. The opinion states sufficient facts.

SHIPMAN, D. J. The complaint in this case alleges that on April 23, 1874, Louisa S. Mackay died, and subsequently letters of administration upon her estate were duly granted to the plaintiff, a resident of the city of New York, by the surrogate of the county of New York; that the plaintiff duly qualified and entered upon the discharge of the duties of said office; that the defendants are a corporation created under the laws of the State of New Jersey, and are common carriers of passengers between the cities of New York and Jersey City, and on April 23, 1874, received Louisa S. Mackay, in New York, into one of their ferry-boats as a passenger to be transported to Jersey City, and so unskillfully conducted themselves that in consequence of their negligence she fell between the end of the boat and the pier at Jersey City and was drowned. The

complaint further alleges that by an act of the Legislature of New Jersey, passed March 3, 1848, it was provided: "1. Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, and the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death to the wife and next of kin of such deceased person; provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person."

After the jury was impanelled, and before any evidence was taken, the defendants moved to dismiss the complaint because the plaintiff, an administratrix in the State of New York, and appointed solely under its laws, has no power or authority, by virtue of the statute of the State of New Jersey, to sue for and recover damages for the death of the intestate—a question which, it was conceded by the plaintiff, is clearly presented upon the pleadings. It is manifest that the right of an administrator to recover for the pecuniary injuries resulting from the death of the intestate to the widow and next of kin is unknown to the common law, and exists only by statute. It has been held that such a statute has no extra-territorial force, and that no recovery can be had thereon for an injury which was committed beyond the limit of the State by whose Legislature the statute was enacted. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Beach v. Bay State Co.*, 30 Barb. 433.

The alleged injury in this case was received in New Jersey, and the question which arises is whether a New York administrator can, by virtue of the appointment of the surrogate of the county of New York, recover the damages which a personal representative is authorized to sue for and obtain for the benefit of the widow and next of kin by the statute of the State of New Jersey, and not by the laws of the State of New York. An administrator takes his title by force of the local law and the grant of administration. *Marcy v. Marcy*, 32 Conn. 308.

A New York administrator exists by virtue of his appointment under the laws of that State, and his powers and duties are prescribed by its statutes. Another State cannot impose upon him liabilities, obligations or duties different from those which the laws of New York impose, for he takes upon himself such obligations only as the laws of the State which appointed him create. Neither can the statutes of another State impart to the New York administrator powers which the New York statutes do not confer. He is the creation of the local law, and until additional authority is derived by virtue of an additional appointment, he has only the power which the local law confers.

The right which the plaintiff is supposed to have received by the statute of New Jersey is not a right to any property which are the assets of the deceased, or of her estate, but is a right to sue as trustee of a fund which may be obtained for the next of kin—a position in which she is not placed by the law under which

she was appointed. In order to execute such a trust the trusteeship must have been conferred, and the only title which the plaintiff has acquired to this trusteeship is by virtue of her appointment as administratrix by the surrogate under the laws of New York. Its laws do not confer upon the representatives of deceased persons any power to obtain damages for injuries resulting in death which the deceased received in another State. This question has been considered by the Supreme Courts of Massachusetts and of Ohio. In *Richardson v. N. Y. Central R. Co.*, 98 Mass. 85, a Massachusetts administratrix sued a New York corporation for damages, by reason of the death of the plaintiff's intestate through the negligence of the defendants in New York. The right to sue was founded upon a New York statute which is very similar to the New Jersey statute. The court say: "The plaintiff is the administratrix appointed under the laws of Massachusetts. Her right to sue in this Commonwealth in her representative capacity is upon causes of action which accrued to the intestate, or which grow out of his rights of property or those of his creditors. The remedy which the statutes of New York give to the personal representatives of the deceased, as trustees of a right of property in the widow and next of kin, is not of such a nature that it can be imparted to a Massachusetts executor or administrator *virtute officii*, so as to give him the right to sue in our courts, and to transmit the right of action from one person to another in connection with the representative of the deceased. The only construction which the statute can receive is that it confers certain new and peculiar powers upon the personal representative in New York. A succession in the right of action, not existing by the common law, cannot be prescribed by the laws of one State to the tribunals of another." To the same effect is the decision in *Woodward v. Michigan South., etc., R. Co.*, 10 Ohio St. 121.

The complaint is dismissed.

NEGLIGENCE—FIRE SET BY LOCOMOTIVE ON HIGHWAY.

ENGLISH COURT OF APPEAL, MARCH 18, 1880.

POWELL V. FALL, 43 L. T. Rep. (N. S.) 562.

The owner of a locomotive engine propelled by steam along a public highway is liable for damages to a rick of hay, standing on land adjoining the highway, occasioned by sparks proceeding from such engine and firing the hay, notwithstanding that such engine was constructed in conformity with the provisions of the acts for regulating the use of locomotives on roads, and was managed and conducted with all reasonable care and without negligence.

THIS was an action tried before Mellor, J., and reserved by him for further consideration. The facts of the case sufficiently appear from his judgment, which was as follows:

MELLOR, J. This was an action tried before me at Devizes without a jury. It was brought by the plaintiffs to recover a sum of 53l. 6s. 8d., in respect of injury done to a rick of hay upon a farm of the plaintiff, John Thomas Powell, adjoining a public highway, and which injury was caused by sparks escaping from the fire of a traction engine belonging to the defendant, which was then being propelled by steam power along the highway. The engine was constructed in conformity with the provisions of 24 & 25 Vict., ch. 70, and of 28 & 29 Vict., ch. 83, being the acts then in force for regulating the use of locomotives on turnpike and other roads. At the time when the injury was occasioned to the haystack by the sparks of fire issuing from

the defendant's engine, it was not travelling at a greater speed than that prescribed by the acts referred to, nor was the injury occasioned by any negligence on the part of the defendant's servants conducting or managing the same, and the question which I reserved for further consideration was, whether the owner of a locomotive engine propelled by steam along a public highway, using a fire for the purpose of generating the steam required to propel such engine, and which engine was constructed in conformity with the provisions of the Locomotive Acts above referred to, and was managed and conducted with all reasonable care and without negligence, was liable to the plaintiffs for injury occasioning damage to a rick of hay standing on land adjoining the highway, by sparks proceeding from such engine and firing the hay. It was contended on the part of the plaintiffs, that although the acts regulating the use of locomotives on turnpike roads and public highways might warrant the use of locomotives properly constructed, and not proceeding faster than the prescribed speed, still they did not exempt the owners of such locomotive engines from liability for injury or damage occasioned to others by the use of such locomotive engines, and they alleged that by the very terms of the 13th section of 24 & 25 Vict., ch. 70, and particularly of the 12th section of 28 & 29 Vict., ch. 83, their liability at common law was expressly preserved to the persons who might suffer injury arising from the use of such locomotives. The 13th section of 24 & 25 Vict., ch. 70, is as follows: "Nothing in this act contained shall authorize any person to use upon a highway a locomotive engine, which shall be so constructed or used as to cause a public or private nuisance, and every such person so using such engine shall, notwithstanding this act, be liable to an indictment or action, as the case may be, for such use, where, but for the passing of this act, such indictment or action could be maintained;" and by section 12 of 28 & 29 Vict., ch. 83, it is enacted that: "Nothing in this act contained shall authorize any person to use a locomotive which may be so constructed or used as to be a public nuisance at common law, and nothing herein contained shall affect the right of any person to recover damages in respect of any injury he may have sustained in consequence of the use of a locomotive." And it was further contended on the part of the plaintiffs, that whilst the acts entitled the defendant to use a locomotive properly constructed on the public highway, yet it was never intended by the Legislature to exempt him from liability to damages in respect of any injury sustained by third persons in consequence of the use by him of a locomotive, and that it was wholly immaterial to the result that such injury arose from no want of care or negligence on the part of the defendant's servants in the management and use of the same. On the part of the defendant it was contended that the effect of the several statutes being to authorize the use of locomotives on public highways, if constructed and managed according to the provisions of such statutes, was to exempt the owners from liability to make good any injury arising from the use of locomotives, unless some improper construction of the engine, or some act of negligence in the use of it, could be imputed to such owners or their servants. I am of opinion that the contention on the part of the plaintiffs must prevail. The principle which governs this case is that established by *Fletcher v. Rylands* (L. R., 1 Ex. 205; 14 L. T. Rep. [N. S.] 523), and affirmed in the House of Lords (*Rylands v. Fletcher*, L. R., 3 H. of L. 330; 19 L. T. Rep. [N. S.] 220), which overruled the decision of the majority of the Court of Exchequer, and supported the view taken by Bramwell, B., in that court. That case, which settled, as I think, the principle upon which the result of this case depends, is "that when a man brings or uses a thing of a dangerous character on his own land, he

must keep it in at his own peril, and is liable to the consequences if it escapes and does injury to his neighbor." In the present case the defendant brought along the public highway a locomotive propelled by steam generated by fire, and although that act might be justified by the provisions of the locomotive statutes, yet the authority conferred by these statutes to use locomotives on public highways is not an unqualified authority, as was the case in *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679; 2 L. T. R. (N. S.) 394, and in *Rez v. Pease*, 4 B. & Ad. 30, but is a qualified authority only, and does not extend to protect the defendant from liability to damages in respect of any injury he may have occasioned in consequence of the use by him of a locomotive engine on the highways. *Jones v. Festiniog Railway Co.*, L. R., 3 Q. B. 733; 18 L. T. Rep. (N. S.) 902, is entirely in point, and in my opinion governs the present case. In that case as in this, an action had been brought by the plaintiff to recover damages by reason of a haystack having been fired by sparks from a locomotive engine. There, as here, the defendants contended that the statute under which they worked and used their locomotive prevented any liability for damage occasioned by such working and use; but the court held, distinguishing it from *Rez v. Pease*, *ubi sup.*, and *Vaughan v. Taff Vale Railway Co.*, *ubi sup.*, that the act authorizing the making and use of the railway in that case did not exempt them from liability to make good the damage done to the plaintiff by an accidental fire occurring in the use of a locomotive engine without negligence. Now, in the cases under consideration, the right to recover for damages is expressly reserved to a person sustaining injury from the use of locomotive engines authorized by those statutes. It is therefore a stronger case than that of *Jones v. Festiniog Railway Co.*, *ubi sup.* Upon principle and authority therefore, I am satisfied that judgment ought to be entered for the plaintiffs.

The defendant appeared.

Cave, Q. C., and *Kinglake*, for the defendant.

A. Charles, Q. C., and *Bullen*, for the plaintiffs, were not called upon.

BRAMWELL, L. J. I am of opinion that the judgment of Mellor, J., should be affirmed. The act done by the defendant on the road is confessedly dangerous, because it is admitted that no care on the part of those who manage the engine can prevent the sparks from flying. It is conceded that at common law, before the act was passed, the plaintiff could have maintained his action; but the act is said to furnish a defense. To my mind the act not only goes to show that the action would formerly have been maintainable, but also carefully provides that nothing contained in it shall prevent the action being maintainable still. It seems to me a just and reasonable enactment that if a man for his own advantage uses a dangerous machine on the highway, he should pay damages for injury caused thereby. If the profit which he obtains from using it is not enough to enable him to pay for the damage he causes, the loss is not one to which the community or the injured person ought to be subject, and it is for the public benefit that the use of the machine should be suppressed. The action being maintainable at common law, it is in accordance with good sense, and in my view the statute is careful to provide that no conclusion should be drawn from its provisions such as was drawn in *Vaughan v. The Taff Vale Railway Co.*, 5 Hurl. & Norm. 679; 2 L. T. Rep. (N. S.) 394. I am bound to say that the result of the arguments used in the present case has been to harden my conviction that *Rez v. Pease*, 4 B. & Ad. 30, and *Vaughan v. Taff Vale Railway Co.*, *ubi sup.*, were wrongly decided.

Baggallay and *Thesiger, L.JJ.*, concurred.

Appeal dismissed.

NEW YORK COURT OF APPEALS ABSTRACT.

CARRIER—OF GOODS—DUTY TO PROVIDE MOTIVE POWER TO RELIEVE FROM EMERGENCY—NEGLIGENCE—WHEN QUESTION FOR JURY—INABILITY TO DO DUTY CAUSED BY PREVIOUS NEGLIGENCE, NOT EXCUSABLE—DAMAGES.—(1) An unforeseen obstruction arose whereby a train loaded with cattle belonging to plaintiff was delayed. There was not sufficient motive power to move the train so as to prevent injury to the cattle, but there was evidence, which was disputed, that engines could be procured by telegraphing to a place forty-three miles away, upon the same railroad, and it was shown that the conductor of the train refused to send for such engines. *Held*, that a submission to the jury of the question as to whether there was gross negligence on the part of the railroad company's servant, the conductor, in not sending for the engines, was not error. (2) In this case the train was run into water over the track, so deep as to put out the fires of the propelling engine, so that it could not move the train. The conductor in charge knew before he attempted to pass over the track at that place that it was covered with water, which was liable to put out the engine fires. The train being unable to go on, it became the duty of defendant to move the cars where plaintiff could unload his cattle. *Held*, that the company defendant could not set up as an excuse for its neglect to move the cars to such a place, the lack of motive power, which had been caused by its own negligence. (3) In this case plaintiff's cattle were injured by a neglect of defendant, the railroad company, to afford him an opportunity to unload. *Held*, that the damage from such injury could not be reduced or affected by what injury might have happened if the opportunity to unload had been afforded, there being no evidence, but only a mere surmise, as to the amount of such injury. Judgment affirmed. *Bills v. New York Central Railroad Co., appellant.* Opinion by Finch, J.; Folger, C. J., and Earl, J., dissented. [Decided Feb. 1, 1881.]

PLEDGE—PROPERTY PLEDGED FOR SPECIFIC PAYMENT NOT LIABLE FOR GENERAL INDEBTEDNESS—BANKER'S LIEN—EVIDENCE—DECLARATIONS AS TO TITLE.—Plaintiff, a banker, advanced to a firm, of which B. was a member, \$10,000, upon bills of lading of whisky. This loan was afterward paid. Plaintiff had also advanced large amounts to the same firm, for which he held personal property as security, but those advances were not general and did not by any special agreement include the whisky. *Held*, that to entitle the plaintiffs to hold the whisky for any advances beyond the \$10,000, a special agreement should be proved. *Wilmerding v. Hart, Hill & D. Sup. 305; Robinson v. Frost, 14 Barb. 538.* As a pledge the whisky could not be held for any more than the debt, unless by special agreement. *Bouv. L. Dict.; 2 Kent's Com. 775.* Nor could the plaintiff hold the same as banker for a banker's loan. The general lien which bankers hold upon bills, notes, and other securities, deposited by them for a balance due on general account, cannot be invoked when the pledge of property is for a specific sum and not a general pledge. *Story on Agency, § 380, 381; Neponset Bank v. Leland, 5 Mete. 250; Grant on Banking, 168; 3 Para. on Cont. 202.* Consequently, in a suit by plaintiff against a sheriff for the seizure of the whisky, on an execution against another, after the \$10,000 was paid, *held*, that the declarations of B. as to his ownership of the whisky were admissible. Order affirmed and judgment absolute. *Duncan et al., appellants, v. Brennan.* Opinion *per Curiam.* [Decided Jan. 18, 1881.]

PROMPTLY DEFEATS ACTION—DEALING WITH PROPERTY AFTER DISCOVERY—REMOVING GROUND OF RESCISSION PENDING SUIT.—(1) In June, 1872, plaintiff purchased of defendant lands in New York, for which he paid \$12,500 cash, and gave mortgages for \$37,500. This was in pursuance of a contract made in March, 1872, wherein defendant covenanted to give a title free from all incumbrance. Defendant's wife had died in 1869, which fact plaintiff knew, as he was well acquainted with defendant. Defendant had secretly remarried in Jersey City, N. J., in 1871. He and his wife resided in different places in the city of New York, until June, 1872, when they first cohabited as man and wife. When the conveyance was made, plaintiff did not ask defendant if he was married, and defendant did not inform him of the fact. Defendant's broker in the sale informed plaintiff's attorney that defendant was unmarried. *Held*, that defendant was guilty of fraud in not disclosing his marriage to plaintiff; that a belief on defendant's part that the marriage was invalid would not relieve him from the duty of disclosure, and that plaintiff was entitled, upon the discovery of the marriage, to have the contract rescinded. (2) But after plaintiff had discovered the existence of the marriage, he retained possession of the property for two years and a half, upon defendant's assurance that the title would be made perfect, selling and conveying some of it, and receiving rents from a part of it, and joined in a suit to determine whether the wife had dower, etc. He then, without notice previously, tendered a deed of reconveyance and brought action for rescission. Pending the action defendant tendered a deed releasing the dower interest of the wife. *Held*, that the action for rescission was not maintainable. A party, to rescind a contract for fraud, must act promptly upon the discovery of the fraud, and offer to restore what he has received under the contract. He has an election to sue for damages or to rescind the contract, but these sometimes are inconsistent and a choice of one excludes the other. *Masson v. Bovet, 1 Den. 69; Cobb v. Hatfield, 46 N. Y. 533; Lawrence v. Dale, 3 Johns. Ch. 23; Tanner v. Smith, 10 Sim. 441; Ayres v. Mitchell, 3 S. & M. 693; Vigers v. Pike, 8 Cl. & Fin. 562. See, also, Gale v. Nixon, 6 Cow. 445; More v. Smedburgh, 8 Paige, 600; Tompkins v. Hyatt, 28 N. Y. 347.* If plaintiff was induced to postpone action upon defendant's promise to perfect the title, he should have fixed a reasonable time in the future to perfect the title, giving defendant notice before bringing the action. *Harris v. Troup, 8 Paige, 423; Myers v. De Mier, 52 N. Y. 647.* And in accordance with the general rule in these actions it is sufficient if the party is able to make his title before decree, provided no change in circumstances has occurred. Consequently the tender of the release of dower, after the action was commenced, was a good defense. *Davidson v. Moss, 5 How. (Miss.) 683; Clinton v. Burgess, 2 Dev. Eq. 13; Gaunt v. Macomb, 6 Cal. 368; 1 Story's Eq. Jur., § 777.* Judgment reversed and new trial granted. *Schiffer v. Dietz, appellant.* Opinion by Andrews, J. [Decided Jan. 18, 1881.]

WILL—CONSTRUCTION OF—ANNUITY FROM INCOME OF ESTATE NOT PAYABLE FROM CORPUS.—The will of testatrix, after providing for debts, etc., a monument and a trifling bequest of specific chattels, gave to executors named all the residue of her estate, real and personal (she had both), to receive the rents and profits of the real estate, and to invest and keep invested the personal estate, and to apply those rents and profits, and the interest or income of the personal estate, to the use of her husband for his life, except that they should apply to the use of the plaintiff who, the will says, was brought up by her, "the sum of \$500 per annum thereout" till he reached the age of twenty-one,

RESCISSION OF CONTRACT—FRAUD—CONCEALMENT OF MARRIAGE BY VENDOR OF LANDS—FAILURE TO ACT

after that, \$1,000 per annum "thereout" during the life of her husband, and after his death \$2,000 "thereout" during the natural life of plaintiff. There was no devise of the remainder after the death of plaintiff, though testatrix had a brother living when she made the will, and who survived her, and a cousin. At the date of the will, and when testatrix died, the income from the real estate and the interest from the personal property was sufficient to pay the varying annuities given to plaintiff and leave a larger sum for the use of the husband. Of her real estate, one piece was occupied as a homestead, and the remainder yielded \$5,000 per annum. The personal property was a mortgage of \$18,000, yielding seven per cent per annum. Subsequent to her death and the death of her husband the entire property has failed to yield enough to pay taxes and expenses of repairs upon the real estate and leave enough to pay plaintiff the amount of his annuity. *Held*, that the corpus of the estate could not be applied to make up the amount of the annuity. Testatrix gave her husband the income of the estate only, and the fixed sums given to plaintiff were to be taken thereout. Generally speaking, rents and profits mean annual rents and profits. *Henceage v. Lord Andover*, 3 Y. & J. 300; *Allan v. Backhouse*, 2 Ves. & B. 65. Direction to pay annual rents does not give a right to corpus. *Foster v. Richardson*, 11 Hare, 350. The natural meaning of a direction to pay rents, etc., would confine it to annual rents, etc. *Bortle v. Blundell*, 1 Mer. 192; *Bloomer v. Waldron*, 3 Hill, 361. Though this meaning has been departed from in Chancery. See *Story's Eq. Jur.*, § 1064 a; *Green v. Belcher*, 1 Atk. 505. See, however, *Wilson v. Holliday*, 1 Russ. & My. 590; *Small v. Wing*, 5 Bro. P. C. (Tomlin's ed.) 60; *Schemerhorn v. Schemerhorn*, 6 Johns. Ch. 70. There is no principle involved in these cases save to ascertain what is the testator's intention. *Baker v. Baker*, 6 H. of L. 615. Each case depends upon its own circumstances and language. *Id.*; *Birch v. Sherratt*, L. R., 2 Ch. App. 642, 644; see *Pierpont v. Edwards*, 25 N. Y. 128; also *Dickin v. Edwards*, 4 Hare, 423; *Craig v. Craig*, 3 Barb. Ch. 76, 94; *Phillips v. Gutteridge*, 3 DeG., J. & S. 332; *Giddings v. Seward*, 16 N. Y. 365; *De Nottebeck v. Astor*, 13 id. 98. Judgment reversed and new trial granted. *Delaney v. Van Aulen*, appellant. Opinion by Folger, C. J. [Decided Feb. 1, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

APPEAL—AMOUNT DUE TO SEVERAL FOR COMMON SERVICE MEASURES THE AMOUNT IN CONTROVERSY.—The suit below was by a set of salvors to recover for a single salvage service, and there was but one claim filed for the property saved. The total amount of the recovery was \$14,198, but on the division by the court below, between the several parties entitled to share in the recovery, some got less than \$5,000. Separate and distinct interests were not united in the suit. The service rendered was the joint service of all the salvors, and the recovery was on that account. *Held*, that an appeal would lie to this court. The owners were decreed to pay the salvors for what they, acting together in a common service, had done. In such a suit the owners cannot be deprived of their appeal because the court below, in the further progress of the cause, saw fit to apportion the recovery among the salvors according to their respective merits. The decree is, in legal effect, one decree in favor of all the salvors, they having, as between themselves, unequal interests. In all the cases where it has been held that several sums decreed in favor of or against different persons could not be united to give jurisdiction on appeal, it will be found that the matters in dispute were entirely sepa-

rate and distinct and were joined in one suit for convenience and to save expense. See *Seaver v. Bigelow*, 5 Wall. 208; *Rich v. Lambert*, 12 How. 347; *Oliver v. Anderson*, 6 Pet. 143; *Stratton v. Jarvis*, 8 id. 4. Here the amount in controversy was what was due the salvors collectively and not the particular sum due each. See *Shields v. Thomas*, 17 How. 4. Motion to dismiss or affirm denied. Appeal from United States Cir. Ct., Louisiana. *Snclair et al., appellants, v. Cooper et al.* Opinion by Waite, C. J. [Decided Jan. 10, 1881.]

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—STATES MAY PROVIDE FOR IMPROVEMENT OF LOCAL WATERS—VIOLATIONS BY STATE STATUTE OF STATE CONSTITUTION NOT COGNIZABLE IN FEDERAL COURTS—TAXATION NOT TAKING FOR PUBLIC USE.—An act of the Legislature of Alabama to provide for the improvement of the river, bay and harbor of Mobile, which authorized the deepening and widening of such river, harbor and bay, and the construction of an artificial harbor and the issue of bonds by Mobile county therefor, *held*, not invalid as conflicting with the commercial power vested in Congress. The subjects upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being and until it sees fit to act, they may be regulated by State authority. The improvement of harbors, bays and navigable rivers within the States falls within this last category of cases. The control of Congress over them is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government. Legislation of the States for the purposes and within the limits mentioned, do not infringe upon the commercial power of Congress. There have been expressions of individual judges of this court that the mere grant of commercial power, exclusive of congressional action, is exclusive of State authority (see *Gibbons v. Ogden*, 9 Wheat. 1; *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 252), but there has been no adjudication of

the court to that effect. See, as to the doctrine in the case at bar, *Couley v. Wardens of Philada.*, 12 How. 230; *Gilman v. Philadelphia*, 3 Wall. 727; *Crandall v. State of Nevada*, 6 Id. 42; *Welton v. State of Missouri*, 91 U. S. 282; *Henderson v. Mayor of New York*, 92 Id. 259. (3) It was claimed that the act was invalid under the Constitution of Alabama, forbidding the taking of private property for public use, etc., inasmuch as the expense was ultimately to be defrayed by taxation upon property in the county of Mobile. *Held*, that taxation is not such a taking, and further, that this court would not pass upon the question. The judicial power of the Federal government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. Decree of United States Cir. Ct., S. D. Alabama, affirmed. *County of Mobile, appellant, v. Kimball et al.* Opinion by Field, J.

[Decided Jan. 10, 1881.]

RES ADJUDICATA—COMPROMISE WITH PRINCIPAL BY UNITED STATES DISCHARGES SURETY—DISTILLER'S BOND.—Sureties on a distiller's bond cannot be subjected to the penalty attached to the commission of an offense, when the principal has effected a full and complete compromise with the government, under the sanction of an act of Congress, of criminal prosecutions based upon the same offense and designed to secure the same penalty. Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term "penalty," involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. The compromise pleaded must operate for the protection of the distiller against subsequent proceedings as fully as a former conviction or acquittal. The government, through its appropriate officers, has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would therefore be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in *Ex parte Lange*, speaking through Mr. Justice Miller: "If there is any thing settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is proposed in the same court, on the same facts, for the same statutory offense. The principle finds expression in more than one form in the maxims of the common law." 18 Wallace, 108. Judgment of United States Cir. Ct., E. D. Missouri, affirmed. *United States, plaintiff in error, v. Chouteau et al.* Opinion by Field, J.

[Decided Jan. 17, 1881.]

KANSAS SUPREME COURT ABSTRACT.

JULY TERM, 1880.*

AGENT—TO SELL, MAY NOT MORTGAGE.—W. sold a colt to B. Subsequently, and while the colt was in W.'s possession, B. gave W. authority to sell the colt. W. did not sell, but mortgaged the colt in his own name to a third person. *Held*, that the mortgage was void. A power to sell does not authorize an agent to

execute a chattel mortgage. *Sutcliff v. Wilcox.* Opinion by Horton, C. J.

— TO COLLECT NOTE MAY RECEIVE ONLY MONEY IN PAYMENT.—An attorney employed to collect a note is, in the absence of special directions, authorized to receive money only in payment thereof, and does not bind the client by an agreement to receive county warrants, or other property, real or personal, in payment and discharge of the debtor's liability on the note. 2 Daniel on Neg. Inst., § 1245; *Chapman v. Cowles*, 41 Ala. 183; *Wright v. Dailey*, 26 Tex. 730; *Bradford v. Arnold*, 31 Id. 412; *Moye v. Cogdell*, 60 N. C. 91; *Maddur v. Bevan*, 30 Mil. 485; *Walden v. Bolton*, 55 Mo. 405; *Sparks v. Ledergerber*, 66 Id. 465; *Harper v. Harvey*, 4 W. Va. 530; *Maxwell v. Owen*, 7 Coldw. 630; *Campbell v. Bailey*, 19 La. Ann. 172; *Davis v. Lee*, 20 Id. 248; *Mayor v. Blease*, 4 Rich. (S. C.) 10; *Carstens v. Barnstorf*, 11 Abb. Pr. (N. S.) 442; *Beers v. Hendrickson*, 46 N. Y. 685; *De Mote v. Dagron*, 51 Id. 655; *Marbourg v. Smith*, 11 Kans. 554. *Herriman v. Shomon.* Opinion by Brewer, J.

VERDICT—OBTAINED BY AGGREGATING AMOUNTS DECIDED UPON BY DIFFERENT JURORS AND DIVIDING BY 12 ERRONEOUS—CIVIL DAMAGE LAW—EACH SELLER OF LIQUOR CONTRIBUTING TO INTOXICATION LIABLE FOR ENTIRE WRONG.—(1) Where, in order to determine the amount of the verdict, the jury agreed that each juror should name the amount for which he was willing to give a verdict, and that the sum of these amounts should be divided by twelve, and that the quotient should be returned as the verdict, and this agreement was carried into effect, and the result reached in no other way and without any subsequent consideration or assent of the several jurors. *Held*, that a verdict so made up and returned was improper, and must be set aside. (2) The Civil Damage Law of Kansas provides that in case of injury to any one by reason of the intoxication of another, the person selling the liquor which "shall cause the intoxication" shall be liable for the injury. *Held*, that it is no defense to an action brought under this statute, that the intoxication was caused partially by liquor sold by other parties; it is enough if the liquor sold by the defendant was the direct cause, either in whole or in part, of the intoxication. Where the separate acts of two wrong-doers contribute to and jointly cause the wrong, each is responsible as though he were the sole wrong-doer. This is a universal law of torts, and applies in the case of the sale of liquor as in all other cases. Of course the act must stand in the line of direct causation. If a glass of liquor is sold to-day which simply awakens an appetite, which months thereafter causes the party to seek and drink liquor to excess, such sale cannot be said to be in the line of direct causation; but where the liquor sold is part of that which directly produces the intoxication, the sale is within the statute, although it appears that other parties sold liquor which also contributed to the intoxication. In other words, it is sufficient if it appears that the liquor sold was either solely or with liquor sold by other parties at or about the same time, the direct cause of the intoxication. In *Lawsen on the "Civil Remedy for Injuries arising from the sale or gift of intoxicating liquors,"* p. 20, it is said: "A seller of intoxicating liquors by which another is injured in person, property or means of support, is not released from liability, if a part of the liquors causing the intoxication was sold by others. He is liable if he contributed to the result." *Woolheather v. Risley*, 38 Iowa, 480; *Fountain v. Draper*, 49 Ind. 441; *Hackett v. Smelsley*, 77 Ill. 100; *Emory v. Addie*, 6 Ch. Leg. N. 330; *Stone v. Nickerson*, 5 Allen, 29; *Bodge v. Hughea*, 53 N. H. 618; *Boyd v. Watt*, 27 Ohio St. 229; *Roth v. Kippy*, 16 Am. L. Reg. (N. S.) 111. *Werner v. Edmiston.* Opinion by Horton, C. J.

* To appear in 54 Kansas Reports.

VIRGINIA SUPREME COURT OF APPEALS ABSTRACT.*

APRIL, 1890.

EXEMPTION—FRAUDULENT CONVEYANCE OF EXEMPT PROPERTY—HOMESTEAD—PURCHASE-PRICE OF EXEMPT GOODS—CONFUSION.—(1) Where a "householder or head of a family" executes a homestead deed as a part and in furtherance of a design to hinder, delay and defraud his creditors in the recovery of their just debts, such deed will be vitiated and invalidated by such conduct. *Gilleland v. Rhodes*, 34 Penn. St. 187; *Dieffendoffer v. Fleber*, 3 Grant Cas. 30; *Smith v. Emerson*, 43 Penn. St. 456; *Strouse v. Becker*, 38 id. 190. In the last case, Woodward, J., said the rule of decision which denies the benefit of the exemption law to a dishonest debtor who shuffles and conceals his property, is founded in a sound morality and is agreeable to the spirit and intention of the exemption law. The remark is equally applicable to the homestead law. (2) The laws of Virginia not allowing property to be claimed as exempt for debts contracted for the purchase-price of such property or any part thereof—where a large portion of goods claimed as exempt has not been paid for, and are so mingled with those that have been as to put it out of the power of the vendors to distinguish between the two, the onus is on the person claiming the exemption to show which has been paid for; and he failing to do this, they will all be treated as not having been paid for, as far as the homestead deed is concerned, and therefore not exempt under the law. *Ross v. Sharpless*. Opinion by Anderson, J.

MORTGAGE—TRUST DEED BY INDORSER OF NOTE TO SECURE IT—WHEN PROTEST AND NOTICE TO INDORSER NOT NECESSARY—WAIVER BY INDORSER.—B, as maker and R. and C., as indorsers, made two notes which were discounted at the E. & A. bank, and the proceeds went to the credit of B. The notes were discounted much on the faith of a deed of trust by which C. and wife conveyed to A. a tract of land in trust to secure the notes, with this covenant: "that upon the default of payment of either of said notes or any part thereof, the said A. shall upon the request of the president or other authorized officer of the said E. & A. bank, after giving thirty days' notice, etc., proceed to sell at public auction the property hereby conveyed for cash, etc., and pay off and discharge any part of the sum of \$2,000 hereby secured to be paid then remaining unpaid," etc. The notes were not paid at maturity; and were not protested, nor was there any notice to the indorsers. *Held*, that the deed of trust with the covenant therein bound C. to the extent of the trust subject, though there was no protest or notice to the indorsers; that the bank was not bound to give notice to R., so as to hold him liable, in order to hold C. liable. *Mory v. King*, 7 Eng. C. L. 57; *Hilton v. Catherwood*, 10 Ohio St. 109; *Mitchell v. Hodgson*, 35 Vt. 104. In this case C. repeatedly applied to officers and directors of the bank for a postponement of the sale of the land under the deed of trust, promising to pay the debt, and never objected that the note had not been protested or that notice had not been given him. *Held*, a sufficient proof of an agreement to waive demand and notice. 3 Dan. Neg. Inst., § 1147-1152; *Walker v. Lavery*, 6 Manuf. 467; *Pate v. McCluer*, 4 Rand. 184. *Cordwell v. Allen*. Opinion by Staples, J.

TRESPASS—ONE PRESENT ENCOURAGING, LIABLE AS PRINCIPAL FOR INJURY—INSISTING UPON ADMISSION TO CLOSED HOUSE TRESPASS—WILLFUL FIRING PISTOL IN CITY.—Whilst the mere presence of a person at the commission of a trespass will not make him liable for its consequences, yet every one present encouraging or inciting a trespass by words, gestures, looks or

signs, or who in any way or by any means, countenance or approves the same, is in law assumed to be an aider and abettor, and is liable as a principal to the extent of the injury done. But the burden is on the plaintiff to show that the party charged was present, aiding, encouraging or inciting the trespass. *Jordan v. Wyatt*, 4 Gratt. 131; *Parsons v. Harper*, 16 id. 64; 1 Hale P. C. 438; 3 Greenl. Ev., § 40; 43 Mo. 238. Here T. was the keeper of a restaurant in Alexandria city, which has an ordinance prohibiting the discharging of firearms in its streets. He had shut his front door for the night but his light was burning, when D., H. and S. came there and demanded admittance about midnight. S. went around at a side door, went in and told T. that D. wanted to come in. D. and H. were at the front door. D. said to H. "fire a salute," or something of the sort. H. fired, and the ball went through the door into the leg of T., wounding him. *Held*, in an action by T. against D. and H. for the injury that D. was liable. Insisting on being admitted into the house of another at a late hour of the night, after it is closed and after being refused by the owner, is a trespass. The willful firing of a pistol in the streets of a city, whether done maliciously or not, is of itself an unlawful act, and the consequences must be visited on those who commit it or instigate it. *Duingerfeld v. Thompson*. Opinion by Christian, J.

WEST VIRGINIA SUPREME COURT OF APPEALS ABSTRACT, 1890.*

ATTORNEY—LIEN OF, UPON JUDGMENT.—An attorney has a lien on the judgment or decree obtained by him for his client for services and disbursements in the case whether the amount of his compensation is agreed upon or depends upon a quantum meruit. This lien includes not only the amount necessary to pay for his services and disbursements in the case in which the judgment or decree is rendered, but also the amount necessary for such person in any other case so connected with it as to form the basis on which such judgment or decree is rendered or which is essential to the realizing it. This lien is subject to all the equitable liens of the defendant in the judgment existing at the time of its rendition. Notice to the defendant, express or implied, of the claim of the plaintiff's attorney to such lien, before the defendant pays such judgment to plaintiff, is essential to the maintenance of such lien, but notice of the existence of such lien to the assignee of such judgment is not essential. Such lien may be waived by any arrangement or transaction made by or with the attorney which satisfactorily shows an intention to waive such lien and rely exclusively on some other security or mode of payment, but such lien will continue to exist unless an intention, and a manifest intention, that it shall not continue to exist appears. Here P., an attorney, recovered a judgment for R. against L., and after L. becomes totally insolvent, R. assigned this judgment for a valuable consideration to D., who had no notice of the attorney's lien; P., the attorney, then takes the bond of R. for his fees in the case, and at the same time R. confesses a judgment to P. for the amount, and simultaneously he assigns his judgment against L. to P., to satisfy his fees. *Held*, that these transactions were not a waiver by the attorney of his lien, and that he was entitled to priority over D. in the distribution by the court of the amount of the judgment. *Central Land Co. of West Virginia v. Calhoun*. Opinion by Green, P. J.

CONSTITUTIONAL LAW—EMIGRANT DOMAIN—ALTERATION OF GRADE OF STREET TO INJURY OF PROPERTY—REMEDY.—If a municipal corporation, in changing the

* To appear in 26 Gratian's Reports.

* To appear in 16 West Virginia Reports.

grade by raising or depressing its streets, permanently damage private property without acquiring the right to do so, and if demanded, by paying just compensation therefor, it violates the constitutional provision, which declares that private property shall not be taken or damaged for public use without just compensation. When the Constitution forbids a damage to private property, and points out no remedy, and no statute gives a remedy for the invasion of the right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of such grievance. *Johnson v. City of Parkersburg*. Opinion by Johnson, J.

CONTEMPT—ADVICE OF COUNSEL HOW FAR AN EXCUSE—PROCESS MUST BE LAWFUL TO AUTHORIZE PUNISHMENT—PROCESS IMPROVIDENTLY ISSUED LAWFUL.—The advice of counsel may, under some circumstances, be a palliation of the offense of a client in disobeying the lawful process of the court, but the extent of such palliation must depend upon the character of such advice and the circumstances under which it has been given. The offense will be palliated by such advice to the extent only of making it a reckless disobedience of the process instead of a willful contempt of the court when the advice is hasty and inconsiderate, or when the party through carelessness has failed to give the counsel correct information as to the facts of the case. In order to justify any punishment in such a case, the process of the court disobeyed must have been its lawful process. By its lawful process is meant such process as the court has jurisdiction to issue. If such jurisdiction exists, its process is lawful though it be improvidently awarded, or though on the merits of the case it ought not to have been awarded. If a supersedes, which this court has power to issue, be improvidently awarded, the defendant should move to have it quashed, and he cannot, while it is in force, disobey it with impunity. *State of West Virginia ex rel. Mason v. Harper's Ferry Bridge Co.* Opinion by Green, P. J.

REAL ESTATE—CONVERSION TO PERSONALTY BY SEVERANCE.—To convert an article which is part of the freehold into a chattel state by severing it from the realty, the act of severance must be done by one having the authority or right to do so, and it must be severed with the intention of converting it into a chattel state. *Levis v. Rosler*. Opinion by Moore, J.

RECENT ENGLISH DECISIONS.

ATTORNEY—LIEN AS TO ALIMONY PENDENTE LITE PAID TO HIM.—A solicitor's lien does not extend to alimony *pendente lite* paid over to him as such, *i. e.*, for the purpose of the wife's maintenance, unless he holds her direct written authority to him to receive it as her agent under rule 94 (D. R.). *Bremner v. Bremner* and *Brett*, L. R., 1 P. & D. 257, distinguished; *Leete v. Leete*, 48 L. J. 61, Mat., followed; Prob. Div. and Adm'r Div., Nov. 16, 1880. *Cross v. Cross*. Opinion by Manley, J., 43 L. T. Rep. (N. S.) 533.

BAILEMENT—LIABILITY OF WAREHOUSEMAN AS TO DELIVERY OF GOODS CONSIGNED TO ANOTHER—TRIPPLICATE BILLS OF LADING.—The consignees and owners of a cargo to arrive in London indorsed and delivered the first of three bills of lading to the plaintiffs as a collateral security for money advanced. These bills of lading had been signed by the master of the ship in the usual set, marked respectively "First," "Second," and "Third," and they represented the goods as deliverable to the said consignees or their assigns, that freight was made payable in London, and that the master had affirmed to three bills of lading, "the one of which bills being accomplished, the rest to stand void." When the ship arrived the consignees made

entry of this cargo, and it was placed in defendants' warehouses. The master on the same day lodged with the defendants a copy of the manifest of the cargo, with an authority to defendants to deliver the goods to the holders of the bill of lading; and on the following day, notice to detain the cargo until the freight should be paid. Upon receipt from the consignees of the second of the bills of lading, the defendants entered the consignees in their books as enterers, importers, and proprietors of the goods, and after removal of the stop for freight, delivered the goods to persons other than the plaintiffs, on delivery orders signed by the consignees, the plaintiffs having no knowledge of any dealings with the cargo. *Held*, by Bramwell and Bagallay, L. JJ. (Brett, L. J., dissenting), that the defendants were not liable to the plaintiffs in an action to recover the value of the goods. Judgment of Field, J., reversed. Cases referred to: *The Tigress*, 32 L. J. 97; *Fearon v. Bowers*, 1 H. Bl. 364; *Meyerstein v. Barber*, L. R., 2 C. P. 38 and 661, and 4 H. of L. 317; *Hollins v. Fowler*, L. R., 7 Q. B. 616, and 7 H. of L. 757; Court of App., Nov. 19, 1880. *Glyn Mills, Currie & Co. v. East and West India Dock Co.*, 43 L. T. Rep. (N. S.) 584.

FALSE IMPRISONMENT—DEFENDANT NOT ACTIVELY INSTRUMENTAL IN PROSECUTION.—The defendant having missed two pairs of horse clippers from his stable, sent for a police constable and said, "I have had two pairs of clippers stolen from me, and they were last seen in the possession of Danby." Thereupon the constable, having made inquiry, and without communicating with the defendant, arrested the plaintiff, who was taken before the magistrate and committed for trial. *Held*, that there was no evidence that the defendant was actively instrumental in putting the criminal law in force, and therefore he was not the prosecutor and not liable in an action for false imprisonment and malicious prosecution. C. P. Div., Nov. 25, 1880. *Danby v. Beardsley*. Opinions by Lopes and Lindley, JJ., 43 L. T. Rep. (N. S.) 103.

SURETYSHIP—WHEN DEATH OF SURETY DOES NOT DETERMINE CONTRACT—CORPORATION SUCCEEDING PRIVATE ASSOCIATION—TRUSTEE.—(1) A, desiring to become an underwriting member of Lloyd's, B gave a guarantee to the committee of that body on behalf of A, in which he held himself responsible "for all his engagements in that capacity." *Held* (affirming the decision of Fry, J.), that the guarantee was not determined by the death of the guarantor or by notice of his death. *Calvert v. Gordon*, 3 M. & R. 124, followed. *Held*, also, that the guarantee extended to all engagements entered into by A, as an underwriter, both with the members of Lloyd's and other persons. (2) When the guarantee was given, Lloyd's was a voluntary association, managed by a committee, to whom the guarantee was given. A few years after the members of this association were incorporated by a special act of Parliament under the name of Lloyd's, and the rights of the committee were vested in the corporation. *Held*, that the committee, and the corporation as their successors, were in the position of trustees for all persons with whom A had entered into engagements as an underwriter, and were therefore entitled to maintain this action. Cases referred to, *Calvert v. Gordon*, 2 Sim. 253; *Coulthart v. Clemenson*, 41 L. T. Rep. (N. S.) 798. Court of Appeal, Nov. 15, 1880. *Lloyd's v. Harper*. Opinions by James, Cotton and Lush, L. JJ., 43 L. T. Rep. (N. S.) 481.

WILL—GIFT TO ILLEGITIMATE CHILD—SUBSEQUENT GIFT TO "CHILDREN."—A will contained the following provisions: "I bequeath unto my grandson James (the son of my daughter Alice Jane, and who is now residing with me) the legacy or sum of 500*l.*, to be paid to him if and when he shall attain the age of

twenty-one years. * * * But in case my said grandson James shall die under the age of twenty-one years, * * * the said sum * * * shall go in augmentation of the legacy of 2,500^l hereinafter bequeathed upon trusts in favor of the children and issue of my said daughter Alice Jane." And subsequently the will contained a legacy of 2,000^l to trustees, the income of which was to be accumulated for twenty-one years or the death of Alice Jane, when the fund and its accumulations were to be divided amongst all the children of Alice Jane. The grandson James was illegitimate. He survived his mother. *Held*, by Jessel, M. R. and the Court of Appeal, that the grandson James was not entitled to any share of the 2,000^l or the accumulations as one of the children of Alice Jane. *Hill v. Crook*, L. R., 6 E. & J. App. 265, distinguished. See *Bagley v. Mollard*, 1 R. & M. 581. (Ct. Appeal. July 1, 1880. *Re Hindle [Meyson v. Hindle]*. Opinions by James Cotton and Thesiger, L.J.J., 43 L. T. Rep. (N. S.) 551.

NEW BOOKS AND NEW EDITIONS.

LEWIS' LAW OF THE STOCK EXCHANGE.

Law Relating to Stocks, Bonds and other Securities in the United States. By Francis A. Lewis, Jr., of the Philadelphia Bar. Philadelphia: Rees, Welsh & Co., 1881. Pp. xxxiv, 196.

THIS monograph is divided as follows: the Stock Exchange; effect of exchange usages on stock contracts; method of transfer; negotiability of stock certificates; statute of frauds; wagering contracts; pledges; sub-pledges; sale of pledges; specific performance; measure of damages. This is an important and rather new subject. It is treated in an independent and intelligent manner, and is really a treatise and not a mere digest. It is of general applicability. The most recent cases are included. There is a table of cases and an index. We have seldom seen so thorough a piece of work as this little essay.

STEWART AND CAREY'S HUSBAND AND WIFE.

A Digest of the Law of Husband and Wife as established in Maryland. By David Stewart and Francis K. Carey, of the Baltimore Bar. Baltimore: John Murphy & Co., 1881. Pp. xvi, 100.

This little book is divided into articles and propositions, with illustrations and references. The principles are neatly and concisely stated. The work is founded on the Revised Code of Maryland, and of course is of principal importance in that State. This Code has made radical changes in the law, and the authors state that "some of the statutes have been framed in the most bungling manner." The introduction, by Richard M. Venable, is interesting, and the same may be said of the Appendix of Notes.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Friday, February 11, 1881:

Judgment affirmed with costs—*The Roosevelt Hospital v. The Mayor, etc., of New York*; *Dows v. Vedder*; *Theiss v. Barrows*; *Parish v. Smith*; *Long v. The Village of Tonawanda*. — Judgment reversed and new trial granted, costs to abide event—*Falkland v. St. Nicholas National Bank of New York*. — Order affirmed with costs *Phelps v. Curran*. — Order of Special and General Terms reversed, and case remanded to Special Term to exercise its power and dispose of the motion on its merits, without costs to either party in this court: *Direct United States Cable Company v. Dominion Telegraph Company and ore.* — Judgment modified by striking out that portion which

provides "that in case said society shall be not supporting or unwilling to maintain Gordon, etc., at any time during his life, the executors shall pay the balance of the fund to the residuary legatee," and otherwise judgment affirmed, without costs to either party as against the other on this appeal—*William S. Livingston, Jr., and ano., executors, v. St. Joseph's Home for the Aged and ano., etc.*

Adjourned to Monday, February 28.

CORRESPONDENCE.

DESIGNATION OF JUDGES.

Editor of the Albany Law Journal:

The proposed amendment to the Constitution of the State of New York, which was submitted to the electors at the last November election, having been declared carried, the Legislature has before it a bill for the designation of one of the judges of the city court of Brooklyn to act in the county of Kings, at Circuits and Special Terms of the Supreme Court.

Under this amendment, can a judge of the city court of Brooklyn, who was elected before this amendment became a part of the Constitution of the State, be designated to act at the Circuits and Special Terms of the Supreme Court?

It is clear that against his will he cannot be compelled to do so. He and the people have entered into a contract, and under the Constitution of the United States he cannot be compelled to perform other and different duties than required by the contract. This agreement is not affected by the fact that the jurisdiction of his own court may be increased or diminished during his term. If he cannot be compelled to act as a justice of the Supreme Court, will his consent to so act alter the argument?

Suppose that the Constitution had been so amended that instead of designating a judge of the city court of Brooklyn, it had required a justice of the peace of Brooklyn, or, for that, a ward constable to act, the amendment would have been equally valid.

If a judge elected by the electors of the city of Brooklyn can act in the Supreme Court for the whole county of Kings, why cannot his jurisdiction be extended to the whole district? If so, general elections for justices of the Supreme Court could be done away with, and a particular locality could make all the nominations and do all the voting. I am not, however, questioning this power, but only the making such power, by implication, extend to persons elected to a different office, before the power existed. The amendment does not apply in express words, or by implication, to judges elected previous to its passage. It is not in accord with the other judicial sections of the Constitution.

Acting legally as justice of the Supreme Court, virtually for the time being, makes the person a justice of said court. If, then, any present judge of the city court of Brooklyn should be designated to act under this amendment, and should act, would he be a judge or justice *de facto* and *de jure*, or either? Would he not be simply a trespasser?

Respectfully,

A. P. BATES.

BROOKLYN, N. Y., Feb. 7, 1881.

NOTES.

THE paper read by Mr. William L. Gross, before the Illinois State Bar Association, on the History of Municipal Law in Illinois, is issued in a pamphlet of 46 pages. We judge it to be of considerable local interest. — The *Kentucky Law Reporter* has a leading article on Presumption of Death.

The Albany Law Journal.

ALBANY, FEBRUARY 26, 1881.

CURRENT TOPICS.

THERE is a too general belief among clergymen that lawyers are heathen, and among lawyers that clergymen are fanatic and credulous. Occasionally a member of each profession does a particularly silly act which strengthens the belief of the gentlemen of the other profession. Thus, Judge Forbes, deceased, late of the Massachusetts Supreme Court, gives Northampton \$200,000, by will, for the establishment of a public library, provided that no minister of religion shall have any thing to do with the management of the institution. In case of non-acceptance of the condition, the money goes to Harvard College, which the testator seems to consider the next most irreligious institution. He does not seem to have gone quite so far as Girard, who, if we remember right, would not even let a minister into the grounds. Judge Forbes has thus written himself down a particularly bigoted and short-sighted person. If he wanted an unsectarian library, it was easy to effect it, without such a rigid and illiberal exclusion. A public library ought to contain all sorts of books, not absolutely indecent, and a board of library management ought to contain representatives of the four learned professions—the editorial is the fourth, of course—besides scientific and business men and teachers. For some very sensible views of a court on the subject of the exclusion of atheistic or materialistic books from a public library, see 21 Alb. L. J. 243, the case of *Manner's Appeal*.

The clergy certainly cannot complain of any theological unsoundness of Judge Comegys, of Delaware, who recently charged a jury to punish what he calls "blasphemy," that is to say, such doctrines as Col. Bob Ingersoll utters. We do not ourselves at all approve of the Colonel's opinions, but we think it would be a very foolish and wicked thing to indict him for blasphemy. There is a difference between maliciously reviling God and religion, and denying the existence of God and the credibility and reasonableness of the christian religion. We even think that the conviction of *Chandler*, in Delaware, for blasphemy in calling the Virgin Mary a whore and Jesus Christ a bastard (3 How. 553), was of very doubtful policy, however disgusting and abominable that utterance seems to most people. Christianity is not now believed to be a part of the common law, as was formerly believed. But aside from this, there can be no doubt that words used in the course of a serious discussion, and with intent to make known or recommend opinions entertained by the accused, are not blasphemy. This is the restriction made by the old cases. The New York Code commissioners said that the favor which the law shows to liberty of speech and free discussion

of religious opinions forbids that the sincere expression of belief, however erroneous, should be embarrassed by the penalty of blasphemy. Opinion changes. There are good Calvinistic ministers now-a-days who give such a definition of the trinity as would have subjected them to being burned a few centuries ago. It may well be said that Judge Comegys himself is unsound on this point. He should recall the best definition of "orthodoxy" and "heterodoxy" ever given; "'orthodoxy' is my doxy; 'heterodoxy' is every other kind of doxy." As for Col. Ingersoll we expect to see him a good Calvinist before we die. He must even now occasionally find his own disbelief in hell extremely inconvenient. His reply to Judge Comegys leads us to suspect that for him he would "consent to a mild form of damnation," as Horace Greeley used to concede for the slaveholders.

Our correspondent, Mr. Dawson, has already got us into trouble by his new science of "Psychometry." The *Ohio Law Journal* says: "We find in that highly influential periodical, the ALBANY LAW JOURNAL, an earnest demand for judicial recognition of *Psychometry* as a science and its consequent use as a means of determining the guilt or innocence of persons charged with *forgery*." "If the ALBANY LAW JOURNAL is really the champion of this new science, we sincerely hope it will give us something definite concerning it, and sign the thesis 'Irving Browne.'" Now if our contemporary had read our "current topics" that week as attentively as he read our correspondent's article, he would have seen that we did not adopt our correspondent's views. The *Ohio Law Journal* very pertinently asks, why confine the application of the new science to forgery? "The article states that 'Psychometry is a science from which no mortal man can conceal his real thoughts, if he will dare to write what he pretends are his real convictions upon paper.' Now that would indicate a general power which ought to scorn confinement to forgery alone. Possibly the thing is patented and the claim does not cover other crimes." We do not at present see what answer can be made to this.

A writer in *The Nation* thinks he has discovered the cause of the decline of greatness, including eloquence, we suppose, among our public men. He does not adopt the levelling theory that fewer men are great by comparison because all men are greater than formerly, but he believes that it is because our common-school system dwarfs rising greatness, cuts it to a set pattern, and fits it to a Procrustean bed, and thus affords no scope for the development of peculiar genius. He says: "The school itself is a well-kept hedge-row. Every tree in that human hedge is trimmed down to the regulation standard; and while there may be many stunted, dwarfed shrubs which will never attain to that standard, the strong, robust plant which would overtop its fellows and look up to the sun must have its branches mercilessly lopped off, its growth checked, and its

life distorted." But this reasoning does not satisfy us that education, culture, and the accumulated experience of the country have not raised all so that none tower above the rest so noticeably as formerly, rather than that their effect has been to depress a few.

Mr. George P. Lathrop, in an illustrated article in *Harper's Magazine* for March, on the city of Washington, entitled "A Nation in a Nutshell," ventures the suggestion that the traditional glories of the senatorial eloquence of the olden time were considerably enhanced by the small size of the old Senate chamber, which brought the audience within the reach of the speaker's magnetism. Doubtless there is some force in this suggestion. It must be remembered, too, that from the same cause the audience was small and select, and naturally, highly cultivated. The article has also some interesting description of the Supreme Court, with a cut of the court in session in the old Senate chamber.

Three recent cases are of peculiar interest. In *Francois v. State*, Judge Wood, in the Federal Circuit Court for Texas, has held that the provision of the Texas statutes making it criminal for a white person to marry a black is unconstitutional under the 14th amendment of the Federal Constitution. This is opposed to *Frasher v. State*, 3 Tex. Ct. App. 276; S. C., 30 Am. Rep. 131; *Green v. State*, 58 Ala. 190; S. C., 29 Am. Rep. 739; *Kinney's case*, 30 Gratt. 858; S. C., 32 Am. Rep. 690; *State v. Bell*, 7 Baxt. 12; S. C., 30 Am. Rep. 549; *State v. Gibson*, 36 Ind. 389; S. C., 10 Am. Rep. 42; but in harmony with *Medway v. Needham*, 16 Mass. 157. We hope this question will be settled by the ultimate court before long. — A rival of the queue case has arisen in Vermont. We learn the details from the *Burlington Free Press*. One Cox was sentenced to pay a fine in twenty-four hours, or be committed to the House of Correction, and was placed in the custody of the sheriff for safe-keeping during the twenty-four hours. The sheriff took him to the House of Correction and left him. The superintendent, Eayres, explained to him that by waiving the twenty-four-hour privilege and being committed at once he would save costs. Cox agreed to be committed at once. Under the rules of the institution, his beard was removed, in spite of his protest. A sore throat resulted, which endangered his life. He sued the superintendent for damages. At the trial the jury were instructed that Cox had a right to waive the twenty-four-hour privilege, and the jury found for the defendant. The Supreme Court has reversed this decision, Judge Pierpont holding that the law committed the prisoner from a certain time to a certain time, and that neither he nor any other power could commit him before, and that any one shaving him without his consent before that time was liable, as for an assault. — In *Attorney-General v. Edison Telephone Company*, 43 L. T. (N. S.) 697, it has been held that a telephone is a "telegram," and a telephonic conversation is a "tele-

gram," under a statute defining a "telegram" as "any message or communication transmitted by telegraph," and a "telegraph" as "a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe, inclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication." This will cause Mr. Edison to say, "hallo!"

Assemblyman Brooks proposes that persons under sentence of death shall be imprisoned in the State prison nearest the place of conviction, and there hanged. He provides that the warrant shall issue to the warden; that the sheriff of the county of the conviction shall be present, and he authorizes the admission of the district attorney and clerk of that county, a surgeon, and six others, besides the relatives of the convict, his counsel, and a priest or clergyman selected by the convict. The cost to be borne by the State. This seems to us in every way a discreet measure. We should be glad to see newspaper accounts of executions suppressed. — Mr. Alvord proposes that superintendents and overseers of the poor may administer oaths and take affidavits in matters pertaining to their office. — Mr. Niles proposes a concurrent resolution requesting Congress to ask the President to make friendly intercession with Great Britain concerning the Boers. (We would like to edit a political journal for just one day to free our mind against Great Britain on this subject.) — Mr. Patterson proposes that the assignee for value of a recorded real mortgage, without notice of a prior unrecorded mortgage on the same premises, shall be protected against the latter, although the mortgagee in the recorded mortgage may have known of the unrecorded mortgage. Mr. Patterson is right again. — Senator Williams proposes a municipal court for Buffalo.

NOTES OF CASES.

IN *Gerdes v. Weiser*, Iowa Supreme Court, October 20, 1880, 11 Rep. 159, an action for board, it was held that where a step-father receives a stepson into his family, he is entitled, while standing *in loco parentis*, to the rights and is subject to the liabilities of an actual parent. The court said: "It is said, however, that the defendant was under no obligation to maintain the child of his wife by a former marriage. We have no occasion to determine the question whether the defendant could have been compelled to take his wife's child into his family and maintain it as his own. But we believe it is well settled that he is liable when he takes such children into his family and keeps them as part thereof. When this relation exists between the parties, the child cannot recover for services rendered, and the step-father cannot ordinarily recover for the support and maintenance of the child. When a man stands *in loco parentis*, he is entitled to the rights and subject to the liabilities of an actual parent, although he may not have been legally compelled to assume that situation. *Williams v. Hutch-*

inson, 3 N. Y. 312; *Stone v. Carr*, 3 Esp. 1; *Cooper v. Martin*, 4 East, 76; and see *Bradford v. Bodfish*, 39 Iowa, 681. It appears from the report made by the defendant in this case, that when the plaintiff was three months old he took him into his family and boarded him, furnishing him with his clothing and other necessities, as one of his own children. Under these circumstances the relation between the parties was that of parent and child, with like obligations. *Bradford v. Bodfish*, *supra*." In the latter case, it was held that the step-father, assuming the place of the parent, was responsible for education and maintenance. And in *Williams v. Hutchinson*, *supra*, it was held that the step-child, under such circumstances, could not maintain an action for services to the step-father, although their value exceeded the expense of his education and support. The court said: "The policy of the law seems to be to encourage and protect that relation—to encourage an extension of the circle and influence of the domestic fireside. And unless compelled by some rigid law, we should not by our decision establish a rule calculated to deter the husband from adopting his wife's children, by a former marriage, into his family. The marriage with the mother, it has been held, severs the relation which would otherwise exist between her and her children, as guardian of their persons. If therefore the husband voluntarily adopts them into his family, educates and supports them, and discharges his whole duty toward them as a parent and a good citizen, the law should be liberally construed in his favor." The court also observed: "So he is liable for necessities furnished to a child standing in that relation, to the same extent that he is liable for necessities furnished to his own." In *Smith v. Rogers*, to appear in 24 Kansas, it is said: "It is well settled, that in the absence of statutes, a person is not entitled to the custody and earnings of step-children, nor bound by law to maintain them. Yet if a step-father voluntarily assumes the care and support of a step-child, he stands *in loco parentis*; and the presumption is, that they deal with each other as parent and child, and not as master and servant; in which case the ordinary rule of parent and child will be held to apply, and neither compensation for board is presumed on the one hand, nor for services on the other."

In *Dow v. Updike*, Iowa Supreme Court, January 12, 1881, N. W. Rep. 857, it was held that a stipulation in a promissory note to pay a reasonable attorney's fee for instituting a suit on the note, in addition to legal interest, is illegal and void. But this was put on statutory ground. The court said: "In the year 1873 'An act to provide for the allowance and recovery of attorney's fees in certain actions,' was passed by the Legislature. This act provided 'that in all actions brought for the foreclosure of a mortgage, or upon a written instrument, for the payment of money only, there shall be allowed by [to] the plaintiff, upon a recovery of judgment by him, a sum, to be fixed by the court, in addition to

the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases wherein the mortgage, or other written instrument upon which the action is brought, shall, in express terms, provide for the allowance of an attorney's fee.' This act was repealed in 1879, the law taking effect June 1st of that year." "In this State, attorney's fees were not allowed prior to the passage of the act of 1873; and the Legislature, by repealing that act, evidently intended to withdraw from the plaintiff the right to recover the same." In *Miner v. Paris Exchange Bank*, Texas Supreme Court, September, 1880, it was held that if a contract is lawful in other respects a conditional stipulation to pay the usual attorney's fees, in the event suit has to be instituted to enforce it, would be legal and founded upon a valuable consideration. Such fees, though not an element of damages in an ordinary suit for the collection of money, can be made such by express contract. The authorities, *pro* and *con*, on this vexed question can be found in a note, 29 Am. Rep. 406. *Bullock v. Taylor*, 39 Mich. 137; S. C., 33 Am. Rep. 356, is against the above Texas doctrine, but *Bank of British America v. Ellis*, U. S. C. Ct., Or., June 26, 1880; 21 Alb. L. J. 238, is in harmony with it.

In *Einstein v. Jamison*, Pennsylvania Supreme Court, Nov. 8, 1880, it was held that a mechanics' lien will attach to the separate property of a married woman, without express promise to pay, if the materials were furnished and used in the improvement of her property by her direction, or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor. The testimony showed that the woman superintended and ordered changes, and ordered some materials and afterward promised to pay for those. The judge charged that "she must not only have ordered them, but promised to pay for them, and they must have been necessary." The court on review observed: "In saying she must have 'promised to pay for them' we think the learned judge erred. The other necessary ingredients being proved, the law will imply a promise to pay. While courts could carefully protect married women in the enjoyment of their separate property, and not permit it to be unjustly charged with an incumbrance, yet they should not be permitted to enhance the value of their property at the expense of an innocent and confiding creditor. If the materials were furnished and used in the improvement of her property by her direction, or with her knowledge and assent, and were reasonably necessary, and there was no agreement that her property should not be liable therefor, the law will give a lien thereon for the value of the materials." In *Husted v. Mather*, 77 N. Y. 388, the wife knew and did not object, and this alone, without express consent, was held sufficient to maintain the lien. The court said: "It is, however, contended by the learned counsel for the appellant that, inasmuch as the owner of the land in this case was a married woman, it cannot be bound, inasmuch as she has neither consented in

writing to charge her separate estate nor made any contract for its benefit. But the statute prescribes the conditions on which the lien is to attach and they are found in this case. It was not necessary that the owner should have contracted for the materials and, however manifested, the 'consent of the owner' to the erection of the house is sufficient. The case is not one of contract. The woman creates no debts; but consenting to the improvement of her land, it is by statute subjected to a lien. As to that land she is to be regarded as though unmarried, and her consent may be implied from her knowledge; in the absence of any objection her silence may, as in other cases, be deemed sufficient evidence of assent. *Anderson v. Mather*, 44 N. Y. 262." But where the contract was with the husband, not as the wife's agent, her land will not be bound, although she sees the improvement going on. *Jones v. Walker*, 63 N. Y. 612; 22 Alb. L. J. 463.

Two recent unreported cases, concerning obstruction of sidewalks, deserve notice. In *State v. Burdette*, Indiana Supreme Court, the State asked the court to charge that if the defendant permanently maintained a fruit-stand on the sidewalk of a street, the jury should find him guilty, such an obstruction being a nuisance within itself. The court modified the instruction as follows: "And that the obstruction essentially interfered with the comfortable enjoyment of said sidewalk." Held, that the instruction asked should have been given. The common-law doctrine was, that a public highway was a way common and free to all the king's subjects to pass and repass at liberty, and that an unauthorized obstruction was indictable and punishable as a nuisance. Nor was it necessary to show any thing more than that there was a permanent obstruction of the public way. *People v. Vanderbilt*, 28 N. Y. 396. While we have no common-law offenses, it has been held that there is such an offense as a public nuisance. *Burk v. State*, 27 Ind. 430. Followed to its logical consequences, that case would require us to hold that what was at common law a public nuisance is such under our statute, and that permanently obstructing a highway is, *per se*, a public nuisance, because it was always such at common law. We are inclined to hold this to be the correct ruling. The question is not whether travel was interfered with, but whether there was an unlawful incroachment upon a public street by the erection of a permanent obstruction. Angell on Highways, § 226. There is a distinction between the temporary occupancy of public streets for commercial or building purposes, and their permanent obstruction. *Wood v. Mears*, 12 Ind. 515. But even such temporary use may go to the extent of becoming a public nuisance." The other case is *Hawkins v. Sanders*, Michigan Supreme Court, Jan. 28, 1891. The court said: "Hawkins, who owns a hotel building in Ypsilanti filed his bill to restrain defendant, who owns a neighboring store building, from maintaining a wooden awning in front of his premises. The complainant's theory seems to be that this is a pub-

lic nuisance, which injuriously affects him specially. The awning is so far as we can see no more of a nuisance than it would have been if made of any other material, and it was not as shown from the evidence such a structure as any court would regard as a public injury or grievance. It was such as was used habitually in other parts of Ypsilanti as well as elsewhere, and was recognized by the city ordinances as not objectionable. It was therefore no more than a lawful use of defendant's own property. The special grievance complained of is simply that it obstructs the view of the sidewalk and a portion of the street. The testimony does not indicate that there was any very well-founded objection in fact to the awning, and there is no legal objection to it." See, in this connection, 20 Alb. L. J. 188; 22 id. 2; *Cushing v. Boston*, 128 Mass. 330.

ONE HUNDRED AND TWENTY-EIGHTH MASSACHUSETTS REPORTS.

THIS volume contains a great number of cases, decided between November, 1879, and June, 1880. We note the following:

Commonwealth v. Allen, p. 46.—On the question of the genuineness of a writing alleged to be in the defendant's hand, the court may exclude another writing made by him during the trial, and offered by him for the purpose of comparison.

Commonwealth v. Wardell, p. 52.—The indecent exposure of his person by a man in a house to a girl eleven years old is "open and gross lewdness and lascivious behavior."

New Haven & Northampton Co. v. Campbell, p. 104.—A common carrier, who has delivered part of goods carried without collecting his freight, does not thereby, as matter of law, lose his lien for that freight as against the part undelivered.

Small v. Howard, p. 181.—A country surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning, art, and skill, ordinarily possessed by others of his profession, having regard to the advanced state of the science.

Gerrish v. New Bedford Institution for Savings, p. 159.—D. deposited in a savings bank in his own name all he was permitted under the rules, and then made three other deposits as trustee, one for his only son, the others for his grandchildren, taking separate bank books, which he never delivered, but which were found among his effects on his death. He received the dividends during his life. The rules provided that he must produce the books to receive dividends, in order that they might be entered, and that any depositor might designate the person for whose benefit he made deposit, which should bind his legal representatives. The son and grandchildren offered to prove that he had told each of them that he had made and intended the deposits for them after his death, but he wanted to draw the interest during his life. Held, competent, and to justify a finding of a complete and effectual trust.

Green v. Boston & Lowell Railroad Company, p. 221.—A family portrait is not an article of "great and intrinsic value," when coupled in an exemption clause in a carrier's receipt, with "specie, drafts, and bank bills;" but the measure of damages for its loss is the value to the owner and not the market value, and so evidence that it was the only one extant would be competent.

Fay v. Harlan, p. 244.—In an action of assault and battery, the attending physician of the plaintiff may testify as to the plaintiff's complaints and statement of symptoms made to him for the purpose of medical treatment and advice, and also as to his own observation of his indications of suffering.

McNeil v. Kendall, p. 245.—Where a lessee leases a part of the premises to another, for the remainder of his term, with easements in the other part, this is an under-lease, and not an assignment.

George v. Gobey, p. 289.—A master is civilly responsible for an illegal sale of intoxicating liquor made by his servant, without his knowledge or consent, and against his instruction.

Dolliver v. St. Joseph F. and M. Ins. Co., p. 315.—A fire policy was conditioned to be void upon a decree of foreclosure, or in case the interest of the insured was not truly stated, or was any other than the entire, unconditional and sole ownership of the property. The property was subject to an existing and undisclosed mortgage and a lease for years. *Held*, no breach.

Boardman v. Cutter, p. 388.—A contract for the sale of shares of corporate stock is for the sale of "goods, wares, and merchandise," within the statute of frauds.

Murphy v. Lowell, p. 396.—A city, authorized to build sewers in its streets, is not liable for damage done by necessary blasting of rocks in the work, unless negligently done by its agents.

Commonwealth v. Hall, p. 410.—The statute punishing any one who in Massachusetts takes or kills woodcock, etc., between specified days, or buys, sells, offers for sale, or has them in possession within the same time, does not apply to such birds lawfully taken or killed in another State.

Commonwealth v. Hartwell, p. 415.—On an indictment against a railway conductor for manslaughter, caused by his criminal negligence in misplacing a switch and omitting to notify it to an approaching train, and alleging that he knew the approach of the other train, the fact of his knowledge must be proved as laid.

Connell v. Reed, p. 477.—If there is any right of trade-mark in the words "East Indian" in connection with "remedy," on bottles of medicine, the false adoption of those words to indicate that the medicine is used in the East Indies will defeat an action for infringement.

Kelly v. Johnson, p. 530.—Where a servant engaged in a temporary work for another, on the false representation that his master had directed it, he does not become the servant of that other, so as to be remediless for an injury by the negligence of the latter's servant.

Larabee v. Peabody, p. 561.—A town is not liable

to a person who is injured by falling into a trench near a town building, but outside the highway, on the occasion of attending an entertainment given in the building by a society, which has received the use of the building for such entertainment free.

Clark v. Waltham, p. 567.—A town is not liable for an injury received by a traveller by reason of a defect in a public common, although the town has constructed public footpaths across it, the place where the injury occurred not being connected with any building for the use of which the town received any pecuniary benefit.

Steele v. Boston, p. 583.—A city is not liable for an injury caused to a person on a public common by collision with a coasting sled, on a path therein, although the city has not only permitted the coasting, but specially fitted the path for the purpose, by bridging and freezing it.

Davis v. Somerville, p. 594.—One who is injured by a defect in a highway, on his return from a funeral, on Sunday, having diverged from his ordinary route to make a social call, is remediless.

White v. Lang, p. 598.—One whose property is injured by the assault of a dog is not defeated in his action of damages against the owner by the fact that he was unlawfully travelling on Sunday at the time.

The opinions are nearly all very short, and only one or two dissents are noted.

CAPACITY OF LEGITIMATED BASTARD TO TAKE REAL ESTATE IN ANOTHER STATE BY COMITY.

DOES legitimation by subsequent marriage under the law of a foreign or a sister State create an heir who can inherit real estate under the laws of intestate succession of the State of New York, where illegitimate persons cannot inherit and where a bastard cannot be legitimated by subsequent marriage?

Throughout Christendom the status of legitimacy arises from marriage which has its foundation in nature, and is guarded by the moral sanction of society and the legal sanction of positive law.

It is therefore upon the family created by lawful marriage and the bond of consanguinity that Christendom bases the legitimacy of heirs and the laws which regulate intestate succession. This principle, like many others of modern jurisprudence, has been adopted from the Roman and Canon laws, and a glance at its historic features may be important in this connection.

In Roman as in modern jurisprudence the family was the basis of the law of legitimacy and of intestate succession. The Roman family, however, had no foundation in nature, but was an artificial creation of the civil law known as the aggregation of the agnates; and while lawful marriage was essential to its formation, its purely artificial character in respect to intestate succession did not depend on marriage and was not an attribute of consanguinity.

A near relative or a child even was not a lawful heir unless united to the family of the intestate by the bond of the Paternal Power; whoever was released from that bond by emancipation, and retained only the natural relationship, forfeited the rights of succession, and whoever was placed under that bond by adoption, although having no consanguineous relationship to the intestate, was endowed with the rights of succession.

The Paternal Power, however, did not spring from natural filiation, but was a prerogative granted by the primitive Roman law to him who had become a father in consequence of lawful marriage, *justas nuptias*, and whose children were legitimate because they were begotten in lawful wedlock, and because between the man and woman, their parents, there had existed the *Conubium* at the time of marriage. Gaius, I, 55; Inst. Just. I, 9; Code Just. VIII, 31, 47; Law 27, Digest ad mancip. and Law 12, § 1, Digest ad leg. Jul. de adult, Gaius, I, 87.

By the side of the civil marriage there arose, however, a natural union called the concubinate, which before the time of Augustus is believed to have been confounded with illicit and unacknowledged intercourse. Under that prince, however, it became an agreement legally recognized by the natural law. Paul. Law, 144, Digest verborum signif. Troplong, the illustrious French juriscult, attributes the existence of the concubinate to a compromise between the license of morals at the end of the republic and the laws of Augustus against adultery and concubinage, and between the aversion of the Roman of that period for marriage and the laws *Julia et Papia-Poppæa* to render marriages more frequent. Inst. Just. IV, 18; Digest, XLVIII, pr. and 1; Troplong, *De l'influence du Christianisme sur le droit civil des Romains*, chap. VIII.

The obvious intention of Augustus was to increase the population of the empire, which had become greatly depopulated by civil war, and to harmonize certain weaknesses with the necessity of endowing the republic with citizens who would not have occasion to blush at their birth. Accordingly, that prince authorized with women a certain lawful commerce, which, although it was not lawful marriage, was still an imitation of that institution. Digest law, 3, § 1, de concub. Heinne, lib. II, ch. IV, n. 1, 2, 3.

The having of several concubines was prohibited (Novel XVIII, ch. 5), and he who had a wife by lawful marriage and took a concubine, was guilty both of adultery and of bigamy. Law 1, Code Just., de concubinis.

The children of the concubinate were not bastards, and being begotten out of lawful wedlock were not legitimate; in other words, they were not members of their father's family, could not succeed to his estate nor bear his name, nor claim any of the privileges given to children of the family by the civil law; they were regarded simply as the offspring of a natural union, and were therefore called natural children. With regard to their mother, however, they were legitimate, and all their rights were as perfect as were those of children begotten and born in lawful wedlock.

The concubinate was therefore a natural imitation of the lawful marriage of the primitive Roman law, and was regulated by the principles of the natural law.

When Constantine became emperor, the concubinate was repulsive to his Christian ideas of marriage, and he endeavored to convert it into lawful marriage by a promise of legitimacy to all children already born whose parents would renounce it for lawful marriage. He also ordained that at the moment of conception the parents must have been capable of lawful marriage and that the children should ratify the legitimation; for no one was to be made unwillingly legitimate. Law 5, Code Just., de natural. lib.

Legitimation by subsequent marriage is therefore a principle introduced into the later Roman law through the influence of Christianity; it was, however, strictly confined by Constantine to children of the concubinate, and did not apply to children illegitimated by the principles of the primitive Roman law, under which those illegitimately begotten took their status from the moment of their birth, while those legitimately conceived took their status from the time of conception. *Gaius, I, 89.* Constantine also instituted severe meas-

ures against natural children and forbade their fathers to confer any thing on such children by donation and testament. Law 1, Code Theod. de natur. filii.

The difficulty experienced in securing the acceptance of these reforms by the polytheistic nations of the empire, led Valentinian I, Emperor of the West, to publish in 371 a constitution whereby natural children and their mothers were given greater capacities for inheriting by testament from the father. Valens, who was then Emperor of the West, was at first unwilling to ratify the constitution of Valentinian I, his colleague, but finally did so at the earnest entreaty of Libanius, the sophist, a pagan who desired to make a will in favor of a son whom he had had by a concubine after his divorce from his wife. Godefroy on Law, 1, Code Theod. de natur. filii.

Valentinian III, Emperor of the West under the tutelage of Placidia, attempted to repeal the law of Valentinian I and to restore that of Constantine, but failed because Theodosius the Younger was unwilling to deprive natural children and their mothers of the concessions granted them by Valentinian I.

The result of these conflicts between the old and new civilizations was that the children and mothers of the concubinate could not be completely deprived of the legacies and gifts left them by the father, and legitimation by subsequent marriage, which Constantine had authorized only as a transient remedy for natural children already born, was adopted by Justinian and converted by him into a permanent measure applicable to all future concubinages. Law 7, Code Just. de natur. liber; Hunter's Roman Law, p. 622.

Justinian says, A. D. 529-30: *Per sequens matrimonium filii nati ex concubina legitimatur, etiamst ex eo matrimonio nullus postea nascetur; vel natus vivens non reperitur temporis mortis patris.* Code Just. V, 28, 10, de legit per sub. matrimonio, and V, 27, 5.

The principles of this constitution of Justinian and of that of Constantine became a part of the *Corpus Juris Canonici* by a constitution published by Pope Alexander III, A. D. 1160, which reads as follows: *Tanta est vis matrimonium ut qui antea sunt geniti post contractum matrimonium legitimi habeantur. Si autem vir vivente uxore sua aliam cognoverit et ex ea prolem susceperit, licet post mortem uxoris eandem duxerit nihilominus spurcius exit filius; et ab hereditate repellendus presentim si in mortem uxoris prioris aleruntur eorum aliquid fuerit machinatus.* Decret. Greg. Lib. IV, tit. XVII, chap. VI.

The leading principles of this constitution of the Canon Law have passed into the jurisprudence of most if not all the States and nations of Continental Europe; they have also been adopted by some of the States of this republic and may be regarded as the common law of Christendom. An attempt made during the reign of Henry III to introduce them into the law of England was met by the famous statute of Merton, 20 Henry III, in which the English barons declared that *nonint leges Angliæ mutare quæ hæc usque usitate sunt et approbate.* Accordingly, legitimation by subsequent marriage has never been recognized by the laws of England, at least not since the time of Henry III, and the State of New York has uniformly adhered to the English law which considers a child legitimate which is born in the family, or which in other words is born of parents married before the time of its birth, although they were not married when the child was begotten. Stephen's Com., Vol. II, p. 289.

The principle on which legitimation by subsequent marriage rests is that of the creation of the natural family by lawful marriage and the bond of consanguinity, thereby perfecting all the essentials of legitimacy and intestate succession.

Whatever promotes the creation of the natural family on the basis of a lawful marriage contract should be encouraged as a matter of public policy, and

when that contract and the bond of consanguinity have once created a family, the common law of christendom demands that all the rights conferred by the marriage relation shall attach irrevocably and immediately to the bastard children of the parties to the contract, provided that those children were not born of adulterous or incestuous commerce. The leading principles on this important subject, as expressed in the Canon Law, already cited, have been clearly embodied in the law of France, in the following terms: *Les enfans nés hors mariage autres que ceux nés d'un commerce incestueux ou adultérin pourront être légitimes par le mariage subséquent de leurs pères et mères, lorsque ceux-ci les auront légalement reconnus avant leur mariage ou qu'ils les reconnaîtront dans acte même de célébration. La légitimation peut avoir lieu même en faveur des enfans décédés qui ont laissé des descendans; et dans ce cas elle profite à ces descendans. Les enfans légitimes par le mariage subséquent auront les mêmes droits que s'ils étaient nés de ce mariage.* Code Civil, 331, 332, 333.

The principle of legitimation by subsequent marriage is recognized by the laws of Wurtemberg and Pennsylvania, where we will suppose a family to have been thus created by a lawful marriage, and where the rights of legitimacy and of intestate succession were thereby conferred upon a child born before such marriage. The status of legitimacy having been thus repeatedly established under the *lex loci contractus*, is still called in question here, because no illegitimate person can inherit under the laws of intestate succession of this State, where the principle of legitimation by subsequent marriage is not recognized by law, and where the property in question is situated.

Now the marriage contract is not only *juris naturalis* but *juris positivi*, and the status of legitimacy must be determined by the *lex loci*, under the principle that the law of the place governs the form, obligation, interpretation and effect of a contract, in so far as such law does not prejudice the rights, interests and authority of other States and the citizens thereof. Wheaton's Int. L., § 91; Huberus' Confli. of L., tom. II, Lib. I, tit. 3, §§ 2 and 3.

The question then arises, in what respect, if in any, does the law of the place, when applied to the marriage contract, which was entered into by the parents in the foreign and sister State, prejudice the rights and authority of this State and the citizens thereof, if under such law the child be adjudged a legitimate heir under the laws of intestate succession of this State?

The child comes into this State and country as a member of a family legally constituted under the common law of christendom, and the important question arises, whether the courts of this State will establish the principle that an innocent child legitimated under the solemnities of a lawful marriage in one country or State, can be subsequently illegitimated in another, where the marriage contract is adjudged valid and binding? The comity of nations demands that a marriage contract, legal under the common law of christendom, shall be given full effect wherever the parties to the marriage may reside, and that children of such a marriage shall not be legitimate in one country and illegitimate in another.

English precedent has no force in this case in establishing the right of the appellant to inherit, for it is not only illogical in principle but prejudicial to the best interests of society and contrary to public policy. Much stress has been laid on *Doe v. Vardell*, 5 Barn. & Cres. 263, but the principles established by that case have no force here save in establishing the appellant's legitimacy. The law of that case is that the status of legitimacy is established by subsequent lawful marriage in a foreign State, and that such marriage does create a family under the common law of christendom, but that under the artificial, agnatic, political laws of intestate succession which England maintains for

aristocratic purposes, bastards legitimated by subsequent marriage cannot be legal heirs to real estate in that country. In other words, while admitting that the status of legitimacy is created by subsequent lawful marriage under the law of a foreign State and the common law of christendom, the English courts still maintain that to allow children legitimated by a subsequent lawful foreign marriage to inherit lands in England would be prejudicial not only to the rights and authority of that country, but to the interests of her people, and therefore would not be required under the comity of nations.

It will be seen therefore that under the English law and under that of this State also, if we follow English precedent, the term "legitimacy" has two meanings; for we have the law that whoever is legitimate in England and New York can inherit; the child, according to *Doe v. Vardell*, is legitimate but cannot inherit; a conclusion which if true in any sense can only be so under an ambiguous use of the term "legitimate." In other words, it is one thing to be legitimate under the common law of christendom, and another under the law of England, so far as intestate succession is concerned. It is evident, therefore, that to be just and logical in this case we must depart from English precedent.

The term "legitimacy" can have but one meaning under the laws of New York, which long ago became a republic and abrogated the English laws of intestate succession, as well as the aristocratic system which those laws are designed to maintain. In place of the English law she has adopted laws of intestate succession founded on Novels CXVIII and CXXVII, of Justinian, and has thereby harmonized her jurisprudence with the principles of Christian civilization. New York cannot therefore claim any exemption from the binding force of the comity of nations under *Doe v. Vardell*, and it would be a violation of the comity of nations for her to adhere to English precedent in this case, for by so doing she would prejudice the rights and authority of herself and of her citizens.

New York, however, is also bound by the limitations of the Constitution of the United States to a recognition and enforcement of the rights conferred by the marriage contract which legitimated the appellant in Pennsylvania, even if the comity of nations and the marriage in Wurtemberg be entirely disregarded.

"The citizens in each State shall be entitled to all the privileges and immunities of citizens of the several States." U. S. Const., art. IV. The meaning of this article may, we think, be best derived from its incidental interpretation by the Supreme Court of the United States. There is no express prohibition of State legislation in regard to naturalization, in the Constitution. If, however, each State retained the right of naturalization, while the citizens of each State were entitled to all the privileges and immunities of citizens of the several States, any one State might impose on all the others such persons as citizens as it might think proper to admit; hence, in cases dependent on this point, the Supreme Court has declared that the power of naturalization is vested exclusively in the United States, on the ground of a direct repugnancy in the exercise of a similar power by the States. 2 Dall. 370; 5 Wheat. 49.

Now, under the Constitution of the United States, a contract is every executed agreement by which a right is vested, as well as every executory agreement by which a right of action is conferred or an obligation created which may be enforced in a court of justice. By the obligation of contracts, under the Constitution, is meant both the moral and the legal obligation which arises not from the law of civilized nations but from the law of the State where the contract is made. 12 Wheat. 213.

Accordingly, as there is no constitutional provision

empowering Congress to fix the status of legitimacy for citizens of the United States, and as the citizens of each State are entitled, under the Constitution, to all the privileges and immunities of citizens of the several States, a citizen who by a lawful marriage contract is made legitimate and capable of inheriting real estate under the laws of Pennsylvania, must be legitimate and capable of inheriting real estate under the laws of New York. New York has the right to determine who shall be lawful heirs under her laws of succession, and in what manner the estates of any of her deceased intestate citizens shall descend and ascend, but she has no right, as a member of the Union, to judicially reopen a question of legitimacy once settled by the laws of a sister State, for the question is *res adjudicata* under the Constitution of the United States, which is the supreme law of the land, any thing in the laws or Constitutions of the States to the contrary notwithstanding.

We deem it conclusive, therefore, that New York must recognize and enforce the rights of inheritance granted the appellant by the status of legitimacy established by the laws of the sister State, under the marriage contract of his parents in that State.

The child is legitimate in the sister State, and entitled under the Constitution to all the immunities of that status in New York, he is therefore legitimate in New York, and therefore a lawful heir to real estate under the laws of intestate succession.

The dangers apprehended here and elsewhere from the recognition of the status of legitimacy, conferred by a sister State under the Constitution, or by a foreign State under the common law of Christendom and the comity of nations, based on a lawful marriage contract, as recognized by Christian civilization, are rather imaginary than real, and the principles adduced by Mr. Justice Blackstone in support of the vain and aristocratic pretensions of the English law on this subject, are far more theoretical than practical; for where illegitimate children are begotten, the question of legitimating them by a subsequent marriage is not considered, and probably not in one instance out of a million do the parties have any knowledge of their right to legitimate their bastard offspring by a subsequent marriage, where such right exists by law.

It is also the declared policy of this State to encourage the marriage of persons who have begotten illegitimately; for such a marriage settles a case of bastardy under our statutes, and legitimates the offspring if it be still unborn.

It cannot be doubted, we think, that if a mother and father should move from this State to the sister State, and become citizens of that State, and enter into a lawful marriage contract there for the express purpose of legitimating a child already born, the status of legitimacy conferred by the laws of that State would render the child not only legitimate in this State, but in every State of the Union, under the provisions of the Constitution. On the other hand, also, if they had entered into a lawful marriage in this State and subsequently moved to the sister State, such marriage would not legitimate their child, under the laws of that State and the provisions of the Constitution, for the *lex loci* of New York would govern the status of legitimacy and a remarriage in the sister State would be necessary to legitimate the child.

The recognition of the status of legitimacy conferred on the appellant under the laws of the sister State would not militate against the soundest principles of public policy, which demand that whatever will correct the wrong done innocent children and society, and whatever leads to the creation of the family recognized by the common law of Christendom, and the principles of Christian civilization, should be not only countenanced but encouraged by the law of the land.

ZIBA HAZARD POTTER.

ITHACA, N. Y.

CONSTITUTIONALITY OF PILOT LAWS OF NEW YORK.

SUPREME COURT OF THE UNITED STATES, JANUARY 10, 1881.

WILSON, Plaintiff in Error, v. McNAMEE ET AL.

The provision of the pilot laws of the State of New York entitling a pilot to compensation upon tendering his services to a vessel from a foreign port bound to the port of New York without a pilot, is not in violation of the Federal Constitution, and a tender made at sea fifty miles from shore cannot be objected to on the ground that it is outside of the jurisdiction of the State named.

IN error to the Court of Appeals of the State of New York. The opinion states the case.

SWAYNE, J. The defendant in error tendered his services as a licensed Sandy Hook pilot to conduct the schooner E. E. Racket by way of Sandy Hook to the port of New York. The tender was made at sea about fifty miles from that port. The vessel was from a foreign port, sailing under register, and drew nine feet of water. The master refused to accept the services of the pilot, and came into port without one. The pilot demanded the compensation allowed by the local State law upon the tender being made. Payment was refused and this suit was thereupon instituted by the defendant in error in the District Court of the city of New York for the First Judicial Circuit. That court gave judgment in his favor. The case was thereupon removed by appeal to the proper Court of Common Pleas, and subsequently to the Court of Appeals of the State. Those courts successively affirmed the judgment.

The plaintiff in error thereupon brought the case before us by this writ of error for review.

The only point argued here was the validity of the pilot law of New York with reference to the Constitution of the United States.

At the close of the opening argument of the learned counsel for the plaintiff in error, we announced that the affirmative of the question thus presented was so well settled by the repeated adjudications of this court, that we had no desire to hear the counsel for the defendant in error upon the subject.

Thereafter, the counsel who had been heard submitted a memorandum, in which he called our attention particularly "to the tenth point of the brief of the plaintiff in error, namely, that the tender took place outside of the jurisdiction of the State of New York." He added: "This question has never yet been passed upon by this court in either of the other pilot cases."

Our opinion will be confined to that subject.

There are several answers to the suggestion.

1. The objection does not appear to have been taken in the Circuit Court, and cannot, therefore, be considered here. *Everett v. Elliott*, 21 Wall. 537.

2. A vessel at sea is considered as a part of the territory to which it belongs when at home. It carries with it the local legal rights and legal jurisdiction of such locality. All on board are endowed and subject accordingly. The pilot, upon his boat, had the same authority from the laws of New York to tender and demand employment, and the same legal consequences under the circumstances, followed the refusal of the master as if both vessels had then been *infra fauces terræ*, where the municipal jurisdiction of the State was complete and exclusive. The jurisdiction of the local sovereign over a vessel and over those belonging to her, in the home port and abroad on the sea, is according to the law of nations the same. *Dana's Wheat*, p. 169, § 106; 1 Kent's Com. 27; Vattel, Book 1, ch. 19, § 216; 2 Rutherford's Inst., B. 2, ch. 9, §§ 8 and 19.

The principle here recognized is, of course, subject to the paramount authority of the Constitution and

laws of the United States over the foreign and inter-State commerce of the country, and the commercial marine of the country engaged in such commerce, and subject also to the like power of Congress "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations." See *Ex parte McNeil*, 13 Wall. 240.

Speaking of the universal law of reason, justice and conscience, of which the law of nations is necessarily a part, Cicero said: "Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is, and in all time will be, eternally and immutably the same." Lactantius Inst. Div., Book 7, ch. 8.

3. Conceding that the pilot laws of the several States are regulations of commerce, Mr. Justice Story said: "They have been adopted by Congress, and without question are controllable by it." 2 Story on Const., § 1,071.

Chief Justice Marshall, in *Gibbons v. Ogden*, said: "When the government of the Union was brought into existence, it found a system for the regulation of pilots in force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress." 9 Wheat. 207. The long-continued silence of Congress, with its plenary power, in the presence of such legislation by the States concerned, is in itself an implied ratification and adoption, and is equivalent in its consequences to an express declaration to that effect. *Atkins v. Distintegrating Co.*, 18 Wall. 306.

The several acts of Congress bearing on the subject are fully referred to in *Ex parte McNeil*, *supra*. In that case, and in the earlier and more elaborate case of *Cooley v. Wardens of Philadelphia*, 12 How. 283, this subject, in all its aspects, was so fully considered that further remarks on the present occasion are deemed unnecessary.

The judgment of the Court of Appeals of the State of New York is affirmed.

EXCLUSION OF COMPETING PASSENGER CARRIER FROM USE OF STREET RAILWAY.

NEW JERSEY COURT OF ERRORS AND APPEALS, NOVEMBER, 1890.

CITIZENS COACH CO., Appellant, v. CAMDEN HORSE RAILROAD CO.

A street railroad company, authorized by the Legislature to maintain its track upon a public highway and to run cars thereon, charging fare, is entitled to exclude from the habitual and continuous use of such track, any one engaged in carrying passengers for hire in competition with it.

APPEAL from the decree of the chancellor, reported in *Camden Horse Railroad Co. v. Citizens Coach Co.*, 4 Stew. Eq. 525. The opinion states the facts.

A. C. Scovel, for appellant.

D. J. Pancoast and P. L. Voorhees, for respondent.

MAGIE, J. An act of the Legislature, approved March 23, 1866 (P. L. of 1866, p. 640), created the Camden Horse Railroad Company, with a capital stock of \$50,000, and the privilege of increasing the same to \$100,000. The company was, by that act, empowered to construct, use and maintain a railroad over certain streets in Camden, the tracks to be of the width of the wagon track then established by law, and to be laid level with the surface of the streets and in conformity with the grades then or thereafter established. Upon the requirement of the city council of Camden, the

company were to pay a tax to the city, not exceeding an amount specified in the act. The company was also empowered to construct or purchase suitable vehicles for the transportation of passengers and property over the railroad, and was authorized to demand and receive for such transportation such sums as it should think reasonable and proper, not exceeding, however, a certain sum fixed by the act for each trip of a passenger. The act also gave the company an action against any person who should "willfully or maliciously impair, injure, destroy or obstruct the use of said railroad," and permitted the recovery of three times the damage sustained by the company. The company was also empowered to borrow the money necessary to build or equip said road, and to secure the payment thereof by a mortgage on the "road, lands, privileges, franchises and appurtenances of or belonging to said corporation."

The company thus incorporated shortly afterward built a railroad through some of the streets of Camden, in substantial accordance with the requirements of the act above referred to. It has since built other roads or branches through other streets in Camden, under the powers given by the above-mentioned act or supplements thereto. It has continued to operate the railroads so built ever since.

In October, 1876, the Camden Horse Railroad Company filed a bill in the Court of Chancery against the Citizens Coach Company, setting out the facts of the incorporation and organization of the horse railroad company above stated, and the construction of its railroads. The bill charged that the defendant therein had been incorporated on July 29, 1876, under the general law of this State, entitled "An act concerning corporations," approved April 7, 1875, for the purpose of carrying passengers and property in and about Camden, for compensation, and that it had continually, since its organization, made use of the railroads of the complainant, in the pursuit of its business, by driving its coaches upon and along the railroad track, to the obstruction and hindrance of the use of the railroad by its owner, the complainant. The bill also distinctly alleged that the complainant was entitled to the exclusive use and enjoyment of said railroad, as against the said coach company or any other person seeking to use the same in the business of transporting persons or property. The prayer of the bill was that the coach company should be enjoined from using with its coaches, in the pursuit of its business of carrying passengers in and about the city of Camden, the railroad of the complainant.

The Citizens Coach Company, the defendant, filed its answer to this bill, denying that it had made such continuous or obstructive use of the complainant's railroad as was charged, and further denying the right of complainant to the exclusive use and enjoyment of the railroad in the transportation of passengers.

Upon the issue thus formed proofs were taken, and upon the pleadings and proofs the chancellor concluded that the complainant was entitled to relief, and an injunction was decreed, restraining the defendant from using with its coaches, in the pursuit of its business of carrying passengers in and about the city of Camden, the railroad of the complainant, in competition with the complainant in its business of carrying passengers and property thereon, and from obstructing or hindering complainant in the use of its railroad tracks. The decree further provided, however, that it was not to be construed as restraining defendant from "using the tracks incidentally to the use of the street."

From that decree the Citizens Coach Company has appealed to this court, and now contends not only that the evidence in the cause did not justify the court below in holding that it was using the railroad tracks obstructively, but that no right exists in the railroad company to exclude its coaches from the use of the

railroad track, although engaged in carrying passengers for hire in competition with the railroad company.

The first contention is unnecessary to stop to consider. The evidence seems to be ample of such a continuous and obstructive use of the railroad track by the coaches of the coach company as greatly to interfere with and impede the horse railroad company in its use of its track. Whether this alone would justify an injunction before action at law might be questionable.

But the main question in this case is presented by the other contention of the appellant. It is a question of very great importance, not only to the parties to this cause and those interested in them as stockholders or otherwise, but also to the stock and bondholders of the numerous horse railroad companies organized and operated in this State under grants substantially similar to that in question in this case. It requires the consideration and determination of the nature and extent of the rights acquired by a horse railroad company under such legislation as appears in this case, with respect to the public highways on which the rails of its track are laid.

The question of the rights of such a company with respect to the owners of the land under the highway on which the track is laid has been the subject of much judicial consideration. The question has arisen upon the demand of the land-owner to be awarded compensation for the occupation of his land by the railroad. He has contended that such an occupation of the public highway imposed upon his land a burden greater than that which it sustained before, and which amounted to a taking of his land or some interest therein for which he was entitled to compensation. On the other hand, the railroad companies have contended that the occupation of the highway by the track and its use by the cars was no other or different use than that public use to which the highway was originally devoted.

A similar question had arisen in the earlier periods of the history of railroads designed to be operated by steam power. With a limited and imperfect knowledge of the extent of development to which such roads were destined to attain, or with an exaggerated or distorted view of their character as public highways, it was long contended that such railroads might occupy the soil of ordinary public highways without making compensation to the land-owner. Much difference of judicial opinion and decision may be found on this subject. In this State, in the case of *Morris & Essex R. Co. v. Newark*, 2 Stockt. 352, Chancellor Williamson expressed the opinion that the Legislature might authorize a railroad operated by steam to be laid on the public highway, and that if the occupation did not entirely destroy the use of the highway in the ordinary mode, it was not such a taking of private property as required compensation to be made. On the other hand the Supreme Court, about the same time, in the case of *Starr v. Camden & Atlantic R. Co.*, 4 Zab. 592, held that the owner of land under a public highway taken by a railroad operated by steam was entitled to compensation. The cases of *Hetfield v. Central R. R. Co.*, 5 Dutch. 571, and *Morris & Essex R. Co. v. Prudden*, 4 C. E. Gr. 386; S. C., 5 Id. 530, indicate that the view taken by the Supreme Court is correct. And the reason is pointed out by Chancellor Green in the case of *Hinchman v. Paterson H. R. Co.*, 2 C. E. Gr. 75, with his usual perspicuity and breadth of view. And considering the developments of the railroads of the country, it is now perfectly obvious that the use of a public highway longitudinally by a railroad operated by steam is a use entirely inconsistent with and destructive of the public use to which the highway was originally devoted. The rate of speed at which such roads are operated is dangerous to the public who would otherwise use the highway. It makes use of

rails not adapted to, but destructive of, the ordinary public use of the highway by the usual vehicles of travel thereon. The noise, the danger, the obstruction of its road-bed, all combine to make the use of the highway by such a railroad incompatible with its general use as a public highway. In such a case, then, the railroad becomes a manifest burden on the soil additional to that originally imposed by the public highway, which is a taking of property for which compensation must be made. The question may be considered as set at rest now, in favor of the above views, by a decided weight of authorities to be found collected in 1 Redf. on Railw. (5th ed.), 314 *et seq.*, and notes.

It is obvious, however, that an ordinary horse railroad in occupying a highway with its track and making use of it with its cars produces a different result from that produced by such an occupation and use by a railroad operated by steam. By legislative direction, the track of the horse railroad is required to be (as in this case) so constructed not only as not to interfere with or prevent the passage of other vehicles, but to be adapted to such passage both across and along the rails. The cars are drawn by animals such as usually draw the vehicles used on public highways. They carry along the highway such passengers as otherwise would be obliged to pass over it on foot or in other vehicles, and do so with no more injury in the way of noise, jar or disturbance than would be occasioned by the passage of other vehicles. The use, if it be novel and peculiar in its form, is but a modification of the original use to which the highway was devoted when it became a highway. The burden imposed thereby upon the land-owner, so far as the use of his property is concerned, is identical in kind and no greater in degree than was originally imposed on the land when the highway was opened. Such was the view taken by Chancellor Green in the case of *Hinchman v. Paterson H. R. Co.*, above cited, and he consequently held that the occupation of a street by a horse railroad was not such a taking of property as would entitle the owner to compensation. This view was mentioned with approval by Chief Justice Beasley in *State v. Laverack*, 5 Vr. 201, and by Chancellor Zabrickie in *Jersey City & Bergen R. Co. v. Jersey City & Hoboken R. Co.*, 5 C. E. Gr. 61, 66, and was followed by the present chancellor in *Paterson & Passaic H. R. Co. v. Paterson*, 9 C. E. Gr. 158.

I do not hesitate to adopt this view, sanctioned by such authorities and so reasonable in itself, and to conclude, that so far as the owner of land under a highway is concerned, the use of the highway by legislative sanction by a horse railroad is not inconsistent with the public use to which the highway was originally devoted, and is not an additional burden imposed on the land, but only a variation or modification of the public right and easement originally acquired. Consequently such owner has no right to claim compensation for such occupation of the highway.

While this view has been adopted by many courts, it has also been controverted by judges of repute, and the decisions are consequently very conflicting. No good purpose will be served by a critical examination of the cases in this opinion. It is sufficient to say that when analyzed, the difference between the cases seems to arise from the different views entertained by the judges in respect to the practical question as to how far the use of the highway by the railroad is incompatible with the use to which the highway was originally devoted. And it may be remarked that when a conclusion different from that to which I have arrived has been reached, dissenting opinions have been expressed by judges whose opinions are entitled to respect. See 39 N. Y. 404. The cases may be found collected in 1 Redf. on Railw. (5th ed.) 317, and notes. In the late case of *Att'y-Gen. v. Metropolitan R. Co.*, 125 Mass. 515,

the Supreme Court of Massachusetts reach a conclusion in accord with that to which we have arrived.

The discussion so far may seem, perhaps, to be somewhat beside the real question in this case. But its applicability will be recognized when it is understood that it is insisted that the conclusion to which we have arrived compels us to adopt a view of the case adverse to the claim of the appellee. It is insisted that if the property owner be not entitled to compensation on the ground that the burden on his land is not increased by the use of the highway by a horse railroad, but that such use is a mere modification of the public easement before taken, then it follows that the public right must continue and remain, as before, open to every person. It is claimed that a use of the highway which would exclude in whole or in part a portion of the public is incompatible with such use as the highway was originally devoted to, and therefore that it cannot be consistently held that any exclusive rights are vested in horse railroad companies.

I am unable to see any force in this objection. When a highway has been once taken for public use, the owner of the land retains his title to the same, subject to the public easement. That public easement vests in the public. How far it extends it is not necessary now to inquire. Whether it gives power for the laying of underground or the building of elevated railroads, need not be considered. It is sufficient to consider the easement as one of a right of passage over the same by the public. This right, however, the Legislature may, it is well settled, control. It may control the road for the public use; it may regulate the public use. Thus, it will be conceded, changes of the grade of highways may be made by the public authorities, and the land-owner is entitled to no compensation or redress, however injurious or destructive such changes may be, unless under the provisions of such a statute as exists in this State. Rev. 1009. The public may, without further compensation, lay sewers in the highway. *Stouthinger v. Newark*, 1 Stew. Eq. 446. Water-pipes, it seems, may be laid within the highway as part of the original burden, at the legislative will. *Jersey City v. Hudson*, 2 Beas. 420. And in the well-considered case of *Wright v. Carter*, 3 Dutch. 76, the Supreme Court, Chief Justice Green delivering their opinion, held that the Legislature might authorize a turnpike company to take a public highway and construct its turnpike thereon, without making compensation to the land-owner whose lands were thus appropriated. The act, which was the subject of consideration in that case, provided for the vacation of the public highway by surveyors of the highways, and it appeared in the case that it was so vacated for the purposes of the turnpike. It also appeared that the turnpike company were authorized to charge tolls for all persons travelling thereon. But the court held that the public easement originally acquired over the land was not thereby discharged, and although transferred to a private corporation authorized to exact tolls from travellers and empowered to exclude all who did not pay toll to them, remained yet the same public easement, and was not an additional burden on the land for which compensation could be required. This decision it is unnecessary to vindicate or support in this court, because, although the case of *Wright v. Carter* was afterward reversed (no opinion appearing in the reports), it is understood that the reversal was upon other grounds, and that the opinion of the court below on the point in question was approved. 3 Dutch. 685, note; *State v. Laverack*, 5 Vr. 207; *Freeholders v. Red Bank Turnpike Co.*, 3 C. E. Gr. 93. But I think the decision may well be vindicated upon plainest principles. The public easement requires for its beneficial use the making and maintenance of a roadway. The Legislature, representing the public, may well determine whether this shall be done by the public and at

its expense, or by a private corporation. In the latter case it may give to such corporation a right to exact reasonable tolls, to remunerate it for its outlay and labor. The object is not the benefit of the private corporation. That is merely incidental. The real design is the public good in the use of the public highway. If that can be best served, in the judgment of those representing the public, by making a turnpike thereon, it may properly be done. Manifestly, then, no additional burden is thereby imposed on the land-owner. See, also, *Benedict v. Gott*, 3 Barb. 459.

I do not perceive, therefore, that the use of the highway by a horse railroad company, if held to be exclusive of its use to some extent by others, is thereby an additional burden on the land. Nor can I see any inconsistency in holding that the land-owner is not entitled to compensation, although the use is more or less exclusive. Such use is in fact but a modification of the original public use, established by the representatives of the public, to serve the public purposes in the transportation of passengers upon the highway. It is for the Legislature to decide if this is a judicious and proper mode of use for the public good. If it is so considered, then the Legislature may authorize it, and may limit and control other public uses of the highway for that purpose. So long as the use made is of the same kind as that to which the land was originally devoted, the owner cannot complain of any modifications or limitations of it.

Let us next inquire what rights a horse railroad company acquires by the legislation with respect to other persons making use of the highway in passing and re-passing thereon. Are its rights merely those of passage back and forth upon the rails which it has been permitted to lay upon the public highway? Or has it the power of excluding others from the use of its rails, and if so, how far does that power extend?

The grant in this case must be conceded to be of a franchise. It includes the right to lay down tracks, to run carriages thereon, to carry passengers, and to exact tolls. Such a grant must be construed as giving all the powers reasonably necessary to accomplish the manifest object. *Morris & Essex R. Co. v. Sussex R. Co.*, 5 C. E. Gr. 542. That it contains no word of exclusion is not of consequence, for the grant of a franchise, by its intrinsic force, is exclusive against all persons but the State. *Raritan & D. Bay R. Co. v. Delaware & R. Can. Co.*, 3 C. E. Gr. 548, 572. As was well said by Chief Justice Shaw in *Commonwealth v. Temple*, 14 Gray, 76, "The accommodation of travellers, of all who have occasion to use them, at certain rates of fare, is the leading object and public benefit for which these special modes of using the highway are granted, and not the profit of the proprietors." "The profit to the proprietors is a mere mode of compensating them for their outlay of capital in providing and keeping up this public easement." "Every such grant must, therefore, be held to carry with it all incidental rights which are necessary to its full use and beneficial enjoyment. When the grant has for its object the procurement of an easement for the public, the incidental powers must be so construed as most effectually to secure to the public the full enjoyment of such easement."

Upon such grounds horse railroad companies have been held to have certain exclusive rights, because the exercise of such rights is plainly necessary to the existence and beneficial use of the railroad. Thus a horse car is held to be entitled to the exclusive use of its track, so that another vehicle in meeting it, is, contrary to the usual rule of the road, required to give way and entirely remove from its track. A similar rule is adopted when the horse car overtakes a vehicle proceeding in the same direction, or encounters a vehicle lawfully stopping in the street to deliver goods, etc. *Commonwealth v. Temple*, *ubi sup.*; *State v. Foley*,

31 Iowa, 527; *Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380, and other cases cited in the chancellor's opinion.

It has also been held that a horse railroad company may exclude from its tracks the cars of another horse railroad company, though given authority to use such tracks by the Legislature, unless compensation is required to be made. *Jersey City & Bergen R. Co. v. Jersey City & Hob. R. Co.*, 5 C. E. Gr. 66; S. C., 6 id. 550; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358; *Metrop. R. Co. v. Quincy R. Co.*, 12 Allen, 262. Now the use of one railroad by the cars of another company may be objectionable, because it is probable, and almost certain, that such use would be incompatible with its full use and enjoyment by the company that laid it. But it is not difficult to conceive of cases where it would be quite possible to run cars on other railroads, at least for short distances, without interfering with the regular use of the road by the owners. And so in the cases last cited, the ground of the decision has been, not that there was an interference with the full use of the railroad, but that there was such an occupation of the property and franchise of the railroad company as was manifestly a taking or appropriation of property for which compensation might be required, and must be provided. Such was the view taken by Chancellor Zabriskie in the case in 5 C. E. Gr. 66, above cited. The iron rails of the railroad laid in the street he held to be the property of the railroad company, not abandoned to the public or to every use by those passing over the street. Such use as was incidental and occasional was held to be justified by an implied permission arising from the mode in which the track was required to be laid. But such use was held not to include the use of the track for a competing traffic by the regular running over the rails of cars or carriages adapted to the track and operated by a rival company. When that case came into this court by appeal, no dissent was expressed from the views of the chancellor. The decision here virtually conceded their correctness, so far as the right of compensation was dependent on a franchise and property in the railroad. But this court held that compensation for the appropriation of the property had been substantially provided for in the legislative scheme. See 6 C. E. Gr. 557.

Now if a railroad company have a property in their track laid in the highway, and in their franchise of operating it for tolls, which entitles them to compensation for the use of it by a rival car company, on what substantial ground can it be denied the same right when a like use is made of its track by coaches or omnibuses of competing companies? It is true that there may be a vast difference in the degree to which a railroad company would be interfered with, whether the interference proceeds from use by cars or by coaches capable of being turned off the track; but so far as the property and franchise are concerned, the interference is identical in kind. The use in each case is equally an appropriation of property, which its owner may resist unless compensation be provided for him.

It is urged, with great force, that there is an implied permission to use the rails thus laid on a public highway, to every one lawfully passing over the public road in the prosecution of a lawful business, and who do not directly interfere with the passage of the cars. It may be conceded that by the legislative requirement that the rails should be laid and maintained on the level of the road and of the width of the ordinary wagon track, and by the company's acceptance of such terms in the grant, some permission to use the rails is implied. It is a permission not emanating from the company, nor is it revocable by it. It arises from the nature of the grant, and the conditions under which the track is allowed to be laid. So far as its use by

nary traffic, is concerned, such an implication may well arise. Such use is in no way inconsistent with the grant to the company, and is not destructive to its business. It does not affect the company's rights or franchise. It may wear its rails, but that is part of the compensation the company gives the public for its rights. But the implied permission now discussed must not be extended further than is consistent with the purpose and design of the grant to the company. That purpose was to serve the public by a use of the public highway for public travel, whereby a cheap, convenient and regularly-recurring mode of carriage should be provided for all passengers. For that purpose all the powers of the company were given. Undoubtedly a correlative duty devolved on the company to lay its track and to run its cars for the benefit of the public. Under such circumstances, the laying of the rails must be considered a permission to use them only so far as such use is consistent with the grant and its purpose. Clearly the railroad has not become part of the street. The sills, ties and rails are laid on the street, but they are not part of it. They constitute a part of the machinery for the transportation of passengers, and although placed on the street, no more become part of it than the cars or carriages placed on the rails. *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, *ubi sup.* Retaining thus its property, no permission to use it will be implied, if the use is inconsistent with the grant and its purpose. And there can be no question but that its use for a business competitive with that for which the company was created is inconsistent with the grant, and tends to thwart its purpose and to destroy the usefulness of the company to the public. Permission for a use inconsistent with the grant will not be implied. On the contrary, the implication is of an exclusion of such use.

The conclusion then is that the horse railroad company, the complainant below, acquired, by the grant contained in the charter, a franchise and property in its tracks when laid, which is exclusive of the use thereof by other persons or companies, in competition with it in the business of carrying passengers for hire.

The cases cited in the opinion of the chancellor indicate an almost universal acquiescence in this conclusion, wherever this question has been raised. In addition to those cases, there may be cited the case of *Buffalo R. Co. v. Leighton*, in which, upon a state of facts identical with this case, Chief Justice Sheldon, of the Superior Court of Buffalo, at June term, 1880, restrained the defendant from using the tracks of the plaintiff's railroad in the business of carrying passengers in vehicles of any description. The whole subject is admirably summed up in a report to the Legislature of Massachusetts, made in 1865, and to be found in 1 Redf. on Railw. 328.

Upon such a conclusion being arrived at, it is quite manifest that the decree below must be sustained. Such an inference with a franchise granted by the State, and exclusive in its character, as is proved to have occurred in this case, may be restrained by injunction. *Raritan & D. B. R. Co. v. Delaware & R. Can. Co.*, 8 C. E. Gr. 546.

It may be further remarked that any possible right which the coach company may have to the incidental use of the rails in the use of the street, has been preserved by the decree and injunction. No appeal was taken on the part of the complainant below, and I have thought it unnecessary to consider the question presented by this limitation.

BEASLEY, C. J. The object of the bill exhibited in this case is to prevent the use and obstruction of the complainant's horse railroad, in the city of Camden, by the Citizens Coach Company, the appellant in this court.

I have had no difficulty in settling in my own mind

what the rights, under ordinary circumstances, of the horse railroad company are. The company was duly chartered by the Legislature to build their road, and to run cars and other vehicles upon it, and to charge for the transportation of persons and property thereon, provided that such charge should not exceed a certain maximum sum. I regard this grant of power as giving to the corporation on which it was conferred the exclusive right to the use of this road as a railroad. No one, without its consent, can put cars or other vehicles upon such track, for the purpose of using it as a railroad. And further, as a necessary incident, this company acquired the right of way when overtaking or meeting ordinary vehicles.

On the other hand, I have no idea that by thus having laid this track, such company acquired the exclusive right to use the space so occupied, or any part of such space. That space still remained part of the public street, open in its entire area, to the use, in the ordinary way, of every citizen. Such citizens, under such conditions, could use, as a part of the street, either transversely or longitudinally, the rails so laid. I would refer only so far to the authorities as to say, that with almost entire unanimity they maintain this right in the public against such a chartered right as the one now in question. And it is also obvious that it is upon this foundation alone that the legislative claim, which has been several times sanctioned by the courts of this State, to appropriate the public streets to the use of these railroads, without making compensation to the land owners whose title extends over the property so applied, can be justified. Nor does it seem to me that any class of persons is excluded from the enjoyment of this public right. A company or a corporation engaged in a business competition with that of this railroad company neither loses nor gains any thing by such a relation. The entire street can be used in such a competition to the same extent, and in the same manner as it is lawful to use it in the pursuit of any other business.

Such being the relative rights of the public and of the railroad company, the question arises in this case whether, in the matters here complained of, the rights of the latter have been infringed by the appellant. The respondent complains that the appellant has been using its railroad in the transportation of passengers. The latter avers that it has only been using the railroad in such business as a part of the public highway, as it had a right to do. It seems to me that the question is solved as soon as it is determined what is a use of the railroad and what a use of the highway. The peculiarity of the use of the railroad consists in its continuity; the vehicles remain upon the rails from one terminus to the other, thereby gaining the advantage of avoiding the impediment incident to the uneven surface of ordinary road-beds. But when the railroad is used as a part of the highway, there is no such continuity of use. It is true that on such occasions ordinary vehicles will be run, for various distances, upon the rails; but such use of them is accidental and intermittent. I think it results from these definitions that when, in the pursuit of any business, the wagons connected with it are run, by way of preference and to the largest extent practicable, on one of these railroads, such practice is a use of the railroad. Such use differs very slightly from that which the company makes of its own road. It is true that in a wide sense such use is a use of the public street; but in the same sense so is that of the railroad company with its cars. Therefore it seems to me that where it is a part of the scheme of a business to use in its prosecution the railroad track in preference to the other parts of the highway, the carrying out of such plan is a use of the railroad, and is a violation of the exclusive franchise which I have said is, in that respect, vested in the railroad company.

And this, I think, is what has been done in the present case. The evidence has satisfied me that the use that has been made of the road of this respondent by the vehicles of the appellant has been the result, not of accident, but of design. It has been quite clearly proved that there has been an understanding, either express or tacit, between the managers of this coach company and their employees, that the road of the respondent was to be converted into one of the efficient instruments of its business; and as was to be expected, such understanding has been put into effect, utterly regardless of the embarrassments which, by such action, were thrown upon the respondent. The road of the respondent has not only been used by this rival company to the greatest extent practicable, but has been used in such a manner as seriously to obstruct the convenient employment of it by its owner. Against the continuance of such conduct the respondent had a right to appeal to the law for protection.

And it is on this same ground that it appears to me that the relief by injunction was admissible. These interferences with the rights of the respondent, being the outcome of an organized plan, could not be sufficiently remedied except by the preventive power of a court of equity. Occasional interruptions and invasions of this franchise, not being parts of a general scheme, would not have justified such interposition, as such wrongs, being both public and private nuisances, could have been sufficiently repressed by actions at law or by indictments. Under such conditions, these latter methods of redress would have been the appropriate and sole remedies. But such repressions would not be adequate where the wrong-doing proceeds from a concerted plan of operations, because, as the remedy would be aimed at the effects, and not at the cause, the result would be the inefficiency, with respect to results, that in general attends a great multiplicity of suits.

I have regarded these questions as of considerable importance, and have, on that account, preferred to express my own views on the subject; and it is in consequence of such views that I shall vote to affirm the decree rendered in the court below.

Decree unanimously affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

CRIMINAL LAW—CRUELTY TO CHILDREN—LAWS 1876, CHAP. 122—OFFICER IN CHARGE OF CHILDREN IN CUSTODY OF CORPORATION LIABLE TO INDICTMENT FOR CRUELTY—INSUFFICIENT FOOD AND MEDICINE CRUELTY—EVIDENCE—HYPOTHETICAL QUESTIONS—PHOTOGRAPHS OF PERSONS—VARIANCE—ACT CHARGED ON SPECIFIC DAY, PROOF OF ACT CONTINUED THROUGH NUMEROUS DAYS—VOLUNTEER TAKING CHILD BOUND TO CARE FOR IT.—(1) Chapter 122, Laws 1876, enacts that "whoever having the care or custody of any child shall willfully cause or permit the life of it to be endangered or the health of it to be injured, or it to be placed in such a situation that its life may be endangered, or its health be likely to be injured, shall be guilty of a misdemeanor." § 4. Plaintiff in error was indicted under this provision, it being charged that he willfully neglected to provide a child named, with, and to give to him proper, wholesome and sufficient food, clothing, and means of cleanliness, causing thereby his health to be injured, and also that he willfully neglected to provide the child with proper and sufficient medicine and medical attendance, thereby causing his health to be injured. The plaintiff in error was secretary of a benevolent institution, duly incorporated, having a board of trustees and subject to the visitation of the Supreme Court and the State board of charities. He was, however, in actual charge of the house and the household in which the child in question dwelt, and where the acts which were the subject of indict-

ment were done. He was the head of the household, the authoritative director of all its internal affairs. That the acts were done was in conformity with his rules, and if he had directed otherwise they would not have been done. The custody of the inmates of the house centered in him. *Held*, that he could not set up as a defense that the acts were not done by him but by the corporation. While penal statutes must be construed strictly, and the letter of the act may not be extended by implication or equitable construction, the intention of the Legislature is the best method to construe, though that is to be deduced from the words it uses. *Haydon's case*, 3 Co. 18, 19, n. b. The Legislature, by "whoever," having the care or custody of any child, meant a sentient being who could will and do. While the legal control of the child was in the corporate body, which could supersede the plaintiff in error in the actual control, plaintiff had the actual physical, immediate care and custody of the child. It has been held that an officer of a corporation may be indicted for the neglect of a duty resting upon it. *Kane v. People*, 3 Wend. 363. (2) Hypothetical questions put to an expert need not state the facts as they exist. Each side, in an issue of fact, has its theory of what is the true state of facts and assumes that it can prove it to be so, and assuming, shapes hypothetical questions to experts accordingly. It is not error to take such questions. *Erickson v. Smith*, 2 Abb. App. Dec. 64; *People v. Lake*, 12 N. Y. 358; *Seymour v. Fellows*, 77 id. 178; *Guterman v. Liverpool, etc., S. Co.*, 23 Alb. L. J. 114. (3) The indictment charged the offense to have been on a specific day. The proof was of a continuous course of conduct consisting in giving the child food insufficient in quantity, and like continuous acts and omissions. There was not one act specifically shown to have been done upon any specific day. *Held*, sufficient to warrant a conviction. See *People v. Van Santvoord*, 9 Cow. 655; *Jacobs v. Commonwealth*, 5 S. & R. 316; 2 Hawk. P. C., § 79; *Starkie's C. P.* 60; 1 Chit. on Cr. L. 218, 180; *People v. Adams*, 17 Wend. 475; *Rex v. Dixon*, 10 Mod. 335; *United States v. La Coste*, 2 Mason, 129; 1 Bish. on Cr. L., § 248. (4) One who with no natural or legal duty voluntarily takes the care and custody of a child must either do his duty in giving it food or must yield it to others, and he cannot set up, in answer to an indictment under the statute mentioned, that he had no means to do his duty. This is not in conflict with *Regina v. Chandler, Dears.* Cr. Cas. 453. See, upon the general subject, *Hogan's case*, 2 Dev. Cr. Cas. 277; *Regina v. Downes, L. R.*, 1 Q. B. D. 25; *Regina v. Mabbett*, 5 Cox's Cr. Cas. 399. (5) At the trial the people offered in evidence photographs of the child. One was proved to be a correct picture of him before he came into the care of plaintiff in error. The other was testified to be a correct likeness of him taken at the hospital, where the child was about two weeks, after he was removed from plaintiff's care, and it was shown that his physical appearance was at that time better than when he was first so removed. *Held*, that the photographs were admissible as evidence. Photographic pictures, when shown by other testimony to be correct resemblances of a person, may be shown to the jury, not as conclusive evidence, but as aids in determining the matter in issue, still being open like other proofs of identity, or similar matter, to rebuttal or doubt. The cases are not adverse to that view. See *Cozzens v. Higgins*, 1 Abb. App. Dec. 453; *Udderzook's case*, 76 Penn. St. 340; *Ruloff v. People*, 45 N. Y. 213; *Macy v. Barnes*, 16 Gray, 162; *Hynes v. McDermott*, 22 Alb. L. J. 368. Judgment affirmed. *Cowley, plaintiff in error, v. People of New York*. Opinion by Folger, C. J.

[Decided Jan. 18, 1881.]

— FALSE PRETENSES—PUTTING FALSE ACCOUNT AGAINST CITY IN THE WAY OF PAYMENT A FALSE PRE-

TENSE TO PAYING OFFICER, THOUGH IT GOES THROUGH OTHER HANDS FOR AUDIT—CHARACTER OF PRETENSE—PLEADING—FACT WITHOUT DETAILS SUFFICIENT—EVIDENCE—OFFICIAL ROUTINE AS REASON FOR STATEMENT THAT ACT WAS DONE—RIGHT TO PUT LEADING QUESTIONS ON CROSS-EXAMINATION—NATURE OF OFFENSE—ACT INFLUENCED BY FALSE PAPER NOT READ MINGLED WITH OTHER TRUE ELEMENTS—JUROR—COMPETENCY NOT AFFECTED BY OPINION FROM READING NEWSPAPERS.—(1) A witness testified that at the dictation of G., accused of procuring a warrant for money by false pretenses, he wrote this as a bill due him from the city of New York: "1871; January, February, March, April, May, June: To iron work, window frames, iron, timbers, etc., on contract as per agreement with commissioners. \$4,710." This bill had reference to a public building in New York city that commissioners were authorized to erect. There had been no agreement or contract for such iron work, etc. It was in evidence that G. took this bill to the commissioners, procured their certificate of its correctness, obtained the written approval of the contractor for the building, delivered the bill to the secretary of the commissioners, and directed that it be sent to the city comptroller for audit; that he requested the auditor to certify to its correctness, the comptroller to draw a warrant upon the city treasury for its amount, and the mayor to countersign that warrant, which these officers did, relying upon the correctness of the bill. Another paper, to be used as a voucher, substantially a copy, was made by the secretary of the commissioners, which referred to the bill prepared by D. as the annexed bill. *Held*, that an indictment for false pretenses against G., which stated that defendant pretended and represented to the mayor that the city was justly indebted to D. in the sum mentioned for materials furnished for the building in question by said D., and that D. had supplied the materials, etc., and that the representations were false, and that thereby the mayor was induced to sign and deliver to G. the warrant, etc., was sufficiently explicit. In *Thomas v. People*, 34 N. Y. 352, it is said it is enough to state and negative one false pretense in an indictment, and if the pretense is "capable of defrauding" that is sufficient. The allegations that the accused pretended and represented to the mayor is sufficient without averring the channels through which the pretense reached him. *Skiff v. People*, 2 Park. Cr. 139. (2) While a mere private cheat is not within the statute, if the pretense is capable of defrauding, that is sufficient. *People v. Williams*, 4 Hill, 9; *Regina v. Wooley*, 4 Cox's C. C. 193. It cannot be set up that the pretense is a debt due from the one it is made to, who must be presumed to know whether such is the fact, the debtor being a municipal corporation, which must act through officers who do not necessarily know in every instance whether a debt exists. (3) A statement by the mayor that he signed the warrant, etc., founded not on recollection but upon the routine of an office, the witness having no precise recollection of what took place when he signed the paper, and knew that he signed it only because his name was affixed to it, *held* sufficient, and that evidence of such routine was competent. *People v. Gates*, 13 Wend. 311. (4) The mayor did not read the bill which as a voucher accompanied the warrant. What moved him to sign the warrant, it was said, was solely the signatures of the auditor and comptroller. He testified that he never signed warrants on such cases unaccompanied by the bills or vouchers. *Held*, that if the presence of the bill had any effect in inducing the mayor to sign, although intermingled with other truthful elements, it was sufficient to establish the false pretense. That it went through other hands, and that the intermediate agencies were independent officers who could have stopped its progress, makes no difference. *People v. Adams*, 8 Den. 190; S. C., 1 N.

Y. 178; *Commonwealth v. O'Donnell*, 7 Metc. 462; *Commonwealth v. Call*, 21 Pick. 523; *Rex v. Brisac*, 4 East, 164. The bare presence of the bill, unread by the mayor, deceiving him, was enough. *Rex v. Barnard*, 7 C. & P. 784. G. knew the consequence of his act when he sent the bill on its way to the mayor, and is responsible therefor. (5) Where a juror testified that he had formed an opinion as to the case by reading the newspapers; that such opinion was dependent upon the truth of what he had read and he had assumed it to be true; that he would not be influenced upon the trial by his opinion, and if put on the jury would discard it and decide upon the testimony; that it would not in that case require evidence to overcome his opinion, and that he would try the case without being influenced by it, *held*, that under the acts of 1872 and 1873 he would not be incompetent. *Thomas v. People*, 67 N. Y. 218; *Cox v. People*, 21 Alb. L. J. 314; *Case of Greenfield*, 74 N. Y. 277, distinguished. (6) The right to put leading questions while seeking to elicit new matter on cross-examination does not exist. *Hanson v. Rowen*, 3 Wash. C. C. 580; *Ellmaker v. Buckley*, 16 S. & R. 77; *Philada.*, etc., *R. Co. v. Stampson*, 14 Pet. 488; *Castro v. Brovington*, 2 W. & S. 505; *Floyd v. Berard*, 6 id. 75; *Jackson v. Thomas*, 2 Cal. 178; *People v. Moore*, 15 Wend. 419. As to the new matter the party makes the witness his own. As a general rule the usage and extent of a cross-examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to the matters pertinent to the issue or to specific facts which tend to discredit the witness or to impeach his moral character. *People v. Brown*, 72 N. Y. 571; *People v. Crapo*, 76 id. 290; *Ryan v. People*, 79 id. 594. If this limitation is not disregarded this court can interpose only when there has been an abuse of discretion. *Great West. Turnpike Co. v. Loomis*, 32 N. Y. 127; *LaBeau v. People*, 34 id. 230; *People v. Casey*, 72 id. 393. Judgment affirmed. *People of New York ex rel. Phelps v. Court of Oyer and Terminer of the county of New York*. Opinion by Finch, J. [Decided Jan. 18, 1881.]

INSURANCE—LIFE POLICY—CONDITIONS AS TO FORFEITURE—TRAVELLING ON SEAS—ENDOWMENT POLICY—FORFEITURE OF RIGHTS AND PREMIUMS ON SURRENDER OF POLICY—NOTICE, WHEN NOT REQUIRED—STIPULATIONS IN RECEIPT CONTINUING POLICY—STIPULATIONS ON BACK OF POLICY PART OF IT—PROMISE TO GIVE CONSENT ON REASONABLE TERMS—EQUITY WILL NOT GENERALLY RELIEVE FROM FORFEITURES.—(1) A life policy issued October 1, 1868, upon the life of Wm. M. Tweed, set forth that in consideration of \$1,180.90 paid, and a like sum annually during the continuance of the policy, it would pay for the benefit of plaintiffs \$10,000 upon the death of Tweed. If he should be alive April 1, 1878, and the policy in force, it would pay the sum to Tweed. The policy contained among other conditions this, that it should be "void and of no effect" if the party whose life is insured should "without the written consent of this company, previously obtained, travel upon the seas." Upon the policy was this stipulation by the company: "It being understood and agreed that if after the receipt by this company of not less than three or more annual premiums this policy should cease in consequence of the non-payment of premiums, then upon the surrender of the same the company will issue a new policy for the full value acquired under the old one, that is to say if payments for three years have been made, it will issue a policy for three-tenths of the sum originally insured; if for four years, for four-tenths, and in the same proportion for any number of payments," etc. The premiums were paid down to and including that due on October 1, 1875, but not thereafter. On the 4th of September, 1875, Tweed es-

caped from the custody of the sheriff of New York, who held him under civil process, and was recaptured at Vigo, Spain, in September, 1876, and was brought to this country by sea. He had never obtained the consent of the insurance company to travel upon the seas. Plaintiffs did not offer to surrender the policy until August, 1877, when they did so, and demanded from the company a paid-up policy for eight-tenths of the amount insured. *Held*, that the travel upon the seas by Tweed forfeited the policy and plaintiffs' rights thereunder and the premiums paid thereupon, and that there was no equitable ground for releasing from the forfeiture. *Held*, also, that it was not necessary that the company should give any notice to enable it to enforce the forfeiture. (2) At the time the payment was made in October, 1875, the company gave a receipt which set forth that the policy "is hereby continued in force for twelve months from this date, to wit, until the 1st day of October, 1876," subject to a condition that if any note was given in payment, if it was not paid when due the policy should become void," etc. All of the receipt after "1876" was in print. The premium was paid in cash. *Held*, that the only force of the receipt was to keep the policy in force so far as it depended upon the payment of the premium. It did not modify or amend it as to the conditions. (3) On the back of the policy was printed a statement that permits will be granted by the company to the insured to travel in foreign countries on "reasonable terms." *Held*, that it could not be claimed that the company was bound to grant the permit upon payment of a reasonable charge, which the court could fix and allow in this action to the company as a deduction. The company could impose other terms than a reasonable charge. The court could not act when the permit was not even asked for. And the court cannot relieve from the forfeiture, even though the insured returned in safety to this country. *Hathaway v. Insurance Co.*, 11 Cush. 448; *Nightengale v. Insurance Co.*, 5 R. I. 38; *Raynsford v. Insurance Co.*, 33 N. Y. Sup. 454; affirmed, 52 N. Y. 626; *Evans v. Insurance Co.*, 64 id. 304. (4) The body of the policy stated that the conditions on the back were a part thereof. *Held*, that the provision for a paid-up policy on the back was not a separate independent agreement to which the conditions of the policy could not be applied. All that is written on the face of the policy and on the back of it are parts of the policy and constitute the contract. *Jennings v. Insurance Co.*, 2 Den. 75; *Palch v. Insurance Co.*, 44 Vt. 481. (5) It is a mistake to suppose that courts of equity will generally release against forfeitures. They will sometimes do so. Their jurisdiction to do so has been regarded as a dangerous one not to be extended, and wise jurists have said it should be sparingly exercised. *Story's Eq. Jur.*, § 1301. Judgment affirmed. *Douglass et al., appellants, v. Knickerbocker Life Insurance Co.* Opinion by Earl, J. [Decided Jan. 18, 1881.]

MUNICIPAL CORPORATION—CLAIM AGAINST CITY OF TROY—VARIANCE—NEGLIGENCE—RULE AS TO CONTRIBUTORY NEGLIGENCE.—(1) By the charter of the city of Troy, in order to sustain an action against the city, it is necessary to show "that the claim for which the action was brought was presented to the comptroller, with an abstract of the facts" out of which it arose, and that he did not, within sixty days thereafter, audit the same. Plaintiff, who was injured by a defect in the streets of the city, in an action therefor, put in evidence a petition addressed by her to the mayor and commonalty of Troy and to the comptroller, stating the facts of her case as they were set out in the complaint, and her claim "for damages and injuries" arising therefrom at the sum of \$1,000. It was not audited. In her complaint she demanded judgment for \$5,000. *Held*, that the provision of the charter was

complied with and there was no variance between the petition and the complaint. See *Field v. Field*, 77 N. Y. 294. (2) The injury was caused by a hole in a city street into which plaintiff drove. The court, at trial, charged that if plaintiff's negligence contributed to the injury she could not recover, and defendant's counsel asked a charge that "if the jury shall find that the hole did exist, etc., still if such hole was one which might have been seen by plaintiff and readily avoided by the ordinary exercise of her eyes, the failure to avoid it constituted negligence on the part of plaintiff, defeating recovery." The court replied: "That is substantially accurate. There is a single expression there, though, which needs to be modified, that is, 'if this might have been seen.' That is the only part in the request to charge which is unsound. I charge you that if in the use of ordinary care and ordinary prudence such as the ordinarily prudent person would have used under the same circumstances, it ought to have been discovered, then the plaintiff cannot recover." Held, that the charge was not erroneous. Judgment affirmed. *Minick v. City of Troy*, appellant. Opinion by Danforth, J. [Decided Jan. 18, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

CONFLICT OF LAW — PRACTICE — STATE LAW OF LIMITATION OF TIME TO TAKE APPEAL WILL NOT OUST SUPREME COURT OF POWER TO ENFORCE MANDATES. A., a citizen of Pennsylvania, commenced an action in a Virginia Circuit Court against B., a citizen of Virginia, to recover a debt due in 1861. The defendant set up a law of the Confederate States and proceedings thereunder as a discharge of the debt. The Circuit Court held the defense valid. Plaintiff, under the practice in Virginia, applied to the Supreme Court of Appeals of that State for a writ of *superedeas* to review this judgment. This court denied said writ on the ground that the decision of the court below was "plainly right." By the law of that State, when application is made to the Supreme Court of Appeals for a writ of *superedeas*, the court looks into the record of the case, and only allows the writ when of opinion that the decision complained of ought to be reviewed. Its action upon the record is in effect a determination whether or not it presents a sufficient question for the consideration of the court. If it deems the judgment of the court below "plainly right," and reject the application on that ground, and its order of rejection so state, no further application for the writ can be presented; the judgment of the court below is thenceforth irrevocable. So in effect its refusal of the writ on that ground is equivalent to an affirmance of the judgment, for the reason that the record discloses no error. A writ of error was taken from that court to this court, which held that the judgments of the Virginia courts were erroneous, that the judgment denying a writ of *superedeas* should be reversed and the cause remanded to the Supreme Court of Appeals for further proceedings, in accordance with the opinion of this court. By the Code of Virginia it is provided that no process shall issue upon an appeal, writ of *superedeas*, etc., from a judgment or decree if more than two years have elapsed since the decree or judgment was rendered, but the appeal or writ shall be dismissed. Where, then, two years had elapsed between the time of the entry of the judgment of the Circuit Court and the reversal by this court of the decision of the Supreme Court of Appeals, and the Supreme Court of Appeals declined to execute the mandate of this court on that ground among others, held, that the judgment denying the *superedeas* is a final determination of the character of

the judgment of the inferior court. Although in the form of denying the *superedeas*, it is not essentially different in its character and effect from a judgment dismissing such writ after it had been once granted and the merits of the case heard. So long as it remains unreversed, it will be authority to all the inferior courts of Virginia that the confiscation of debts due to loyal citizens, under an act of the Confederate government, enforced as a law of the State, was a valid proceeding. It is therefore the subject of review in this court. *Richmond, etc., Railroad Co. v. Louisa Railroad Co.*, 13 How. 80. It is enough for the jurisdiction of this court over the case that there was a final judgment of the Court of Appeals, and such jurisdiction cannot be now ousted after this court has acted upon the case and passed upon its merits, by any suggestion that that court had at the time no jurisdiction to look into the record of the inferior court and determine the character of its judgment; nor can this court listen to any such suggestion. Whenever the highest court of a State by any form of a decision affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a Federal question, will upon a proper proceeding attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or *superedeas*, or by dismissing a writ previously allowed. And when this court has once acquired jurisdiction, it may send its process, in the enforcement of its judgment, to the appellate court of the State, or to the inferior court whose judgment is reversed. Had the Court of Appeals, after assuming jurisdiction so far as to examine the record of the inferior court and pass upon its validity, granted the *superedeas* and rendered in the case the judgment, which, in the opinion of this court, should have been rendered, the judgment of the inferior court would have been reversed, and judgment have been ordered in favor of the plaintiffs in error. Having jurisdiction of the case, this court can now direct that such reversal be made and such judgment be entered. Mandate to Supreme Court of Appeals of Virginia recalled, and judgment directed reversing the judgment of the Circuit Court and awarding judgment to plaintiffs. *Williams et al., plaintiffs in error, v. Bruffy*. Opinion by Field, J. [Decided December, 1880.]

PRACTICE — EFFECT OF AMENDMENT OF PLEADINGS AFTER TRIAL UPON WAIVER OF JURY TRIAL.—By consent of parties a jury trial was waived and the case was tried by the court. At the close of the evidence plaintiff asked, and against the objection of the defendant obtained, leave to amend his declaration so as to avoid a variance between the pleadings and the proof. The defendant then put in a general denial to the amended declaration and demanded a jury trial. This the court refused, but gave the defendant leave to introduce additional evidence if he desired. By section 964, U. S. R. S., the trial court may at any time permit either of the parties to amend any defect in the process or pleadings upon such conditions as it shall in its discretion or by its rules prescribe. Held, that this clearly authorizes the allowance of amendments during the progress of a trial in furtherance of justice. When such an amendment is permitted the court must in its discretion determine whether any submission which has been made ought to be vacated. Here the court decided that it ought not, and in this there was nothing wrong. Neither the nature of the case nor the real issue between the parties, as it had been tried, was changed by the amendment. All that had been done was to present by the pleadings, fairly and on its merits, the controversy as it had actually been tried. Judgment of U. S. Cir. Ct., Connecticut, affirmed.

Bamberger, plaintiff in error, v. Terry. Opinion by Waite, C. J.
[Decided Jan. 10, 1881.]

STATUTORY CONSTRUCTION — EFFECT OF CHANGE IN LIMITATION UPON EXISTING RIGHTS — BANKRUPT LAW. — On the 15th of November, 1873, M. made a transfer of securities to A. to secure an existing debt, A. having reason to believe that M. was insolvent. This was a preference under the bankrupt law, if a petition in involuntary bankruptcy should be filed within four months. Such a petition was filed against M., February 4, 1874, within the four months' limitation. June 22, 1874, Congress amended the bankrupt law, changing the limitation to two months. The assignee in bankruptcy of M. commenced an action against A. to recover the securities as transferred in violation of the bankrupt law, May 11, 1875. *Held*, that the limitation of two months could not be set up as a defense. The rights of the parties were fixed before the new law was passed. The assignee had a vested right to the securities or to their value. The defendant was under legal obligation to return these securities or to pay their value to the assignee. To hold that Congress intended by this amendatory statute to take away that right of action is to hold that it intended by a retrospective statute to destroy a vested right of property or an existing right of action. If it be conceded that Congress could do this, the principle is well established that no law will be construed to act retrospectively unless its language imperatively requires such a construction. Decree of U. S. Circ. Ct., S. D. New York, affirmed. *Auffm'ordt et al., appellants, v. Rastin.* Opinion by Miller, J.
[Decided Jan. 24, 1881.]

MAINE SUPREME JUDICIAL COURT ABSTRACT.

MARCH, 1880.*

AGENT — TO SELL AND BUY GOODS HAS NO AUTHORITY TO GIVE NOTES FOR LOANS — PRINCIPAL RETAINING FRUITS OF UNAUTHORIZED ACTS, LIABLE. — An agent appointed by a company to have charge of a store, sell the goods, and from time to time make such purchases of goods as might be necessary in his judgment, subject to the general oversight of the directors, has no authority to give notes of the company in order to procure loans of money; and when notes in suit were thus given the plaintiff cannot recover. When an agent, without the authority or knowledge of his principal, borrows money and applies it to the payment and discharge of the legal liabilities of his principal, and the principal knowingly retains the benefit of such payment, the lender may recover therefor in an action against the principal for money had and received. A principal cannot knowingly retain the benefit of money hired by his agent in the name of the principal, and at the same time legally refuse to repay the loan upon the ground that the agent had no authority to borrow money. *Merchants' Bank v. State Bank*, 10 Wall. 604; *Mayor of Nashville v. Ray*, 19 id. 484; *Bissell v. Jeffersonville*, 24 How. 300; *Sedgwick on Stat. & Const. Law*, 90; *Tracy v. Talmage*, 14 N. Y. 162; *Curtis v. Leavitt*, 15 id. 9; *Oneida Bank v. Ontario Bank*, 21 id. 490; *Green's Brice's Ultra Vires*, 618; *Chicago Build. Soc. v. Crowell*, 65 Ill. 459; *DeGroof v. American Lin. Th. Co.*, 21 N. Y. 124; *Bissell v. Michigan South., etc.*, R. Co., 22 id. 258; *Bradley v. Ballard*, 55 Ill. 417; *Steam Navigation Co. v. Weed*, 17 Barb. 378; *State Board of Agriculture v. Citizens' R. Co.*, 47 Ind. 407; 17 Am. Rep. 702; *Dill v. Wareham*, 7 Metc. 426; *White v. Franklin Bank*, 22 Pick. 181; *Atlas Bank*

v. Nahant Bank, 3 Metc. 581; *Railway Co. v. McCarthy*, 6 Otto, 267; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 49; compare, also, *Concord v. Delaney*, 56 id. 201; 58 id. 309; *Parish v. Wheeler*, 22 N. Y. 503. *Perkins v. Boothby.* Opinion by Symonds, J.

EMINENT DOMAIN — CORPORATION ENTITLED TO EXERCISE, NOT LIABLE FOR CONSEQUENTIAL DAMAGES. — When the Legislature, in the legitimate exercise of the right of eminent domain, has chartered a corporation with certain powers and privileges, the corporation in the exercise of its corporate rights is not liable for consequential damages arising from such exercise, without fault or negligence on its part. *Boothby v. Androscoggin, etc.*, R. Co., 51 Me. 318; *Burroughs v. Housatonic R. Co.*, 15 Conn. 124; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Hatch v. Vermont, etc.*, R. Co., 25 Vt. 49; *Cleveland & Pittsb. R. Co. v. Speer*, 56 Penn. St. 325. *Sumner v. Richardson Lake Dam Co.* Opinion by Appleton, C. J.

REAL ESTATE — WATER WHEEL IN MILL, A FIXTURE — MILL BUILT BY ONE IN POSSESSION UNDER VERBAL CONTRACT OF SALE, REALTY. — The water wheel and gearing put into a mill to be used permanently for operating said mill, become fixtures and pass with the mill. *Farrar v. Stackpole*, 6 Me. 164; *Pope v. Jackson*, 65 id. 165; *Blethen v. Towle*, 40 id. 310. A mill built upon land in possession of the builder under a verbal contract for its purchase becomes a part of the realty, and the same result follows though built for a third person with an understanding that such third person will take the premises upon certain conditions. Though a person in possession under a verbal contract of purchase is a tenant at will, he is not liable for rent so long as he performs the terms of his contract, or they are waived by the vendor. And all improvements made while such contract is in force are made under the agreement of purchase and not as tenant. In such case the principles of law applicable to landlord and tenant in relation to improvements made do not apply; but in the absence of any other agreement, they become a part of the freehold, as in the case of mortgagor and mortgagees. 1 *Cruise*, 46; *Fuller v. Tabor*, 39 Me. 521; *Pullen v. Bell*, 40 id. 314; *Russell v. Richards*, 1 Fairf. 429; *Dingley v. Buffum*, 57 Me. 381; *Patterson v. Stoddard*, 47 id. 355; *Gould v. Thompson*, 4 Metc. 224. *Lapham v. Norton.* Opinion by Danforth, J.

CRIMINAL LAW.

ACCESSORY — ONE AIDING TO COMMIT ONE CRIME NOT ACCESSORY TO ANOTHER COMMITTED BY HIS ACCOMPLICES WITHOUT HIS KNOWLEDGE. — Where defendant rowed a boat containing others to a place to enable the others to rob a safe, and waited for them while they were absent for that purpose, *held*, that he would not be guilty of the robbery of a person whom his associates met, he having no knowledge of an intent to commit a robbery of such person. It is true the accessory is liable for all that ensues upon the execution of the unlawful act contemplated; as, if A commanded B to beat C, and he beats him so that he dies, A is accessory to the murder. So, if A command B to burn the house of C, and in doing so the house of D is also burned, A is accessory to the burning of D's house. So, in this case, if defendant had knowledge of the intention to rob the safe, and aided and abetted his associates in the commission of that offense, and if, in furthering that purpose, a fatal assault had been made upon any one, the defendant would have been accessory to the murder. But if the accessory order or advise one crime, and the principal intentionally commit another, for instance, to burn a house, and instead of that he commit a larceny, or to commit a

* To appear in 71 Maine Reports.

crime against A, and instead of so doing he intentionally commit the same crime against B, the accessory will not be answerable. 1 Whart. on Crim. L., § 134. Iowa Sup. Ct., Dec. 16, 1880. *State of Iowa v. Lucas*. Opinion by Day, J.

INFORMATION — EXISTENCE OF ONE NOT BAR TO ANOTHER FOR SAME OFFENSE — CONSTITUTIONAL LAW — STATE LAW AUTHORIZING PROSECUTION BY INFORMATION, VALID.—(1) The existence of one information is not a bar to another one for the same offense. *Ex parte Cahill*, 52 Cal. 463; *Ex parte Walsh*, 39 id. 705. In *Dutton v. State*, 5 Ind. 534, it was held that "another indictment pending for the same offense constitutes no ground for abatement. This in criminal prosecutions seems to be the settled rule." 1 Chitty's Crim. L. 447, and in *Commonwealth v. Murphy*, 11 Cush. 472, it is said that "the pendency of one indictment is no ground for plea in abatement to another indictment in the same court for the same cause." In *Mizza v. State*, 36 Miss. 616, it was decided that "the motion in arrest of judgment, on the ground that other indictments of similar import were then pending in the same court against the same defendant, was properly overruled." In *United States v. Herbert*, 5 Cranch's C. C. 87, it is said that "the pendency of another indictment against the defendant, for the same offense, is no ground for arresting the judgment." See, also, Whart. Cr. Pl. & Pr., § 452. (2) A State law authorizing a prosecution by information is not in violation of the provision of the Federal Constitution forbidding a State to "deprive any person of life, liberty or property without due process of law." The meaning of due process of law is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Dartmouth College v. Woodward*, 4 Wheat. 519. See, also, *James v. Reynolds*, 2 Tex. 251; *Den v. Murray*, 18 How. 272; *Heuber v. Reily*, 53 Penn. St. 117. In *People v. Supervisors, etc.*, 70 N. Y. 234, it was held that "the Legislature has the right to take away a particular form of remedy and give a new one." When life and liberty are in question, there must, in every instance, be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted. But the States will prescribe their own modes of proceeding and trial. *The accusation may be by grand jury or without one*, the trial by jury or by court; and whatever is established will be "due process of law," so that it be general and impartial in operation, and disregard no provision of Federal or State Constitution. In general, however, an accused person will be entitled to the judgment of his peers, unless that mode of trial is expressly dispensed with by law. (3) Nor is it in violation of the fourteenth amendment. *Rowan v. State*, 30 Wis. 129; *Walker v. Sauvinet*, 92 U. S. 90; *United States v. Cruikshank*, 92 id. 554; *Bank of Columbia v. Oakley*, 4 Wheat. 244. *California Sup. Ct., Nov. 4, 1880. Kalloch v. Superior Court of San Francisco et al.* Opinion by Morrison, C. J.

ROBBERY — FORCE NECESSARY TO CONSTITUTE.—To constitute robbery, as distinguished from larceny from the person, there must be force or intimidation in the act; therefore, where a thief slipped his hand into the pocket of a lady and got his finger caught therein, and she felt the hand, and turning saw him looking unconcernedly at the houses, and caught him by the coat, which was left with her in making his escape, *held*, that the crime is larceny from the person and not robbery, though the lady's hand was torn in extracting his hand. *Georgia Sup. Ct., Dec. 23, 1880. Fanning v. State of Georgia.*

NEW YORK STATE BAR ASSOCIATION.

MINUTES OF THE EXECUTIVE COMMITTEE.

THE following resolutions, having been duly submitted to the Executive Committee, have been adopted, by correspondence:

I. *Resolved*, That a Committee of Arrangements, consisting of five members of the New York State Bar Association, be appointed by the Chairman of the Executive Committee; that such Committee of Arrangements have power to add to their number one from each Judicial District, and to fill vacancies in the Committee; that they be charged with the duty of making arrangements for the next Annual Meeting of the Association by inviting the reading of papers and the delivery of addresses; by securing, through correspondence or otherwise, the active co-operation of the Standing Committees in bringing before such Annual Meeting, matters of general interest to the Association, within their several Departments, and by preparing a plan for the order of exercises; and that they be requested to report progress to this Committee, or the Secretary thereof, with such suggestions as they think proper, on or before the 1st day of September, 1881.

II. *Resolved*, That the next Annual Meeting shall be held on Tuesday, the 20th day of September, 1881, at 10 o'clock A. M., at the city of Albany, when the business of the Association shall be first in order, and during the session for the transaction of business no persons shall be invited to be present who are not members of the Association, or reporters of the proceedings.

III. *Resolved*, That after the business of the Association shall have been transacted, the other exercises shall be taken up and continued as may be arranged by the Committee of Arrangements, subject to the direction of the Executive Committee.

IV. *Resolved*, That the Committee on Law Reform be requested to take into consideration the subject of the Codification of the Common Law, as already reported to the Legislature, and to report its views and opinions thereon in writing at the next Annual Meeting of the New York State Bar Association.

V. *Resolved*, That the members of each of the "District Committees on Admissions" be individually requested to take immediate steps toward perfecting the organization of such Committees under the provisions of By-law VI, and of Art. VII of the Constitution, and when so organized to use their best exertions in procuring written proposals for membership of the Association (under the provisions of such By-law), to be made to such several "District Committees on Admissions," of members of the profession (eligible under Art. III of the Constitution) who are interested in the objects of the Association (as declared in Art. II of its Constitution), to the end that the names of such persons may be reported to the "General Committee on Admissions" under said By-law, and submitted to the "General Executive Committee" for election, under said Article III of the Constitution.

VI. *Resolved*, That the members of each of the "District Executive Committees" be individually requested to take immediate steps toward perfecting the organization of such Committees under the provisions of By-law V and Article VI of the Constitution; and that, when so organized, the Chairman of each "District Executive Committee" report the same to the Secretary of the "General Executive Committee," to the end that he may be enabled to comply with the Rules and Regulations of the "General Executive Committee," as printed (at page 5 of Vol. III, and at page 27 of Vol. IV) in the Reports of the Association.

VII. *Resolved*, That the Committee on Prizes be requested to make general "rules for the contest for

such prizes as may be instituted by or under the sanction of the Association" (in conformity with Art. X of the Constitution), and to report the same as soon as practicable to the Executive Committee of the Association.

VIII. *Resolved*, That any City or County, or other local Bar Association in this State, may appoint delegates, not exceeding three in number, to the next Annual Meeting of the Association, to be held in the city of Albany, on the 20th day of September, 1881, that such delegates shall be entitled to participate in the proceedings at and during such meeting; and that the Corresponding Secretary of this Association give notice of this resolution to each of such Associations.

Dated ALBANY, Feb. 23, 1881.

S. W. ROSENDALE,
Secretary Executive Committee.

NEW BOOKS AND NEW EDITIONS.

MAY'S CRIMINAL LAW.

The Law of Crimes. By John Wilder May. Boston: Little, Brown & Co. Pp. xxii, 239.

THIS is an addition to the excellent "Students' Series." Mr. May is a competent writer on criminal law, and he has given in this small compass a good summary of its essential principles and definitions of the principal crimes. For its particular purpose the work is admirably fitted.

V JACOB'S FISHER'S DIGEST.

We have several times expressed our favorable opinion of this important republication. The present volume contains the titles Impeachment—Land, and columns 6401–8114. Published by Geo. S. Dossy, New York.

RHETORIC AS AN ART OF PERSUASION.

Rhetoric as an Art of Persuasion. From the standpoint of a lawyer. By an old lawyer. Des Moines, Iowa: Mills & Company, 1880.

To become an eloquent advocate is, we presume, the ambition of almost every one who enters upon the study of the law, and we suppose that it is the general belief among young men that eloquence may be taught and learned as writing and arithmetic are. And this belief is not confined to young men, many mature heads being possessed of it, the only difference being that the former seek to obtain by study a desirable talent, while the latter set themselves up as teachers of it. Years and experience, however, make it plain to most of us that fluency of speech is only one among many of the desirable qualifications of a lawyer or a scholar, that it is not indispensable to success, and that it cannot be taught by rule. For reasons such as these our confidence in the practical value of any work on Rhetoric is very limited, at least so far as a means of education in public speaking. It is well enough for a speaker to be familiar with the rules commonly accepted among scholars for the orderly arrangement of formal addresses, and with the names given to the figures of speech abounding in human language. But this knowledge will avail nothing to furnish him with words and ideas, which are what he most needs for his purpose. We imagine, therefore, that the work before us will somewhat disappoint those for whom it is stated that it is written, namely, "students of law and younger members of the legal fraternity," and "other young gentlemen of literary tendencies and honorable ambition." If they seek in its pages practical instruction in what has been termed the art of oratory. It is a small octavo volume of 183 pages. The text, which treats of the divisions of a speech into exordium, statement of case, argument and peroration, and of figures of speech,

occupies about sixty pages, the remaining space being devoted to illustrations taken from various sources, ancient and modern. These selections embrace a wide field, the Holy Scriptures, Demosthenes, Cicero, Shakespeare, Longfellow, Webster, the gifted Miss Sue Clagett of Keokuk, and other writings and writers of eminence contributing to them. Why is the "sweet singer of Michigan" omitted? The press-work upon the volume is excellently done.

AMOS' REMEDIES FOR WAR.

Political and Legal Remedies for War. By Sheldon Amos, M. A., Barrister at Law, late Professor of Jurisprudence in University College, London. New York: Harper & Brothers, Franklin Square, 1880. Pp. 245.

In every quarter of the globe in the year 1880 there was war or war was imminent. In America, Chili and Peru were in collision. In Asia, England was defending her possessions and Russia was extending hers. In Africa, England again was in a conflict of defense or aggrandizement. In Europe, Greece and Turkey were just on the verge of falling foul of each other in hostile array. And the great nations of the earth, with the exception of the United States, were keeping up large standing armies and expensive navies to the heavy burden of their people, in view of the imminence of an appeal to force by some one or more of the family. In the midst of this, an essay is published, of a philosophic student who was remote from the din of arms and the clash of preparation, on the remedies—that is the preventatives—of war. With what seems at first a blindness to the nature of war, that it is the energetic exercise of immense material and physical force to effect the egotistic will of the sovereigns who wage it, he classes the remedies for it as political and legal, and hopefully looks forward to "the possibility of a permanent peace." But there are "Laws of War," though war itself, in its horrible rush, tramples on every natural right, ruthlessly sacrificing property, liberty and life, and that permanent peace is possible is not the vagary of a dreamer, but a thing in the forecast of the philosopher reasoning from experience and his observation of the progress of the human race. He perceives that war, however violent and irregular as a means, is oftentimes waged for the support of legal rights; and that civilization has introduced restrictions upon the exercise of what have been called the extreme rights of war. He perceives that the condition of prisoners of war has been much ameliorated, both in the treatment of them from the moment of capture to that of discharge, and in the greater ease of parol and exchange; that truces and armistices are treated as binding engagements; while the rights of neutrals have come to be more regarded and defended. So that Professor Amos well suggests as three legitimate aims of laws of war, to mitigate its severity, to reduce its frequency, and to pave the way for its abolition. He points out that its abolition is not impossible, inasmuch as mankind in its progress has abolished the private wars that marked the middle period of the feudal system, that judicial combats have given up the hold they once had on the legal and political mind, and that duelling has so decayed in public estimation as to be put in most minds and in many codes on a par with crime. These three instances were, but war in miniature; for they were the seeking of self-interest by force. He remarks that the character of public and national war has changed; that it is theoretically held as a disastrous means to an indispensable end; that no more injury is to be dealt upon the enemy than is needed to attain that end; and that it is the duty of the statesman to use all peaceful means before plunging his country into war; that the progress of civilization is against it; the advance of economic science is opposed to it, as by the principles of that science the public thought and feeling are

taught to look upon other nations as of more advantage in peaceful dealings than in ruinous and destructive conflicts; that public sentiment condemns it, influenced by the diffusion of education, taught through the press by its correspondents in the field, what war really is; the growth of liberal principles, the theories of philosophers, the principles of religion, the habits of international co-operation and association, are all antagonistic to it.

After setting forth the causes of modern European wars, the author treats of some political remedies for war; and discussing first the nature and possibility of such and other remedies, he names intervention of States; mediation and arbitration; treaties, and especially treaties of peace, as having considerable influence in determining not only the legal but the moral relations of States to each other; the preservation of a balance of power, by keeping in existence smaller States; the neutralization of States, seas, canals and railways; the keeping on foot of large standing armies, and the accumulation of munitions of war, in the effect produced on the public mind by the enormous burden imposed upon the community; and lastly by international conferences and congresses. Of the legal remedies for war, the author names the legal operation of war on trade, especially in the proposed exemption of private persons and property from maritime capture; and the laws of war as bearing on peace. Of these laws, are the consideration shown to non-combatants, to prisoners of war, and to private commerce, the principles of which have been embodied in treaties, and instructions to armies in the field, and in conventions between States.

We are able to give but a skeleton of the work. The filling up as found in the volume is interesting and instructive. The book is written in excellent style and method, from full thought and information upon the subject.

It may not seem at first to have aught to do with law. But the remedies for war are closely connected with international law, and must some of them be worked out to full effect by the establishment of rules by the concurring consent of States. Such rules are law.

WELLS ON JURISDICTION.

A Treatise on the Jurisdiction of Courts. In two volumes, each volume complete in itself. By J. C. Wells, author of "Res Adjudicata and Stare Decisis," "Separate Property of Married Women," "Questions of Law and Fact, Instructions to Juries and Bills of Exception," "Magna Charta," etc. Volume I containing part I, elementary principles. Part II, specific original jurisdiction. St. Paul West Publishing Company. 1880.

It is a difficult task for any one to attempt to satisfy himself regarding the value of a work that is confessedly unfinished, notwithstanding the author may assure his readers, as Mr. Wells has done in his first volume on the jurisdiction of the courts, that each volume is complete in itself. A cursory examination, however, has given us an unfavorable impression of the author's research, of his philosophical comprehension of the branch of the law upon which he treats, and of his appreciation of the relative value of the material he has gathered.

The superficial character of the work is apparent in the first chapter entitled "jurisdiction defined," wherein the etymology of the word is disposed of in seven lines; its limits and definition, in a page. In this no reference is made to the relation of *jurisdiction* to *due process of law*, to the argument of Mr. Webster in the *Dartmouth College* case, or of counsel in the more recent case of *Lange v. Benedict*. On the other hand an entire chapter is devoted to the illegal courts of the Southern States during the rebellion, a subject now, we trust, ever to be obsolete. A chapter of only

four pages is devoted to the distinction between courts of inferior and superior jurisdiction. The principal part of the volume is filled with the jurisdiction of the courts over special subjects, such as Admiralty, Attachments, Bankruptcy, Claims against the General Government, Crimes, Commissioners of Highways, Equity, Garnishment, *Habeas Corpus*, *Mandamus*, Naturalization, *Quo Warranto*, Taxation. These topics are treated without any orderly arrangement of subject, even an alphabetical one. The book does not contain any attempt at historical research. There is no account of the rise of the courts in England or America, the growth of jurisdiction, or the origin of the distinction between courts of general and special jurisdiction. Had this been given, the author would probably have been prevented from stating that "where the want of jurisdiction relates to the subject-matter, a court cannot render a legal judgment in it even for the defendant to recover costs, unless this be expressly authorized by statute" (page 11). In the olden time the plaintiff filed his petition, praying that a writ might issue, and thereby in every case he invested the court with jurisdiction over him personally, and consequently the court could always award costs against him, however powerless it might be for want of jurisdiction to make such an order against the defendant. Now although the petition is abolished, the effect remains. The Court of Appeals of New York, in *Dudley v. Mayhew*, 3 N. Y., recognized their power to award costs against plaintiff where they had no jurisdiction of the subject-matter, although they did not exercise it in this case. In conclusion it appears that our author is ignorant of DuPonceau's valuable work on Jurisdiction, and that he did not consult in the preparation of this volume such works as Austin on Jurisprudence, Sprague's New Science of Law; Reeves' History of English Law, or Wheaton, or any of the great continental authors. And in these days of endless book-making a law writer to secure for himself an abiding place must be exhaustive, thorough, philosophical, profound.

CORRESPONDENCE.

FRAUD.

Editor of the Albany Law Journal:

Permit me to offer a definition of fraud, to which I invite your readers to suggest improvements:

Fraud is that mental peculiarity which must exist in a person when he intentionally so conducts himself as to mislead and thus injure another, who stands in a relation of confidence to him, and on account of this relation has a right to rely upon such conduct.

MEMNON.

NOTES.

WE have received a pamphlet, consisting in an address read by Douglas Campbell before the New York Municipal Society, on "Tenure of office under the New York charter—Civil Service Reform in Practice." Mr. Campbell, who is an ardent disciple of the "Reform," should send a copy of this interesting paper to the President, and ask him why he proposes to turn out District Attorney Woodford. — There is a great variety of interesting matter in the Proceedings of the Illinois State Bar Association, at its fourth annual meeting, a copy of which we have received. — The *Southern Law Review*, for February—March, contains the following leading articles: Notice to Corporations, by Edwin G. Merriam; Demand and Refusal in Trover, by Orlando F. Bump; Power of Usage and Custom to Control and Alter Rules of Law, by John D. Lawson; Judge Isaac Blackford, by D. S. Alexander.

The Albany Law Journal.

ALBANY, MARCH 5, 1881.

CURRENT TOPICS.

WE have received several letters asking our opinion whether a justice of the peace can hold his office after he becomes seventy years of age. The only restriction, if there is any, is in article 6, section 13 of the Constitution, which provides that "no person shall hold the office of justice or judge of any court longer than until and including the last day of December next after he shall be seventy years of age." Judging this language by the maxim "*noscitur a sociis*," it applies only to judges of the Court of Appeals, of the Superior Court and Common Pleas of the city of New York, the Superior Court of Buffalo, and the City Court of Brooklyn, for these are the only judges and justices of courts mentioned in the preceding sections 11 and 12. It is true that the Court of Appeals, or rather four judges of it, did, in *People v. Gardner*, 45 N. Y. 812, say that county judges are within the restriction, but the saying seems unnecessary to the decision and *obiter*. The language is indeed broad enough to include county judges, if not restricted to the immediate context. But even if county judges are included it does not follow that justices of the peace are, for county judges are clearly judges of a court, and it is not so clear that justices of the peace are justices of a court, at least within the contemplation of the Constitution. The only distinct reference to justices of the peace in these three sections is in section 11, where it is provided that "all judicial officers, except those mentioned in this section, and except Justices of the Peace, and Judges and Justices of inferior courts not of record," may be removed in a certain way. This would argue that the Constitution does not regard justices of the peace as "justices of any court," for otherwise they would manifestly be included in the expression "justices of inferior courts not of record," and the former language, "justices of the peace," would be tautological. It would seem from this that the justice of the peace is regarded as a "judicial officer" rather than as a "justice of any court," and that if it had been intended to include him in the restriction of section 13, the language would have been, "no judicial officer shall hold," etc. On the other hand, the new Code, § 3, provides that "courts of justices of the peace in each town" are "courts of the State not of record." This looks the other way. It seems therefore a rather nice question, but we are inclined to believe that it was not designed to include justices of the peace, who are officers holding for a short term, but to apply only to those judges and justices holding by a long and largely increased term. As Folger, J., says in *People v. Gardner*, 45 N. Y. 820: "It is palpable that the intention of the convention was to place this limit of age upon the comparatively extended term which they had

adopted, and to guard against the possible evil which the lengthened term had alone suggested as possible. The short term of the old judiciary article raised no such apprehension, and presented no reason for the application of such a limit." We decline to entertain any more decided opinion unless we are retained and paid to do so!

It seems now to be determined that our State is not to lose the judicial service of its present chief judge by removal to Washington and to a position in the cabinet. We see no reason to doubt the general rumor that he has been offered his choice between the Attorney-Generalship and the Secretaryship of the Treasury. Chief Judge Folger has the instincts, the comprehension, the judgment, and much of the experience and training of the statesman, and would unquestionably have justified his assignment to either of these places. It was probably generally believed that the former would not tempt him, but that the latter might. The Secretaryship of the Treasury is a commanding post, and gives its occupant a national reputation, but it is surrounded by enormous responsibilities and harassing anxieties. It must be very gratifying to the Chief Judge to see with what hearty approval his supposed nomination to it has been received among all parties. We believe he would not have disappointed the public expectation. But in his unselfish adherence to the comparatively noiseless but very honorable position of chief judge of this great Commonwealth, he has entrenched himself still more firmly in the confidence and esteem of his fellow-citizens, and earned a positive tribute of gratitude. Probably he has judged wisely for himself. His determination the other way would have been uncomplainingly acquiesced in, but his determination this way cannot be a mistake either for the public or himself.

In the death of Senator Carpenter the country has lost one of its ablest and most brilliant men. He was one of those somewhat rare men who seem to possess at once the elements of the lawyer, the logician, the advocate, the forensic orator, the politician and the statesman. He reminds us more of Rufus Choate than of any other of our public men. Not that we should place him quite on the plane of that great man in any respect, but there is a strong resemblance, with this difference, that Choate excelled in literary attainments and was little of the politician, while Carpenter, we take it, was comparatively little of the scholar, and was a born manager of men and affairs. Senator Carpenter was a self-made man, while Choate was of liberal education. But in the other particulars above mentioned they resembled one another. Senator Carpenter had large and solid legal attainments, and distinguished himself in some of the most important causes of pure law that have lately arisen in this country. His practice in the Federal Supreme Court was very large, we believe unequalled. He was a sinewy and robust reasoner. He was an over-

whelming advocate. He was a master of senatorial oratory. He was one of the most popular of men and fascinating of companions. He had the broad, unselfish and patriotic views of a true statesman. Like Choate, he was the most beloved of men. His person was noticeably fine and manly. So far as we know, his life was strikingly free from public or private scandals. Certainly he had a warm and generous heart, and a ready and willing hand. His death at an untimely age has caused a sincere public sorrow, and it seems that to speak nothing but good of the dead is in this instance no empty compliment, for the voice of praise is heartfelt and unanimous.

Col. Ingersoll has advanced a very potent argument against the whipping of wife-beaters, which had not occurred to us. After dwelling upon the manifest fact that the office of public whipper involves the degradation of the man who exercises it as well as of the man on whom it is exercised, and upon the idea that the punishment is of that revengeful sort which degrades the government that inflicts it, as it would to execute the old law of an eye for an eye and a tooth for a tooth, he says that the excess of the law would defeat its object, for very few wives would complain of their husbands if the husbands were to be beaten. The result would be that which always attaches to excessive punishments—the law would defeat itself. But we insist that the law is clearly unconstitutional—it is a "cruel and unusual punishment," within the theory and practice of our jurisprudence.

The State Reporter and the Supreme Court Reporter, having been required by the Legislature to report to it the contracts, the amount of fees received for copies of opinions, etc., have reported. It appears from the report of the State Reporter that his net receipts from this source have been as follows: In 1872, \$533.59; 1873, \$908.48; 1874, \$1,204.55; 1875, \$850.22; 1876, \$677.45; 1877, \$770.63; 1878, \$747.96; 1879, \$768.45; 1880, \$687.45. The Supreme Court Reporter receives per volume, \$2,600; and pays: For opinions, express charges, etc., say, \$600; for salary of clerk devoted entirely to this work, per volume, \$250; for assistance in the work of reporting, per volume, \$875; leaving profit on volume, \$875. He charges for copies of opinions only the cost of copying. This does not look as if these gentlemen were "bloated office-holders."

The world moves. A murderer by the duel has been indicted and tried in South Carolina, and was not acquitted. In the case of Col. Cash, who dragooned a judge into a duel and so murdered him, the jury disagreed, four, it is understood, standing for conviction. The presiding judge actually charged that the duel is a relic of barbarism. This is the doctrine of the law, of christianity, and of civilization. Another Southern judge, Judge Baldwin, in *Moseley v. Moss*, 6 Gratt. 539, said: "Duelling received no indulgence whatever from the

common law, which treated its conventionalities and its chivalries as solemn mockeries, and its violence and bloodshed as the result of deliberate malice. But these denunciations were resisted by long-cherished prejudices of society, which appealed with dreadful success to some of the strongest principles of human conduct—the pride of character, the fear of humiliation, and the love of distinction." The preamble of the Virginia anti-duelling act denounces duelling as "a barbarous custom," "a vice, the result of ignorance and barbarism, justified neither by the precepts of morality nor by the dictates of reason," and in Virginia one who has fought or shall fight a duel is disqualified from holding office, and may be removed by *quo warranto* without previous conviction. *Royall v. Thomas*, 28 Gratt. 130; S. C., 26 Am. Rep. 635. This is a very wise provision, and much more likely to be enforced and to suppress the shocking practice of duelling than the mere penalty of imprisonment or hanging.

Assemblyman Shanley proposes to provide for the preparation and publication of a subject-index catalogue of the law department of the State Library. This catalogue is greatly needed. We understand from the librarian, Mr. Griswold, that 14,000 volumes are not catalogued at all. With the present appliances, the librarian's head is the only index, and if he should happen to die or lose his mind, it would be extremely embarrassing. — Mr. Shanley also proposes to exempt from trial jury duty all licensed pharmacists and pharmacists engaged in those professions as a means of livelihood. This strongly reminds us of the chemist summoned on the jury in *Bardell v. Pickwick*, who wished it understood that he was not to be responsible for the possible mistakes of his shop-boy, who thought opson salts meant oxalic acid; and syrup of senna, laudanum. — Mr. Gale proposes to authorize notaries public to exercise their functions in counties adjoining those of their residence.

NOTES OF CASES.

THE most interesting point decided in the case of the gentle Shepherd Cowley (*Cowley v. People*, ante, 178), was the admissibility of the photographs. The court said: "The People offered in evidence pictures taken by the photographic process. One picture was claimed to be that of the boy Louis, before he went into the care of the plaintiff in error. Others were of him about two weeks after he had been taken from the custody of the plaintiff in error and to St. Luke's Hospital. They were offered to show the bodily appearance of the child, at the several times of taking the pictures. The first one was proven to be a correct likeness of him—a perfect picture of him when he came to this country. The photographic operator, who took the others, testified that he was a photographer, doing that business in New York city; that he took them about the sixth of January, which was about two weeks after Louis was taken to the hospital; that they

were exactly correct likenesses of Louis, as he appeared at the time of taking them. The house-physician at the hospital testified that the last-taken picture represented the child as he appeared at the hospital, only, that from the position in which the pictures were taken, they did not show the emaciation so great as it really existed. Another medical witness, who saw and examined the child a while after the last pictures were taken, testified that they were about correct. Another such witness testified that they were correct. It was also in evidence that the boy improved in condition after he was taken into the hospital; so that the fair inference is, that if the pictures were a correct likeness of him when taken, they did not show a worse appearance of him than it was when he left the house of the plaintiff in error. The plaintiff in error objected to the reception of these pictures in evidence. The objection made was general, and did not state the grounds upon which it rested. We must assume that the ground was either general, that photographic pictures may never be properly received in evidence, or special, that these pictures were not, for some reason peculiar to them, competent evidence. As to the latter, as we have seen, there was evidence that they brought into court a faithful likeness of the boy as he appeared when they were taken; and that though they were taken at a lapse of days after he left the custody of the plaintiff in error, he had in that lapse bettered in physical condition, so that his appearance then was more favorable to the plaintiff in error than it was on the day on which he was taken to the hospital. Nor were they offered for other purpose than to show the appearance of the subject as it was presented to one looking upon him—in other phrase, to show a physical fact, that the eye of any human being looking upon the boy could have taken in. So far as the circumstances of the taking of these pictures, and the purpose of them in evidence were concerned, in our judgment they were properly received, if copies of objects taken by that process are ever competent in evidence. And we are now to consider whether they are, under a proper state of facts, and for a proper purpose, competent evidence. We know not of a rule, applicable to all cases, ever having been declared that they are not competent. Nor do we see, in the nature of things, a reason for a rule that they are never competent. We do not fail to notice, and we may notice judicially, that all civilized communities rely upon photographic pictures for taking and presenting resemblances of persons and animals, of scenery and all natural objects, of buildings and other artificial objects. It is of frequent occurrence that fugitives from justice are arrested on the identification given by them. 'The Rogues' Gallery' is the practical judgment of the executive officers of the law on their efficiency and accuracy. They are signs of the things taken. A portrait or a miniature taken by a skilled artist and proven to be an accurate likeness would be received on a question of the identity or the appearance of a person not producible in court. Photographic pictures do not differ in kind of proof

from the pictures of a painter. They are the product of natural laws and a scientific process. It is true that in the hands of a bungler, who is not apt in the use of the process, the result may not be satisfactory. Somewhat depends for exact likeness upon the nice adjustment of machinery, upon atmospheric conditions, upon the position of the subject, the intensity of the light, the length of the sitting. It is the skill of the operator that takes care of these, as it is the skill of the artist that makes correct drawing of features and nice mingling of tints for the portrait. Most of evidence is but the signs of things. Spoken words and written words are symbols. Once a deaf mute, born so, was presumed in law an idiot (1 Hale, 34), but later days look upon him as not incompetent to be a witness, if he in fact have understanding and knows the nature of an oath (*Rustors' case*, 1 Leach Cr. Cas. 455). He is now taught to give ideas to his fellow-men by signs, and his deprivation of some of the common faculties of humanity does not exclude him from the witness-box. The signs he makes must be translated by an interpreter skilled and sworn. So the signs of the portrait and the photograph, if authenticated by other testimony, may give truthful representations. When shown by such testimony to be correct resemblances of a person we see not why they may not be shown to the triers of the facts, not as conclusive, but as aids in determining the matter in issue, still being open, like other proofs of identity or similar matter, to rebuttal or doubt. A witness who speaks to personal appearance or identity tells in more or less detail the minutiae thereof as taken in by his eye. What he says is a description thereof, by one mode of signs, by words orally uttered. If his testimony be written, instead of spoken, and is offered as a deposition, it is a description in another mode of signs by words written, and the value of that mode, the deposition, depends upon the accuracy with which his words uttered are put into words written. Now if he has before him a portrait or a photograph of that person, and it shows to him a correct copy of that person, if it produces to his view a correct description which he testifies is a likeness, why may not that be given to the jury as a description of the person by the witness in another mode of signs? The portrait and the photograph may err, and so may the witness. That is an infirmity to which all human testimony is lamentably liable. But when care is taken to verify first that the process by which the photograph was taken was conducted with skill and under favorable circumstances, and that the result has been a fair resemblance of the object, the picture produced may, in many of the issues for a jury, be an aid to determination. Nor are the cases adverse to these views. In *Cozzens v. Higgins*, 1 Abb. Ct. App. Dec. 453; S. C., 8 Keyes, 206, this court held a photograph competent to show the condition of a cellar floor, caused by the acts of one digging down on premises adjoining. In *Udderzook's case*, 76 Penn. St. 340, one was held competent to show the appearance of a man on a question of identity, and on the further question of the identity of a mangled

dead body as that of the man. In *Kulff v. People*, 45 N. Y. 213, this kind of picture was held competent on the question of identity of persons. In *Marcy v. Barnes*, 16 Gray, 162, photographic copies, on an enlarged scale, of writings conceded to be genuine, and of writings disputed, were held competent for submission to the jury with the writings themselves, on a question of genuineness of handwriting. In *Hynes v. McDermott*, 22 Alb. L. J. 357, this court, in a question of expert evidence by comparison of handwritings, held it incompetent to compare a photographic copy of a writing not produced in court, with a genuine writing before the court, the more so as the accurate resemblance of the photographic copy was not well enough shown. In our judgment, the learned recorder did not err in taking the photographs into the evidence." For a tolerably complete collection of the authorities on photographs as evidence, see note, 26 Am. Rep. 319.

An excellent illustration of the doctrine of the master's liability for the wrongful act of his servant toward third persons, in the course of his employment, is *Evans v. Davidson*, 52 Md. 245. While the defendant's servant, employed for a certain period to do general farm work on defendant's farm, was at work with other servants in a corn-field cultivating the corn, the plaintiff's cow with other cattle broke into the corn-field from an adjoining farm. In driving out the cattle the defendant's servant negligently struck the cow with a stone and killed her before she had left the field. At the time the defendant was away from home. Held, that defendant was liable. The court said: "If that act was, either expressly or by fair implication, embraced within the employment to do general farm work on the defendant's farm, then, it is clear, the latter is liable for any wrong or negligence committed by the servant in doing the act authorized to be done. In one sense, where there is no express command by the master, all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service and for his master's benefit, within the scope of his employment, then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown. This general principle is sanctioned by all the authorities. *Baltimore & Ohio R. Co. v. Blocher*, 27 Md. 277; *B. & Y. Turnpike Co. v. Boone*, 45 id. 344; *Turberville v. Stampe*, 1 Ld. Raym. 205; *Huzzey v. Field*, 2 C. M. & R. 439; *Seymour v. Greenwood*, 7 H. & N. 354; *Limpus v. London Gen. Omnibus Co.*, 1 H. & Colt. 526; *Barwick v. English Joint-Stock Bank*, L. R., 2 Ex. 262; *Wood's Law of M. & Serv.*, § 307, and the authorities there collected. Therefore the fact that the master gave no express direction in regard to driving the cattle out of the corn-field and did not know of their being in it until after the doing the injury

complained of, will not avail to exonerate the master, if the servant was acting in the course of his employment. Was, then, the servant acting in the course of his employment? What is embraced, as commonly understood, in general farm work? Is the very nature of the employment there must be some implied authority and duties belonging to it; and this as well for the protection of the master as third parties. If, for instance, a servant thus employed should see a gate open or a panel of fence down, through which a herd of cattle might or would likely enter and destroy his master's grain, we suppose all would say that it would be the positive duty of the servant to close the gate or put up the fence, to prevent the destruction of the grain; and if he should pass by and willfully neglect such duty, it would constitute cause and a sufficient justification for the discharge of the servant. If that be so, how much more imperative the duty, where, as in this case, in the absence of the master, the servant being in the field at work, and seeing a herd of cattle break into the field, and in the act of destroying the corn, to drive out the cattle and thus to save the corn from destruction? To do such act, for the preservation of the growing crop, must be regarded as ordinary farm work, and such as every farmer, employing a servant to do general farm work, would reasonably contemplate and have a right to expect as matter of duty from the servant. The servant, therefore, was acting in the course of his employment in driving out the cattle, and if he did, while driving them out, commit the wrong complained of, the master is liable therefor."

LEGAL DEFINITIONS OF COMMON WORDS.

VIII.

A LAYMAN would suppose that there is no ambiguity about "creek," when used to describe a body of water. But the derivation would indicate that it means crack, or narrow indentation. Webster gives as its primary meaning, a small bay, inlet, or cove. This was recognized in *French v. Carhart*, 1 N. Y. 107; and in *Schermerhorn v. Hudson River Railroad Co.*, 38 id. 104, it is said that the term "properly imports a recess, cove, bay, or inlet in the shore of a river, and not a separate or independent stream, though sometimes used in the latter meaning."

A step-son is not a member of the step-father's "family," within the meaning of a devise by the step-father to his "family," where the latter leaves a widow and his own child, although the step-son had lived with and been supported by the step-father. *Bates v. Devson*, 128 Mass. 334.

The indecent exposure by a man of his person in a house to a young girl, is "open and gross lewdness and lascivious behavior." *Commonwealth v. Wardell*, 128 Mass. 52.

A family portrait is not an "article of great intrinsic or representative value," within the exemption clause of a carrier's receipt, when coupled with "specie, drafts, and bank bills," although it "rep-

resents" the owner's deceased father, and is the only one extant. *Green v. Boston & Lowell Railroad Co.*, 128 Mass. 221.

In *Smith v. Chase*, 71 Me. 164, it was held that a peddler's wagon designed to be used in trade from place to place, with the body hung upon three elliptic steel springs, with drawer behind and doors at the sides, and a railing around the top, and dasher in front, is not exempt as a "cart or truck-wagon." The language of the statute is, "one plow, one cart or truck-wagon, one harrow, one yoke with bows, ring and staples, two chains, one ox-sled, and one mowing-machine." The court said: "The plaintiff claims that it comes directly within the definition of a truck-wagon, which he says is a wagon used for the transportation and exchange or barter of commodities, deriving truck from the French verb *troquer*, 'to exchange, to barter, to truck.' Defendant derives it from the Greek * * * 'a wheel,' from which come the English truck and trucks, signifying 'a low carriage for carrying goods, stone,' etc. Both fortify their positions by Webster's dictionary, an acknowledged authority; but this does not bring us perceptibly nearer a solution of the question. What did the Legislature intend to exempt as 'a cart or truck-wagon?' " "We do not believe that the Legislature intended to exempt, under the term truck-wagon, one of those movable stores that traverse the State on wheels or runners, covered, it may be, with the meretricious adornments of carving and gilding, as well as paint and varnish, but rather one of those vehicles used most commonly for farm work or heavy hauling, with horses or mules, as a 'cart' is with oxen."

"Wagon" ordinarily includes a buggy; but not an insurance agent's buggy, under a statute of exemption, when connected with "cart or dray, plows, drags, or other farming utensils." *Gordon v. Shields*, 7 Kans. 325. The court said: "This clause was evidently designed for the protection of the farmer." "The articles should be adapted to the purposes of husbandry." One judge, however, dissented, holding that a lawyer's or a hardware merchant's buggy would be exempt.

A man is not a woman's husband until he is married to her. *Reed v. Reed*, 70 Me. 156, holding that where a married woman, prior to her marriage, had received a deed of real estate from one who subsequently became her husband, such a deed was in no sense a conveyance to her from her husband.

Although, as we have seen, the power to "regulate" includes the power to prohibit a slaughterhouse in a city, yet a power to "regulate and license" a business or trade confers no power to tax it. The rules and regulations which a corporation may make in respect to business or trade, under its police power, are such only as have relation to the public health, morals, and order of the community. *Mühlbrinck v. Long Branch Corners*, New Jersey Supreme Court, June, 1890.

"Information" is defined in *United States v. Whitier*, 5 Dill. 35. Under the act of Congress prohib-

iting the mailing of obscene matter, the defendant was indicted for depositing in the post-office a letter giving "information" where, how, and of whom to procure an article to prevent conception. The letter was in answer to a decoy letter of a detective, written in an assumed and fictitious name. The letter was held not within the statute. The court, by Dillon, J., said: "On its face it did not show that it was within the prohibited statute. If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for, but would have been sent to the dead-letter office, and could not have been given to any person the desired information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter actually giving the information. If a letter of inquiry seeking the prohibited information had been written by an actual person, although under a feigned name, an answer in reply, giving such information, would present a case distinguishable, it would seem, from the one under consideration. I place my judgment in this case on the single ground that the sealed letter, written by the defendant, addressed to a person who had no existence, and which on its face gave no information of the prohibited character, and which is brought within the statute only by the fictitious letter of inquiry written by the detective, is not the 'giving of information' within the meaning of the statute."

A colt or a heifer may be exempt as a "horse" or "cow" respectively, or as a "work beast," if the debtor has nothing more nearly answering the description. *Kennedy v. Bradbury*, 55 Me. 557; *Johnson v. Babcock*, 8 Allen, 583; *Freeman v. Carpenter*, 10 Vt. 433; *Winfrey v. Zimmerman*, 8 Bush, 588. This is on the ground that the animal may grow to fill the description.

"Tradesman," in the Bankrupt Act, means a small merchant or storekeeper, and does not include a large stockholder and main office of a manufacturing corporation. *Re Stickney*, 5 Dill. 91. The court, Dillon, J., said: "The English authorities hold that one who owned land, or a man who rented land and has held it for a term of years, and carried on the business of brick-making as a means of realizing the profits to be derived from his land, is not a 'tradesman,' and they have said that the word 'tradesman,' as used in the Bankrupt Act, refers to smaller merchants or shopkeepers."

In *Pennsylvania Railroad Co. v. Price*, 23 Alb. L. J. 69, it is held that a government mail agent is not a "passenger," within the ordinary meaning of the term. The court said: "The company have no control of him as they have over passengers, for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers. He may expose his life in the most reckless manner. The mail car, like the baggage car, is a known place of danger. From its position it is exposed to destruction in cases of collision. The effect of the act of Congress is to make

his position in the car a lawful one. Being lawfully upon the train, a recovery might possibly have been had for his death upon the duty to carry safely." "The learned judge of the court below places considerable stress upon Webster's definition of the word 'passenger' as 'one who travels in some conveyance, as a stage-coach or steamboat.' The citation from Webster is not strictly accurate. His definition is 'a passer or passer-by — one who is making a passage — a traveller especially by some established conveyance — a person conveyed on a journey.' Worcester defines the same word as follows: 'One who passes or is on his way — a traveller — a wayfarer.' It will be seen that the leading idea of these definitions is that a passenger is one who travels from place to place. Mere locomotion is not travel, in the popular use of the term. There are conductors on short lines of railroad in this State who have passed over more miles in the course of their employment than any traveller of ancient or modern times. Yet we would hardly call them travelled men. The same sense given to particular words by our great lexicographers is always entitled to weight, yet where a word is used in an act of Assembly, regard must be had to the circumstances surrounding its use. A more correct definition of the word in its legal sense would be, one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor. A mere trespasser, a person who steals a ride upon a train, or one who is employed thereon, is not a passenger, within the meaning of the act of 1868, nor entitled to protection as such."

A windmill used for forcing water, is a "process for forcing water," within the meaning of a reservation in a deed, reserving a right to "a supply of spring water by means of a hydraulic ram, wheel, or other process for forcing water." *Richardson v. Clements*, 89 Penn. St. 503; S. C., 33 Am. Rep. 784. The court said: "A perpetual supply of water was to be reserved. The language used indicates no intention to deny the use of such improved process as science may discover or mechanical ingenuity invent for forcing water. It may not be an injurious or offensive process not contemplated in the reservation. The windmill is not averred to be either the one or the other; nor that it works any substantial injury to the plaintiff, either by occupying a larger quantity of land, or by taking an increased volume of water. The question is simply whether a windmill is itself outside of the 'other process' reserved? We think it is not." One judge dissented.

In *Ehret v. Pierce*, U. S. Circuit Court, Eastern District of New York, July 28, 1880, it was held that an advertising card containing bits of paper of various colors as specimens of paints for sale is not a chart, and not the subject of copyright. The court observed: "The act is confined by its terms to the following matters: a book, map, chart, musical composition, print, cut, or engraving. The plaintiff designates the matter in question as an en-

graving or chart. Morris, who took out the copyright, calls it a chart. It is not possible to hold such an article to be a chart within the meaning of the act of 1831. The word 'chart' as used in that act refers to a form of map. Neither is it a print, cut, engraving, or book, within the meaning of that statute. It is an advertisement and nothing more; aside from its function as an advertisement of the Morris paints it has no value. In my opinion it is neither chart, engraving, or book, and could not be the subject of a copyright under the provisions of the act of 1831. The case of *Grace v. Newman*, L. R., 19 Eq. 623, has been cited as authority in support of the proposition, that such a card can be copyrighted. In that case the matter was a book containing sketches of monumental designs, which was held by the court to have a value as a book of reference. Upon this ground it was distinguished from the matter involved in *Cobbett v. Woodward*, L. R., 14 Eq. 407, where a mere catalogue of articles offered for sale was under consideration."

A "store-room" is not a "store-house," within the statute of burglary. *Hagar v. State*, 35 Ohio St. 268.

A railroad is not a "structure," within a mechanics' lien law giving a lien on "any house, mill, manufactory, or other building, appurtenance, fixture, bridge, or other structure." *Rutherford v. Railroad Co.*, 35 Ohio St. 559.

The salary of a public officer is not "wages," within the exemption clause of a statute of garnishment. *McLellan v. Young*, 54 Ga. 399; S. C., 21 Am. Rep. 277.

The word "fight" does not necessarily imply that both parties should give and take blows; it is sufficient that both parties should voluntarily put their bodies in a position to give and take blows, and with that intent. So, where two men go out to fight, and one is knocked down in the "first pass," and that is the end of it, both are guilty of an affray; that is of a fight by mutual consent. *State v. Gladden*, 73 N. C. 150.

The word "tight," used in a claim for a patent to qualify a wooden vessel for sweating tobacco, means sufficiently tight to subserve the purpose of the invention; and an imitation less tight than the original is not thereby saved from the charge of infringement. *Robinson v. Sutter*, U. S. Circ. Court, N. Dist. Illinois, 1881. The court said: "If it was the intention of complainant, and a necessary part of his device, that the tobacco holder should be open or porous enough to admit moisture, I do not think defendant can be allowed to infringe by using a tobacco holder a little more porous or open. The essential feature of complainant's invention consists in subjecting the mass of leaf tobacco to moisture and heat in a comparatively close wooden box for a sufficient time to have it undergo the process of re-sweating; and it is no answer to complainant's charge of infringement of his patent, to say that defendant's box is not quite so tight as that complainant deems desirable or necessary for the most satisfactory operation of his device."

LORD CAMPBELL AND THE QUARTERLY REVIEW.

THAT the *London Quarterly Review* should now be published in the United States, under the auspices of the Riverside Press, in the same type and bulk as it is in England, will be a matter of satisfaction to those who recall the fact that in that journal some of the ablest law-writers are employed. The review of Lord Campbell's life, published in the January number, is an illustration of the interest which attends this branch of literature. Lord Campbell had in him not a particle of romance, and not even a particle of eccentricity. He was eminently fitted for any practical duty he undertook to perform; and though the performance was never brilliant, it was always useful and to the purpose. "If he had undertaken to dance," said his father-in-law, Lord Abinger, "I do not say he would have danced better than Vestris, but he would have made more money." He undertook the profession of a barrister; and though he did not speak as well as Brougham—although he was always at the bar "plain Jack Campbell," who bore about the same relations to his brilliant fellow-countryman and rival as a sober, average-gaited roadster to a high-mettled race-horse—yet he not only made more money at his profession, but became the indispensable legal adviser of the Whig party, succeeding modestly to a post Brougham had sought in vain to recover, and dying as Lord Chancellor, having filled that office and that of Chief Justice to the entire satisfaction of the English bar. And now, on the publication by his daughter of a biography made up in a large measure of his diary, it is no small tribute to his worth that the leading article in the leading conservative review closes with saying "Campbell has enabled, nay invited, the whole world to look into the little corners of his (life); and the severest moralist, making a fair allowance for human frailty, will not hesitate to declare that his career was eminently useful and honorable, and his character, in whatever light we place it, above reproach." And in view of the fact that few English judges have left so distinct an impress on our common jurisprudence, his history is well worthy of study.

Campbell's birth and training were in Scotland. He was the son of a respectable Scotch clergyman, but his father's respectability alone did not give him the means of support when he took up his residence in London for the purpose of studying law. His resource was reporting. Of this the reviewer says:

"His general engagement with the *Morning Chronicle* was continued, and besides law-reporting in the King's Bench, which occupied most of his mornings, he became regular dramatic critic for the paper, and attended the theaters every night. The drama was then pre-eminently in vogue, even more so than it has recently become. The hour of dinner was reconcilable with an attendance at the theater, and night after night, 'fashionable ladies (to quote from the diary) and distinguished senators' were to be seen in the side boxes.

'Dramatic criticism was accordingly very much attended to, and this was a very important department of a newspaper. I took great pains with my articles on plays and players. I not only read carefully all the pieces usually acted, but I made myself master of the history of our stage from Shakespeare downward, and became fairly acquainted with French, German and Italian dramatic literature. I never acknowledged myself as a critic, but it was pretty well known from whom the dramatic articles came, and I sometimes found myself treated with most unaccountable deference by first-rate performers and popular dramatists. The plaudits or hisses of the audience, and overflowing houses or empty benches, certainly

depended a good deal on the award of the anonymous critic of the *Morning Chronicle*."

His future is thus playfully foreshadowed in a letter to his brother of this date:

"I am not sure that it ought to be assumed that I shall be without friends six years hence. During that long period surely some opportunity will occur of forming desirable connections, and every opportunity I shall sedulously improve. I shall not have been long in the House of Commons before I interest the minister in my favor, and am made Solicitor-General. The steps there, though high, are easy, and after being a short time Attorney-General and Master of the Rolls, I shall get the seals."

How many thousands have had similar aspirations; in how few cases have those aspirations been fulfilled! His beginning at the bar was not hopeful. In fact few young men have entered the bar with less patronage.

During his first term, says the reviewer, he did not receive even a half guinea fee. "'To be sure,' he says, 'there were about thirty men called, and of these only one had any thing to do.' He joins the Home Circuit as the most economical, and on June 30, 1807, announces the exact amount of his earnings since his call to have been forty-one guineas and a half; more, he adds, than any compeers of the same standing have made, except one. Toward the expiration of the first year from his call, he hit upon an expedient for gaining money and reputation, which had also the incidental effect of opening a connection with the attorneys and attracting briefs. In November, 1807, he entered into an agreement for the publication of his 'Reports for Nisi Prius Cases,' the first number of which appeared on the 11th of the February following. These Reports were almost exclusively taken up with the decisions of Lord Ellenborough, who, with a judicial mind of no common order, combined an over-eagerness for the dispatch of business which led to occasional mistakes. Talfourd describes him as going through the calendars like a rhinoceros through a sugar plantation. Referring to the surprise expressed by a brother chief, Sir James Mansfield, at finding how universally right were Lord Ellenborough's decisions, Campbell remarks that the wonder may a little abate when the 'garbling process' to which he subjected them is made known; the fact being that he rejected all that struck him as unsound."

This was in 1806. His progress, when we take into account the isolation of his position, and the prejudice against him as one who had made his way along by aid of reporting, was extraordinary. In 1810 he joined the Oxford Circuit "where an opening had just been made by the secession of three or four men in good practice, and the competition promised to be less formidable. His town practice increases surely if slowly, and in February, 1812, he writes that he is making more than a thousand a year." He at this time had in his mind the importance of social position. He was thirty-three years of age. He was one of the most industrious men of his time. He was an omnivorous reader. His practice was considerable. It is curious to observe that at this age, and when thus oppressed with work, and with his sober Scotch temperament certainly not made more playful by time, he should have undertaken to learn dancing. He thus writes in his journal: "I was at last driven to the resolution of applying to one of the dancing masters who teach grown gentlemen. Accordingly on my return from the circuit I waited upon a celebrated artist from the Opera House. Chassé! Coupé! Brisé! One! Two! Three! I may say I devoted the long vacation to this pursuit. I did not engage in special pleading with more eagerness. I went to my instructor regularly every morning at ten, and two or three times a week. I returned in the evening. You may be sure I was frightened out of my wits lest I should be seen

[illegible]

PARTNERSHIP AND INDIVIDUAL CREDITORS.

Davis, Assignee, v. Howell, Assignee.

BILL for relief. On final hearing on bill and answer.

G. M. Shipman and J. G. Shipman, for answering defendants.

RUNYON, Chancellor. John C. Bennett and James M. Andrews were, on or about the 10th of February, 1876, partners in business in Phillipsburg. On that day they made an assignment under the assignment act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment under the act for the equal benefit of his creditors to

the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about eleven per cent of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews' estate with legal proceedings if their demand be not complied with. The complainant therefore comes into this court for protection and instructions as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews' estate, and he is made a defendant.

The question presented has been often discussed, and though there exists some contrariety of judicial determination upon it, must be considered as settled by the great weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate, and separate debts out of the separate estate. Story's Eq. Jur., § 775; Snell's Prin. of Eq. 419; Story on Part., § 376; Kent's Com. 64, 65; Pars. on Part. 480. And though the propriety of the rule has been often and persistently questioned on the ground that it is a violation of principle, and devoid of equity, and was originally adopted from considerations of convenience only, and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known, and has been so often stated, that it is profitless to repeat it. It was declared in 1715, in *Ex parte Crowder*, 2 Vern. 706; it was affirmed by Lord Hardwicke, and though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon, and it has existed ever since in the English chancery. It has an exception where there is no joint estate and no solvent partner. But where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this State. *Cammack v. Johnson*, 1 Gr. Ch. 163; *Mallack v. James*, 2 Beas. 126; *Mitthigh v. Smith*, 2 C. E. Gr. 259; *Scully v. Allen*, 1 Harr. 147; *Curtis v. Hollingshead*, 2 Gr. 402; *Brown v. Bissett*, 1 Zab. 46; *Linford v. Linford*, 4 Dutch. 113. In *Scully v. Allen* the Supreme Court recognized the rule in all its parts. Chief Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the Assignment Act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshalled; the partnership effects applied in the first instance to the partnership debts; the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated. *Camp v. Grant*, 21 Conn. 41. It has been repudiated also in certain other States. *Bardwell v. Perry*, 19 Vt. 292; *Emanuel v. Bird*, 19 Ala. 596. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In *Wilder v. Keeler*, 3 Paige, 167, Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under considera-

tion there was at the death of G. F. Lush a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors, upon the principle of this court that equality is equity." The doctrine was recognized in *Morgan v. Skidmore*, 55 Barb. 263. In Pennsylvania in *Bell v. Newman*, 5 S. & R. 78, 91, 92, Gibson (afterward chief justice), in a dissenting opinion, strongly supports the rule as one founded on the most substantial justice. In *Black's Appeal*, 44 Penn. St. 503, and again in *McCormack's Appeal*, 55 id. 252, the doctrine is completely recognized and affirmed. In South Carolina, in *Woddrop v. Price*, 3 Desaus. 203; *Tunno v. Trezevant*, 2 id. 264, and *Hall v. Hall*, 2 McCord's Ch. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by statute. In *Murrill v. Neill*, 8 How. 414, it is recognized by the Supreme Court of the United States.

The objection that is always pressed as the conclusive argument against it is that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim as to the balance of his debt which the partnership assets may not be sufficient to satisfy with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate he will not be deprived of it. *Wisham v. Lippincott*; 1 Stockt. 353; *Randolph v. Daly*, 1 C. E. Gr. 313; *National Bank v. Sprague*, 5 id. 13; *Howell v. Teel*, 2 Stew. Eq. 490. But if he has no such lien and the assets are to be marshalled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt to the exclusion of the separate creditor, and to which he is indebted for the preference, will, in like manner and for like reason, give the latter preference upon the separate property. Such was the view of Chancellor Kent. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner." 3 Kent's Com. 64, 65. The obvious infirmity of the objection to the rule is that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of

his debt while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate, and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there are in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole and as a rule it has not operated unjustly is evidenced by the fact that it has existed so long (*Ex parte Crowder* was decided in 1715), notwithstanding opposition, and that in Massachusetts at least it has, in the face of the opposition referred to, been established by legislative authority, and that too as lately as 1838. In this State it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in *Wisham v. Lippincott*, 1 Stockt. 353, 356, the chancellor expressed strong doubt of its correctness as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews' estate in equal shares.

THE INCOME TAX CONSTITUTIONAL.

SUPREME COURT OF THE UNITED STATES, JAN. 24, 1881.

SPRINGER, Plaintiff in Error, v. UNITED STATES.

An income tax is not a direct tax within the meaning of the Federal Constitution, and need not be apportioned among the several States according to their respective numbers in order to render it constitutional.

Direct taxes, within the meaning of the Federal Constitution, are only capitation taxes as expressed in that instrument, and taxes on real estate.

IN error to the Circuit Court of the United States for the Southern District of Illinois. The opinion states the case.

SWAYNE, J. This is an action of ejectment brought by the defendant in error. The title relied upon was derived from a sale to satisfy the income tax assessed against the plaintiff in error, which he had failed to pay.

In June, 1866, the proper officer delivered to him a notice in due form requiring him to make out a list of his income, gains and profits during the year 1865. He thereupon made such statement, dated June 21, 1866, and delivered it to the officer, with a protest against the right of the officer to make the demand. The statement was handed over to the collector of the district. The plaintiff in error refused payment. On the 19th of November, 1866, the collector served a notice upon him, that unless he paid the tax within ten days it would be collected, with a penalty of ten per cent, by the distraint and sale of his property. The plaintiff in error still refusing to pay, the collector caused a warrant to be issued and levied upon the premises in question and the property was thereafter advertised, exposed to sale and bid in by the United States. A deed was made to the purchaser and duly recorded. Owing to a defect touching that instrument a subsequent deed was executed to the same grantee. The latter bears date April 17, 1874, and is the one here in question.

This action was instituted by the United States to recover possession of the premises. Upon the trial it was agreed by the parties, that at the time the premises in question were seized and distrained, the plaintiff in error had no goods or chattels known to the collector or his deputy out of which the tax and penalty could have been made. The introduction of the deed in evidence was objected to upon several grounds. The objections were overruled and exceptions were taken. As all the objections appear in the assignments of error, it is deemed unnecessary here to reproduce them. It was also proved that the premises sued for consisted of two lots or tracts of land in the town of Springfield, Illinois. There was a house upon one of the tracts and a barn on the other. They were inclosed together and the house and both tracts were occupied by the plaintiff in error and his family as a homestead. They were assessed separately for State taxation.

The evidence being closed, the court instructed the jury—"That the deed in question is a valid instrument and transferred the title of the defendant in the premises to the United States," and "that the laws or acts of Congress mentioned in said deed were valid enactments at the time and authorized the proceedings taken in the premises."

The plaintiff in error excepted to each of these instructions. He also submitted a series of instructions on his part, all of which were refused, and he excepted as to each one. They also appear in his assignments of error and will be considered in that connection. The jury found a verdict in favor of the United States and judgment was entered accordingly. This writ of error was thereupon sued out, and the plaintiff in error, who was the defendant below, has thus brought the case into this court for review.

There are ten assignments of error. The first one is thus expressed: "The tax which was levied on the plaintiff's income, gains and profits, as set forth in the record, and by pretended virtue of the acts of Congress and parts of acts therein mentioned, is a *direct tax*."

This presents the central and controlling question in the record. It is fundamental with respect to the rights of the parties and the result of the case. This point will be last considered. Many of the other assignments are reproductions of the same things in different forms of language. They will all be responded to without formally restating any of them. This will conduce to brevity without sacrificing clearness, and will not involve the necessary omission of any thing proper to be said.

The plaintiff in error advises us by his elaborate brief "that on the trial of the cause below the proceedings were merely formal," and that "no arguments or briefs were submitted, and only such proceedings were had as were necessary to prepare the case for the Supreme Court."

This accounts for the numerous defects in the record as a whole. It was doubtless intended that only the question presented in the first of the assignments of error should be considered here. In that respect the record is full and sufficient. Other alleged errors, however, have been pressed upon our attention and we must dispose of them. There is clearly a misrecital in the deed of one of the acts of Congress to which it refers. By the act of the 30th of March, 1864, was clearly meant the act of June 30th, in the same year. There is no act relating to internal revenue of the former date. But the plaintiff in error cannot avail himself of this fact for several reasons.

The point was not brought to the attention of the court below and cannot therefore be insisted upon here. It comes within the rule *falsa demonstratio non nocet*. It was the act of June 30, 1864, as amended by the act of March 3, 1865, that was in force when the

tax was assessed. The latter act took effect April 1, 1865, and declared that "the duty herein provided for shall be assessed, collected and paid upon the gains, profits and income for the year ending the 31st day of December next preceeding the time for levying, collecting and paying said duty."

The tax was assessed for the year 1865 in the spring of 1866 under the act of 1865, according to the requirements of that act, and we find upon examination that the assessment was in all things correct. See 13 Stat., 479. The criticism of the plaintiff in error in this regard is therefore without foundation.

The proceedings of the collector were not in conflict with the amendment to the Constitution, which declares that "no person shall be deprived of life, liberty or property without due process of law." The power to distrain personal property for the payment of taxes is almost as old as the common law. Cooley on Taxation, 302. The Constitution gives to Congress the power "to lay and collect taxes, duties, imposts and excises." Except as to exports, no limit to the exercise of the power is prescribed. In *McCulloch v. Maryland*, 4 Wheat. 431, Chief Justice Marshall said: "the power to tax involves the power to destroy." Why is it not competent for Congress to apply to realty as well as personalty the power to distrain and sell when necessary to enforce the payment of a tax? It is only the further legitimate exercise of the same power for the same purpose. In *Murray's Lessee v. Hoboken Land Co.*, 18 How. 274, this court held that an act of Congress authorizing a warrant to issue, without oath, against a public debtor, for the seizure of his property, was valid; that the warrant was conclusive evidence of the facts recited in it, and that the proceeding was "due process of law" in that case. See, also, *DeTouville v. Smalls*, 98 U. S. 517; *Sperry v. McKinley*, 99 id. 496; *Miller v. The U. S.*, 11 Wall. 268, and of *Tyler v. Defrees*, id. 831.

The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason. If the laws here in question involved any wrong or unnecessary harshness, it was for Congress, or the people who make congresses, to see that the evil was corrected. The remedy does not lie with the judicial branch of the government.

The statute of Illinois had no application to the point whether the premises should be sold by the collector *en masse* or in two or more parcels. The fact that the house was on one lot and the barn on the other; that the whole was surrounded by a common inclosure and that the entire property was occupied as a single homestead, rendered it not improper for the collector to make the sale as it was made. No suspicion of bad faith attaches to him. He was clothed with a discretion, and it is to be presumed that he exercised it both fairly and well. *Olcott v. Bynum*, 17 Wall. 49.

Certainly the contrary does not appear. If the tax was not a direct tax, the instructions given by the court, brief as they were, covered the whole case, and submitted it properly to the jury.

The plaintiff in error was entitled to nothing more. The fourth instruction which he asked was as follows: "That a party claiming title to land under a summary or extraordinary proceeding, must show that all the indispensable preliminaries to a valid sale, which the law and the Constitution have prescribed, have been complied with; and if they believe from the evidence that the plaintiff has failed to show that all the requirements of the law have been complied with in the assessment and levy of said tax, the service of said notice, the issuance of said warrant and the execution thereof, in the advertisement and sale of said property, in the making and execution of said deed, and in all

the other requirements of the law, then they will find for the defendant."

This instruction was liable to several fatal objections. It was too general and indefinite. It left it for the jury to decide what were the "indispensable preliminaries" required by the law and Constitution in the numerous particulars specified. It referred to matters to which the attention of the court below does not appear to have been called, and in regard to which, if this had been done, the requisite proof would doubtless have been supplied. It falls within the principle of the rule so often applied by this court, that where instructions are asked in a mass, if one of them be wrong the whole may be rejected. The record does not purport to give all the testimony, and its defects are doubtless largely due to the mode in which the case was tried, and the single object already stated which the parties then had in view. The instruction was properly refused.

To grant or refuse a new trial was a matter within the discretion of the court. That it was refused cannot be assigned for error here. Several other minor points have been earnestly argued by the learned plaintiff in error, but as they are all within the category of not having been taken in the court below, we need not more particularly advert to them.

This brings us to the examination of the main question in the case. The clauses of the Constitution bearing on the subject are as follows: "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons." * * * "No capitation, or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken."

Was the tax here in question a direct tax? If it was, not having been laid according to the requirements of the Constitution, it must be admitted that the laws imposing it and the proceedings taken under them by the assessor and collector for its imposition and collection were all void.

Many of the provisions of the Articles of Confederation of 1777 were embodied in the existing organic law. They provided for a common treasury and the mode of supplying it with funds. The latter was by regulations upon the several States. The delays and difficulties in procuring the compliance of the States, it is known, was one of the causes that led to the adoption of the present Constitution. This clause of the articles throws no light on the question we are called upon to consider. Nor does the journal of the proceedings of the constitutional convention of 1787 contain any thing of much value relating to the subject.

It appears that on the 11th of July, in that year, there was a debate of some warmth involving the topic of slavery. On the day following, Governor Morris, of New York, submitted a proposition "that taxation shall be in proportion to representation." It is further recorded in this day's proceedings, that Mr. Morris having so varied his motion by inserting the word *direct*, it passed *nem. con.*, as follows: "Provided always that direct taxes ought to be proportioned to representation." 2 Madison Papers by Gilpin, pp. 1079, 1080, 1081.

On the 24th of the same month, Mr. Morris said that "he hoped the committee would strike out the whole clause. * * * He had only meant it as a bridge to assist us over a gulf; having passed the gulf, the bridge may be removed. He thought the principle laid down with so much strictness liable to strong objections." Idem. 1107. The gulf was the share of representation claimed by the Southern States on account of their slave population. But the bridge remained. The

builder could not remove it, much as he desired to do so. All parties seem thereafter to have avoided the subject. With one or two immaterial exceptions, not necessary to be noted, it does not appear that it was again adverted to in any way. It was silently incorporated into the draft of the Constitution as that instrument was finally adopted. It does not appear that an attempt was made by any one to define the exact meaning of the language employed.

In the 21st number of the *Federalist*, Alexander Hamilton, speaking of taxes generally, said: "Those of the *direct* kind, which principally relate to land and buildings, may admit of a rule of *apportionment*. Either the value of the land, or the number of the people, may serve as a standard." The thirty-sixth number of that work, by the same author, is devoted to the subject of internal taxes. It is there said, "they may be subdivided into those of the *direct* and those of the *indirect* kind." In this connection land taxes and poll taxes are discussed. The former are commended and the latter are condemned. Nothing is said of any other direct tax. In neither case is there a definition given or attempted of the phrase "*direct tax*."

The very elaborate researches of the plaintiff in error have furnished us with nothing from the debates of the State Conventions, by whom the Constitution was adopted, which gives us any aid. Hence we may safely assume that no such material exists in that direction, though it is known that Virginia proposed to Congress an amendment relating to the subject, and that Massachusetts, South Carolina, New York and North Carolina expressed strong disapprobation of the power given to impose such burdens. 1 Tucker's Bl., pt. 1, App. 235.

Perhaps the two most authoritative persons in the convention touching the Constitution were Hamilton and Madison. The latter, in a letter of May 11, 1794, speaking of the tax which was adjudicated upon in *Hylton v. The United States*, 3 Dall. 171, said: "The tax on carriages succeeded in spite of the Constitution by a majority of twenty, the advocates of the principle being reinforced by the adversaries of luxury." 2 *Mad. Writings* (pub. by Congress.), p. 14. In another letter of the 7th of February, 1796, referring to the case of *Hylton v. United States*, then pending, he remarked: "There never was a question on which my mind was better satisfied, and yet I have very little expectation that it will be viewed in the same light by the court that it is by me." Id. 77. Whence the dependency thus expressed is unexplained.

Hamilton left behind him a series of legal briefs, and among them one entitled "Carriage tax." See vol. 7, p. 848 of his works. This paper was evidently prepared with a view to the *Hylton* case, in which he appeared as one of the counsel for the United States. In it he says: "What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms. There is none. We shall be as much at a loss to find any disposition of either which can satisfactorily determine the point." There being many carriages in some of the States, and very few in others, he points out the preposterous consequences if such a tax be laid and collected on the principle of apportionment instead of the rule of uniformity. He insists that if the tax there in question was a direct tax, so would be a tax on ships, according to their tonnage. He suggests that the boundary line between direct and indirect taxes be settled by "a species of arbitration," and that direct taxes be held to be only "capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the *whole property* of individuals or on their *whole* real or personal estate. All

else must, of necessity, be considered as indirect taxes."

The tax here in question falls within neither of these categories. It is not a tax on the "whole * * * personal estate" of the individual, but only on his income, gains and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.

The Constitution went into operation on the 4th of March 1789. It is important to look into the legislation of Congress touching the subject since that time. The following summary will suffice for our purpose. We shall refer to the several acts of Congress, to be examined according to their sequence in dates. In all of them the aggregate amount required to be collected was apportioned among the several States.

The act of July 14, 1798, ch. 75, 1 Stat. 53. This act imposed a tax upon real estate and a capitation tax upon slaves.

The act of August 2, 1813, ch. 37, 3 id. 53. By this act the tax was imposed upon real estate and slaves, according to their respective values in money.

The act of January 19, 1815, ch. 21, id. 164. This act imposed the tax upon the same descriptions of property, and in like manner as the preceding act.

The act of February 27, 1815, ch. 60, id. 216, applied to the District of Columbia the provisions of the act of January 19, 1815.

The act of March 5, 1816, ch. 24, id. 255, repealed the two preceding acts, and re-enacted their provisions to enforce the collection of the smaller amount of tax thereby prescribed.

The act of August 5, 1861, ch. 45, 12 id. 294, required the tax to be levied wholly on real estate.

The act of June 7, 1862, ch. 98, id. 422, and the act of February 6, 1863, ch. 21, id. 640, both relate only to the collection, in insurrectionary districts, of the direct tax imposed by the act of August 5, 1861, and need not therefore be more particularly noticed.

It will thus be seen that whenever the government has imposed a tax which it recognized as a *direct tax*, it has never been applied to any objects but real estate and slaves. The latter application may be accounted for upon two grounds: (1) In some of the States slaves were regarded as real estate (1 *Hurd on Slavery*, 239; *Veasey Bk. v. Fenno*, 8 Wall 543); and (2) such an extension of the tax lessened the burden upon the real estate where slavery existed, while the result to the National treasury was the same, whether the slaves were omitted or included. The wishes of the South were therefore allowed to prevail. We are not aware that the question of the validity of such a tax was ever presented for adjudication. Slavery having passed away, it cannot hereafter arise. It does not appear that any tax like the one here in question was ever regarded or treated by Congress as a direct tax. This uniform practical construction of the Constitution touching so important a point, through so long a period, by the legislative and executive departments of the government, though not conclusive, is a consideration of great weight.

There are four adjudications by this court to be considered. They have an important if not a conclusive application to the case in hand. In *Hylton v. United States*, *supra*, a tax had been laid upon pleasure carriages. The plaintiff in error insisted that the tax was void, because it was a direct tax and had not been apportioned among the States as required by the Constitution, where such taxes are imposed. The case was argued on both sides by counsel of eminence and ability. It was heard and determined by four judges — Wilson, Patterson, Chase and Iredell. The three first named had been distinguished members of the constitutional convention. Wilson was on the com-

mittee that reported the completed draft of the instrument, and warmly advocated its adoption in the State convention of Pennsylvania. The fourth was a member of the convention of North Carolina that adopted the Constitution. The case was decided in 1795. The judges were unanimous. The tax was held not to be a *direct* tax. Each judge delivered a separate opinion. Their judgment was put on the ground indicated by Justice Chase, in the following extract from his opinion:

"It appears to me that a tax on carriages cannot be laid by the rule of *apportionment* without very great inequality and injustice. For example, suppose two States equal in census to pay eighty thousand dollars each by a tax on carriages of eight dollars on every carriage; and in one State there are one hundred carriages, and in the other one thousand. The owners of carriages in one State would pay ten times the tax of owners in the other. A, in one State, would pay for his carriage eight dollars; but B, in the other State, would pay for his carriage eighty dollars."

It was well held that where such evils would attend the apportionment of a tax, the Constitution could not have intended that an apportionment should be made. This view applies with even greater force to the tax in question in this case. Where the population is large and the incomes few and small, it would be intolerably oppressive.

The difference in the ability of communities, without reference to numbers, to pay any tax is forcibly remarked upon by McCulloch in his article on taxation in the *Encyclopedia Britannica*, vol. 21 (old ed.), p. 75.

Justice Chase said further, "that he would give no judicial opinion upon the subject, but that he was inclined to think that the *direct* taxes contemplated by the Constitution were only two—a capitation tax and a tax on land."

Iredell, J., said: "Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil. * * * A land or poll tax may be considered of this description. The latter is to be considered, particularly under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five."

Paterson, J., said: He never entertained a doubt "that the principal, he would not say the only objects contemplated by the Constitution as falling within the rule of apportionment, were a capitation tax and a tax on land." From these views the other judge expressed no dissent. "Ellsworth, the chief justice sworn into office that morning, not having heard the whole argument, declined taking part in the decision." 8 Wall. 545. Cushing, from ill health, did not sit in the case. It has been remarked that if they had been dissatisfied with the result, the question involved being so important, doubtless a reargument would have been had.

In *Pacific Insurance Co. v. Soule*, 7 Wall. 433, the taxes in question were upon the receipts of such companies from premiums and assessments, and upon all sums made or added, during the year, to their surplus or contingent funds. This court held unanimously that the taxes were not *direct* taxes and that they were valid.

In *Vezie Bank v. Fenno*, 8 Wall. 533, the tax which came under consideration was one of ten per cent upon the notes of State banks paid out by other banks, State or National. The same conclusions were reached by the court as in the case of *The Pacific Insurance Co. v. Soule*. Chief Justice Chase delivered the opinion of the court. In the course of his elaborate examination of the subject he said: "It may be rightly affirmed that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances and taxes on polls, or capitation taxes."

In *Scholey v. Rew*, 23 Wall. 331, the tax involved was a succession tax, imposed by the acts of Congress of June 30, 1864, and July 13, 1866. It was held that the tax was not a *direct* tax, and that it was constitutional and valid. In delivering the opinion of the court Mr. Justice Clifford, after remarking that the tax there in question was not a direct tax, said: "Instead of that it is plainly an excise tax or duty, authorized by section 1, article 8 of the Constitution, which vests the power in Congress to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defense and public welfare." He said further: "Taxes on houses, lands, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category; but it has never been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers the assessment is invalid." All these cases are undistinguishable in principle from the case now before us, and they are decisive against the plaintiff in error. The question, what is a direct tax, is one exclusively in American jurisprudence. The text-writers of the country are in entire accord upon the subject.

Judge Story says all taxes are usually divided into two classes—those which are *direct* and those which are *indirect*—and that, "under the former denomination, are included taxes on land or real property, and under the latter taxes on consumption." 1 Const., § 950.

Chancellor Kent, speaking of the case of *Hylton v. The United States*, says: "The better opinion seemed to be that the direct taxes contemplated by the Constitution were only two, viz., a capitation or poll tax and a tax on land." 1 Comm. 257. See, also, Cooley on Taxation, p. 5, note 2; Pomeroy on Const. Law, 157; Sharswood's Bl. 308, note; Rawle on the Const. 30, and Sargeant on the Const. 305. We are not aware that any writer, since *Hylton v. United States* was decided, has expressed a view of the subject different from that of these authors.

Our conclusions are, that *direct* taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty. Pom. Const. Law, 177; *Pacific Ins. Co. v. Soule*, and *Scholey v. Rew*, *supra*.

Against the considerations, in one scale, in favor of these propositions, what has been placed in the other, as a counterpoise? Our answer is, certainly nothing of such weight, in our judgment, as to require any special reply. The numerous citations from the writings of foreign political economists, made by the plaintiff in error, are sufficiently answered by Hamilton in his brief, before referred to.

The judgment of the Circuit Court must be affirmed, and it is so ordered.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION—FOR DEATH BY NEGLIGENCE, GIVEN TO ADMINISTRATOR IN ANOTHER STATE MAINTAINABLE BY ADMINISTRATOR IN THIS STATE—CONSTRUCTION OF FOREIGN STATUTE—TRANSITORY ACTIONS—SURROGATE'S LETTERS CONCLUSIVE AS TO RIGHT TO APPOINT ADMINISTRATOR—PRACTICE—INSERTION OF INTEREST IN JUDGMENT AT TAXATION OF COSTS MUST BE REVIEWED ON MOTION TO CORRECT.—(1) By the statutes of Connecticut the common-law rule as to actions for injuries to the person is changed and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason of death, and that the executor or administrator may prosecute

the same, and that all actions for injuries to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. It is held in that State that under these statutes an action lies to recover damages in favor of the personal representatives of a deceased party. *Murphy v. New York & N. H. R. Co.*, 30 Conn. 184; *Soule v. New York & N. H. R. Co.*, 24 id. 275. *Held*, that an action which is given by the statutes of Connecticut will lie in this State for the death of a person through the negligence of defendant in the State of Connecticut, and that such action can be brought by an administrator appointed by the courts of New York. The construction given a statute of another State by the courts of that State is controlling in the tribunals of this State. *Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 id. 218. At common law, personal actions whether *ex contractu* or *ex delicto* are transitory (Bouv. L. Dic.) and may be brought anywhere and are governed by the *lex fori*. An action for assault committed in another State will lie here. *Smith v. Bull*, 17 Wend. 323. But the statutes here giving an action for damages resulting from culpable negligence do not apply where the injury was committed in another State or country unless the laws of such State are proved to be of a similar character. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steam Co.*, 30 Barb. 433; *Crowley v. Panama R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547. It is not necessary that the statute should be precisely the same as the statute of this State; that it is similar is enough. The statute of Connecticut agrees in its main features with that of New York. The doctrine that an action will lie when the common law or the statutes of different States or countries correspond is sustained by numerous authorities. *Mochazo v. Willes*, 3 B. & Ad. 353; *Melan v. Duke de Fitz James*, 1 Bos. & P. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; *Shipp v. McCraw*, 2 Murph. (N. C.) 463; *Wall v. Hoskins*, 5 Iredell's Law (N. C.) 177; *Stout v. Wood*, 18 Blackf. 71. Cases cited as showing that an administrator appointed in one State cannot bring actions given by statute of another (*Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85; *Woodard v. Mich. So. R. Co.*, 10 Ohio St. 121; *Needham v. Grand Tr. R. Co.*, 38 Vt. 295; *Selma R. Co. v. Lacey*, 43 Ga. 461; *Marcy v. Marcy*, 32 Conn. 308), *held*, not to be analogous. (2) The letters of the surrogate showing on their face that intestate left assets in his county are conclusive as to his authority to issue them. *Roderigas v. East Riv. Sav. Inst.*, 63 N. Y. 460; *Richardson v. West*, 80 id. 139. (3) When interest was not added to the verdict upon trial but was added in the taxation of costs, *held*, that the question of the right and interest could only be raised by a motion to re-tax costs at the Special Term. It cannot be raised on appeal. Code Civ. Proc., §§ 1345, 1349. Where a clause is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment and not by appeal. *People v. Goff*, 52 N. Y. 434; *Kraushaar v. Meyer*, 72 id. 602; *DeLaVallette v. Wendt*, 75 id. 582. Judgment affirmed. *Leonard v. Columbia Steam Navigation Co.*, appellant. Opinion by Miller, J. [Decided Feb. 8, 1881.]

CORPORATION — MEMBER OF BENEFICIARY ASSOCIATION ENTITLED TO PROPERTY RIGHTS CANNOT BE EXPELLED WITHOUT NOTICE AND HEARING — WHAT DOES NOT EXCUSE NOTICE. — It is well settled that an association whose members become entitled to privileges or rights of property therein cannot exercise its power of expulsion without notice to the party charged or without giving him an opportunity to be heard. *Ang. & A. Corp.*, § 420; *Bartlett v. Medical Society*, 32 N. Y. 187; *Commonwealth v. Pennsylvania Ben. Soc.*, 2 Serg. & R. 141; *Innes v. Wylie*, 1 C. & K. 257. Accordingly where the charter of a beneficiary association provided that the secretary should give to a member

who is six months in arrears a written notice of the fact, and that "he shall be stricken from the roll if he does not pay his dues within thirty days," *held*, that a notice was essential to deprive the member in arrears or his representative after his death of the benefits of membership in the society, and that the fact that the member had changed his place of residence without notifying the society was not an excuse for a failure to serve a notice upon him, especially when there was a specific penalty imposed by the society by-laws upon a member changing his residence without giving notice. Judgment affirmed. *Wachtel v. Noah Widows and Orphans' Benevolent Society*, appellant. Opinion by Danforth, J. [Decided Feb. 1, 1880.]

CRIMINAL LAW — DISORDERLY HOUSE — BAWDY OR GAMBLING HOUSE NEED NOT BE NOISY OR OPEN — WHAT EVIDENCE OF BAWDY HOUSE — EVIDENCE OF GAMBLING. — The indictment charged plaintiff in error with keeping a disorderly and common bawdy and gambling house, concluding *ad commune nocumentum*. The court at trial charged that it was not necessary to constitute the offense of keeping a disorderly house that the public should be disturbed by noise, and refused to charge that in order to convict the prisoner of keeping a disorderly house the jury must find that the house was so kept as to disturb, annoy and disquiet the neighbors and people passing. *Held*, no error. *Rex v. Dixon*, 10 Mod. 305; 1 Hawk. P. C. 603. The keeping of a common bawdy or gambling house constitutes the house a disorderly house and indictable nuisance at common law. It is not an essential element that it should be so kept that the neighborhood is disturbed by the noise or that the immoral practice should be open to public observation. The court further charged that if prostitutes came to prisoner's saloon for the purpose of prostitution and there consummated their intent to the knowledge and with the consent of prisoner, the jury should find him guilty. *Held*, no error. The counsel for prisoner requested a charge that the playing of cards in the prisoner's house does not of itself make it a gambling house. The court answered "except that it is the gambling for money that makes it a disorderly house." *Held*, no error. Judgment affirmed. *King, plaintiff in error, v. People of New York*. Opinion by Andrews, J. [Decided Jan. 25, 1881.]

NEGLIGENCE — WHEN QUESTION OF FACT FOR JURY. — In an action against a railroad company for injury to a horse caused by the foot of such horse being caught between the rail and the planking at a street crossing, the evidence was conflicting. It was proved by plaintiff upon the trial that the plank was so placed that there was a space of a little more than three and one-quarter inches between the plank and the rail, which space was for the passage of the flange of the car wheels; and the evidence of the plaintiff showed that two and one-quarter inches was all which was required for that purpose, and hence the space was one inch wider than it should have been, and this caused the horse's hoof to get into the open space and to be caught by the toe-calk under the rail. It also appeared from plaintiff's evidence that the plank was from one-quarter to three-eighths of an inch higher than the top of the rail. The court at trial nonsuited plaintiff on the ground that there was no evidence of negligence on the part of defendant in constructing the crossing. *Held*, error. The case is within the rule that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury when it depends upon conflicting evidence or on inferences to be drawn from circumstances in regard to which there is reason for a difference of opinion among intelligent men. *Wolfkiel v. Sixth Ave. R. Co.*, 38 N. Y. 49; *Weber v. New York Cent., etc., R. Co.*, 58 id. 451; *Hart v. Hudson River B. Co.*, 89 id.

622. Judgment reversed and new trial granted. *Payne, appellant, v. Troy & Boston Railroad Co.* Opinion by Miller, J. Folger, C. J., Earl and Rapallo, JJ., dissent.

[Decided Jan. 25, 1881.]

PRACTICE—PREFERRED CASES IN COURT OF APPEALS.—Notwithstanding the provisions of section 791 of the Code of Civil Procedure, giving certain preferences among civil causes, in the trial or hearing thereof, it is still necessary for a party claiming a preference in this court, to comply with the directions of rule 20. He must therefore in his notice of argument, state such claim and the other facts mentioned in that rule. Motion granted. *Taylor, appellant, v. Winy.* Opinion by Danforth, J.

[Decided Jan. 25, 1881.]

TITLE—TO CHATTEL—ONE ASSERTING CANNOT CLAIM LIEN—SALE AND DELIVERY BY OWNER IN COMMON NOT CONVERSION AUTHORIZING REPLEVIN.—(1) In an action of replevin for a horse, plaintiff claimed title and that the defendant wrongfully withheld the horse from him. The defendant answered that he was part owner of the horse, having acquired his title by purchase from one who was part owner with plaintiff. Held, that the answer disclosed a good defense, if true, as replevin will not lie by one tenant in common of a chattel, against another tenant in common, for taking the chattel, and if one of them sells his interest to a third party he has a right to deliver the chattel to the purchaser, and neither he nor any one assisting him in doing so is liable to an action. (2) The plaintiff did not, until the summing up of the case, claim any lien upon the horse, but claimed to be the sole owner. Held, that if he failed to establish his claim of sole ownership, he could not recover upon a claim of a lien for the care and keeping of the horse. A claim of ownership is inconsistent with one of lien, and both cannot be asserted at the same time. A claim of ownership waives the lien, if one exists, and consequently one who makes such claim as against the true owner cannot, if his alleged title turns out to be unfounded, fall back upon his lien. *Everett v. Saltus*, 15 Wend. 474; *S. C.*, 20 id. 267; *Holbrook v. Wight*, 24 id. 169. The rule is most frequently applied where a defendant who claims to retain property fails to set up his lien or makes some claim or does some act inconsistent therewith. But it is equally applicable to a plaintiff who, as against one who turns out to have a better title than himself, claims as owner when he has nothing but a lien. *Mexal v. Dearborn*, 12 Gray, 336. Judgment reversed and new trial ordered. *Hudson v. Swan et al., appellants.* Opinion by Rapallo, J.

[Decided Jan. 25, 1881.]

WILL—CONSTRUCTION OF—BEQUEST TO ONE SON AND CHILDREN OF ANOTHER—WHEN CONSTRUED PER STIRPE—WHERE LEGACY VESTS.—By the second clause of his will testator gave to his wife, during her life, 169 acres of land, directing "that at the death of my wife said land be sold by my executor and the proceeds be equally divided between my daughters, S., H. and J., and the children and heirs of my sons B. and U., and of my daughter C., share and share alike, and if either of the heirs above mentioned and intended shall die after the date of this will, and before the said sums are paid, then the shares of the one so dying without issue shall be equally divided among the other heirs above named." By the fifteenth clause of the will he thus provided: "I give, etc., the rest and residues of my property, real and personal, to my wife, my daughters S., H. and J., and the children of my sons B. and U., to be equally divided among them, share and share alike," except certain specified real property, one-third of which he gave to his wife, and directed his executor to sell such specified property and "divide two-thirds of the proceeds among the heirs last men-

tioned." Testator died leaving all six of his children named surviving, and soon thereafter his executor died. The daughters H. and J. married and died leaving husbands but no issue; the son E. died leaving one child and a grandchild his heirs, and the son U. died leaving seven children. Thereafter the wife died, and after her the daughter C. without issue. In an action brought thereafter to determine the distribution, etc., and to appoint a trustee to carry out the will, held, that under the terms of the will the daughters H., J. and C., or any claiming under them, were excluded, and the proceeds of the 169 acres were to be divided between the daughter S., the children of the son U., and the child and grandchild of the son B., per stirpe, and not per capita, S. taking one share, the children of U. one share, and the child, etc., of B. one share. No part of the remainder provided for in the second clause vested at the death of the testator. See *Houghton v. Whitgrave*, 1 Jac. & Walker's Ch. 145; *Teed v. Morton*, 60 N. Y. 502; *Mouereef v. Ross*, 50 id. 431; *Hatch v. Bassett*, 52 id. 359. The rule that under a devise or bequest to one and the children of another, prima facie the persons take per capita and not per stirpes, is technical and subject to many exceptions, and courts readily depart from it when a different intent is discoverable. *Jarm. on Wills*, 107; *Balcom v. Haynes*, 14 Allen, 204; *Lockhart v. Lockhart*, 3 Jones' Eq. (N. C.) 205; *Forber v. Shillman's Ex'rs*, 3 C. E. Green, 229; *Clark v. Lynch*, 46 Barb. 81; *Hoppock v. Tucker*, 59 N. Y. 202; *Ferrari v. Pyne*, 81 id. 90. Judgment modified. *Vincent et al. v. Newhouse et al., appellants.* Opinion by Danforth, J.

[Decided Jan. 18, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

MARITIME LAW—PETITION FOR LIMITING LIABILITY IN CASE OF COLLISION MAY BE FILED AFTER TRIAL—ENGLISH AND AMERICAN RULES DIFFER.—A petition under the 54th rule in admiralty, claiming the benefit of a limitation of liability in case of collision, to the value of the owner's interest in the vessel, as provided by section 4283, United States Revised Statutes, may be filed after the trial of the cause. It is not necessary and the 56th rule does not require that it be filed before the trial, although a second trial upon the merits may not be had between the parties. It was not the intention of the admiralty rules to preclude a party from claiming the benefit of a limited liability after a trial of the cause of collision. The 56th rule was merely intended to relieve ship-owners from the English rule of practice, which requires them, when they seek the benefit of the law of limited liability, to confess the ship to have been in fault in the collision. This was deemed to be a very onerous requirement; for in many, if not in most cases, it is extremely doubtful which vessel, if either, was in fault; and to require the owners of either to confess fault before allowing them to claim the benefit of the law, would go far to deprive them of its benefit altogether. Hence this court, in preparing the rules of procedure for a limitation of liability, deemed it proper to allow a party seeking such limitation to contest any liability whatever. But this rule of procedure was not intended to abrogate, and indeed could not abrogate, the rule of law, that *res judicata*, or a matter once regularly decided between parties in a competent tribunal, cannot be again opened by either of them except in an appellate proceeding. The institution of proceedings for a limitation of liability must, however, be subject to some limitations growing out of the nature of the case. They must be regarded as ineffectual as to any specific party if not undertaken until after such party has obtained satisfaction of his demand. The doctrine of

laches, as applied in admiralty courts, would be properly applicable to such a case. The court would justly refuse its aid in compelling a return of money received. But the omission to take the benefit of the law in reference to a particular party ought not to preclude the owners of a ship from claiming its benefit as against other parties suffering loss by the same collision. There may be many persons who have sustained but trifling losses, which the owners may be perfectly willing to pay; whilst, at the same time, they may have just ground for resisting the claims of others. In such cases, a concession to the demands, or a failure to resist the claims of one party ought not to conclude them as against the demands of other parties. In England, the value of the vessel immediately before the collision was regarded as the true criterion of liability. But the English law is different from ours. It makes the owners liable to the extent of the value of the ship at the time of the injury, even though the ship itself be lost or destroyed at the same time; whereas our law, following the admiralty rule, limits the liability to the value of the ship and freight after the injury has occurred; so that if the ship is destroyed the liability is gone; and whether damaged or not damaged, the owners may surrender her in discharge of their liability. Decree of United States Cir. Ct., E. D. New York, reversed. *New York & Wilmington Steamship Co., appellant, v. Mount et al.* Opinion by Bradley, J.
[Decided Jan. 31, 1881.]

PARTNERSHIP—MINING FIRM—SALE OF INTEREST BY PARTNER DOES NOT DISSOLVE FIRM.—A sale by a partner in a mining copartnership, of his interest therein, does not end the copartnership. Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities. In Skillman v. Lockman the question of the relation existing between parties owning several interests in a mine came before the Supreme Court of California, and that court said that, "whatever may be the rights and liabilities of tenants-in-common of a mine not being worked, it is clear that where the several owners unite and co-operate in working the mine, then a new relation exists between them; and to a certain extent they are governed by the rules relating to partnerships. They form what is termed a mining partnership, which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership." 23 Cal. 203. The same doctrine is asserted in numerous other cases, not only in that court but in the courts of England. Associations for working mines are generally composed of a greater number of persons than ordinary trading partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The *delectus personae*, which is essential to constitute an ordinary partnership, has no place in these mining associations. *Duryea v. Burt*, 28 Cal. 569; *Septembre v. Putnam*, 30 id. 490; *Taylor v. Castle*, 42 id. 360. There are other consequences resulting from this peculiarity of a mining partnership, particularly as to the power of individual members to bind the association, etc. *Dickinson v. Valpy*, 10 B. & C. 128; *Ricketts v. Burnett*, 4 Q. B. 686. Decree of

Utah Supreme Court reversed. *Kahn, appellant, v. Central Smelting Co. et al.* Opinion by Field, C. J.
[Decided Jan. 24, 1881.]

PUBLIC MONEY—ONE BUYING STAMPS FROM GOVERNMENT ON CREDIT NOT ACCOUNTABLE AS FOR.—G., a manufacturer of friction matches, as such gave bond to the United States, with sureties, to pay for internal revenue stamps sold him on credit, under section 3423, United States Revised Statutes. Under the law he was entitled to an allowance upon the aggregate amount supplied him, as discount on the face value or commission. By section 3624, United States Revised Statutes, "whenever any person accountable for public money neglects or refuses to pay into the treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the first comptroller of the treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon." In an action against G. and his sureties for amount due for stamps sold upon credit, held, that G. was not accountable for any public money and the United States could not recover for the allowances due to G., although they were called commissions. Judgment of United States Cir. Ct., E. D. Virginia, affirmed. *United States, plaintiff in error, v. Goldback et al.* Opinion by Waite, C. J.
[Decided Jan. 17, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

MARITIME LAW—SEAMAN INJURED OR SICK WITHOUT FAULT ENTITLED TO BE CARED FOR BY VESSEL.—It is the well-settled law that a seaman receiving an injury or becoming sick in the service of the ship without his fault is entitled to be cured or cared for at the expense of the vessel. *Harden v. Gordon*, 2 Mass. 547; *Reed v. Canfield*, 1 Sum. 197; *The Ben Flint*, 1 Abb. (U. S.) 128; *Brown v. Overton*, Sprag. Dec. 462. And the fault which will forfeit this right upon the part of the seaman must be some positively vicious conduct, such as gross negligence or willful disobedience of orders. Ordinary negligence, consistent with good faith and an honest intention to do his duty, is not sufficient. The propriety and good policy of this rule is eloquently vindicated by Story, J., in *Harden v. Gordon*, *supra*, and in the application of it a court of admiralty will not be quick to find cause to exclude the seaman from its benefits. A seaman who went aloft on a ship, being ordered to do so, fell from the breaking of a crane line upon which he had negligently gone without examining its condition. Held, that he was entitled to be cared for at the expense of his ship. U. S. Dist. Ct., Oregon, Nov. 9, 1880. *Peterson v. The Chandos*. Opinion by Deady, D. J.

—SALE OF VESSEL BY FOREIGN ADMIRALTY COURT DISCHARGES LIEN—LIEN HOLDER ENTITLED TO SHARE IN SURPLUS.—By the law of most, if not all, civilized nations, the sale of a vessel by proceedings *in rem*, in a court of competent jurisdiction, extinguishes all liens upon her, and vests a clear and indefeasible title in the purchaser. Story on Conf. of Laws, §592; *Williams v. Armroyd*, 7 Cr. 424; *The Tremont*, 1 W. Rob. 163; *The Mary*, 9 Cr. 126; *The Amelle*, 6 Wall. 18; *The Granite State*, 1 Sprague, 277. In the case of *The Helena*, 4 Rob. Adm. 4, this doctrine was carried so far as to sustain a sale made after a capture by pirates. See, also, *Grant v. McLaughlin*, 4 Johns. 84. Such sales however may be impeached by the owner or other per-

*Appearing in 4 Federal Reporter.

son interested by showing that the court or officer making the sale had no jurisdiction of the subject-matter by actual seizure and custody of the thing sold (*Rose v. Himely*, 4 Cr. 241; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn. 601; *The Mary*, 9 Cr. 126; *Woodruff v. Taylor*, 20 Vt. 65; *Daily v. Doe*, 3 Fed. Rep. 903); that the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party (*Parkhurst v. Sumner*, 23 Vt. 538; *Annett v. Terry*, 35 N. Y. 256; *Castrique v. Imrie*, L. R., 4 H. of L. 427); or that the sale was contrary to natural justice (*The Flad Dyen*, 1 C. Rob. 135). In case of sale by a master, the court will inquire into the circumstances and see whether it was necessary and for the interest of all concerned; but the effect of such sale to discharge liens is the same. In the case at bar, where an American vessel was sold by the maritime court of Ontario, the sale was held to discharge lien for necessities furnished in Cleveland, Ohio, notwithstanding the court has declined to enforce such lien against the vessel for the want of jurisdiction. *Hudson v. Guester*, 6 Cr. 281; *Comstock v. Crawford*, 3 Wall. 396. In such cases the lienholder is remitted to his remedy against the proceeds of sale, and it seems that his claim will be allowed wherever a lien exists by the law of the place where the contract is made. *Stringer v. Marine Ins. Co.*, L. R., 4 Q. B. 676; *Story on Conf. of Laws*, 322 b; *Harrison v. Sterry*, 5 Cr. 289; *The Flora*, 1 Hagg. 296; *The Harmonie*, 1 W. Rob. 178; *The Nordstjernen*, Swab. 260; *The Gustaf*, 6 L. T. (N. S.) 660. U. S. Dist. Ct., E. D. Michigan, Nov. 29, 1880. *The Trenton*. Opinion by Brown, D. J.

—SEAMAN PRESUMED TO HIRE FOR TRIP—DUTY OF BOAT TO CARE FOR INJURED SEAMAN.—(1) In the absence of an express agreement, the law will imply that the employment of a seaman upon a steamboat is for the trip which she is then engaged in. *The Heinrich*, Crabbe, 226. (2) A seaman who, without his fault, is injured in the service of the boat is entitled to his full wages for the trip or other period of service which he had then entered upon, and to be cured at the expense of the boat. *Neilson v. The Laura*, 2 Sawy. 242; *The North America*, 5 Ben. 486; *Morgan v. The Ben Flint*, 1 Abb. (U. S.) 126; *Sims v. Jackson*, 1 Wash. 414; *The Nimrod*, Ware, 1, 9; *The Forest*, id. 420; *Harden v. Gordon*, 2 Mass. 541; *Reed v. Canfield*, 1 Sumn. 195. U. S. Dist. Ct., S. D. Ohio, Dec. 2, 1880. *Longstreet v. Steamboat Springer*. Opinion by Swing, D. J.

GEORGIA SUPREME COURT ABSTRACT.

ATTORNEY AND CLIENT—DEALINGS BETWEEN.—The relation of attorney and client is eminently one of trust and confidence. Where the attorney to collect a debt from the principal debtor was himself liable in the second instance, the statute of limitations as to his liability ran from the time when the debt could not be collected from the principal and when the liability of the attorney was made apparent to the client. While the client was bound to ordinary diligence to discover the insolvency of the principal debtor, he was entitled to the diligence, knowledge and advice of his attorney on that subject. *Freeman v. Bigham*. [Decided Nov. 27, 1880.]

CARRIES OF PASSENGERS—RAILROAD COMPANY MAY RUN SPECIAL TRAINS AND EXCLUDE PASSENGERS THEREFROM—INJURY TO PASSENGER RIDING WITHOUT RIGHT OF TRAIN—LEAVING MOVING TRAIN ON ADVICE OF CONDUCTOR—DAMAGES.—(1) A railroad company in this State, providing sufficient trains and cars to accommodate all the travelling public over its line, has the legal right to run special trains over its road for the purpose of carrying provisions and paying its employees, and to prohibit any person from travelling on such train, and if plaintiff entered a car attached to the same know-

ing its character, without the consent of the corporation or its agents, he becomes a trespasser. If injury is sustained by such person whilst so wrongfully upon such special train, the fact of being on such train will be an element in determining his prudence and want of care, and the liability of the corporation. If one enters a pay-train for the purpose of riding thereon, and by the rules and regulations of the company passengers were not allowed to ride on such trains, it would be his duty to leave the train as soon as he prudently could, when notified of such rule. If one leaps from a train of cars moving at the rate of fifteen miles per hour, on the advice or concurrence of the conductor, his right to recover would involve the question whether he prudently used the only way which the rules of the company permitted him to use, and also his recklessness and want of ordinary care, for if by the use of ordinary care he could have avoided the injury, the company would not be liable. (2) Where the damage alleged was the breaking of the leg of the plaintiff resulting in permanent injury, and the plaintiff being twenty-one years of age, realizing from \$200 to \$300 for four months, and being deprived thereafter of employment, a verdict for \$14,833 is excessive. *South-western Railroad Co. v. Singleton*. [Decided Nov. 27, 1880.]

NEGLECTANCE—ACTION FOR HOMICIDE DEPENDENT UPON.—For a widow to have a right of action for the homicide of her husband, his death must have been caused by some act or by the criminal negligence of the defendants. The allegations that the defendants erected and rented a building having a platform or bridge as its means of egress or ingress, that the tenants had no way of moving their furniture into the building except over such platform, that while in the employment and at the instance of the tenants the husband of the plaintiff was endeavoring to move an iron safe into the building the platform gave way, and he was killed, and that this resulted from the improper and faulty construction of it by the landlords (who were the defendants) are not sufficient. Such a declaration is demurrable. *Daley v. Stoddard*. [Decided Dec. 14, 1880.]

NEW JERSEY COURT OF CHANCERY ABSTRACT.

OCTOBER, 1880.*

EQUITABLE ACTION—SPECIFIC PERFORMANCE—DELAY IN SEEKING RELIEF FOR.—Great delay in seeking relief is a good bar to a suit for specific performance. Sixty years' delay constitutes a bar. A suit asking a court of equity to give him the benefit of the exercise of its discretionary power must show a good conscience, good faith and reasonable diligence. *Plummer v. Kepler*, 11 C. E. Gr. 482. Lord Alvanley said: "A party cannot call upon a court of equity for specific performance unless he has shown himself ready, desirous, prompt and eager." *Milward v. Earl of Thanet*, 5 Ves. 720, note b. Lord Cranworth said: "Specific performance is relief which this court will not give unless in cases where the parties seeking it come as promptly as the nature of the case will permit." *Eads v. Williams*, 4 De G. M. & G. 691. In *Van Doren v. Robinson*, 1 C. E. Gr. 263, Chancellor Green said: "Great delay, unaccounted for, is a bar to a claim for specific performance." Lord Camden stated the general doctrine as follows: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party has slept upon his rights or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and rea-

* To appear in 6 Stewart's (38 N. J. Eq.) Reports.

reasonable diligence. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was also a limitation of suit in this court." *Smith v. Clay*, 3 Bro. C. C. 630, note. The doctrine as thus stated was enforced in a case strongly analogous to the one in hand, by the Supreme Court of the United States. *Platt v. Vetter*, 9 Pet. 413. *Johnson v. Commissioners of Somerset*. Opinion by Van Fleet, Vice-Chancellor.

INJUNCTION—WILL NOT BE GRANTED TO RESTRAIN LAYING OF PIPE TO TRANSPORT OIL ACROSS WATERS OF STATE—NOR ACROSS RAILROAD TRACK IN PUBLIC STREET AT INSTANCE OF RAILROAD COMPANY, IT DOING NO INJURY—FRANCHISE OF RAILROAD CORPORATION TO CARRY OIL NOT EXCLUSIVE.—A foreign corporation, without any authority whatever, laid a pipe for transporting oil on the bottom of a navigable river, on lands belonging to the State, and underneath a draw-bridge of complainant. At that point the channel was so deep and wide as that the laying of the pipe there would not interfere with the bridge. A preliminary injunction to prevent such pipe-laying was denied, because, (1) the pipe had been laid before the application for the injunction was made. (2) The lands where the pipe crosses the bridge belong to the State, and the complainants have no legislative authority to reclaim them. (3) The pipe, as laid, does not interfere with or obstruct the maintenance and operation of the draw-bridge nor any lawful filling. (4) The complainant's franchise of carrying oil is not exclusive, and therefore does not prevent any other company from doing so, if not in contravention of the company's franchise, much less so when it appears the defendants intend to transport only their own oil. *United New Jersey Railroad and Canal Co. v. Standard Oil Co.* Opinion by Ruyon, Chancellor. An injunction was refused in another case on similar grounds, where the oil pipes were laid upon a street bridge built by a city across a railroad, and also upon the ground that no irreparable injury was shown, either from the leakage of oil or interference with the elevation of the bridge, if complainants should desire to raise it. See *Citizens Conch Co. v. Camden Horse R. Co.*, 2 Stew. Eq. 239. *Central Railroad Co. of New Jersey v. Standard Oil Co.* Opinion by Ruyon, Chancellor.

TRUST—MAY BE CREATED ORALLY—MORTGAGE DEBT.—A valid trust of personal property may be created by mere spoken words, and proved by parol evidence. A valid trust of a mortgage debt may be created by parol, for though a trust thus created will not pass any interest in the land held in pledge, yet it is good as to the debt, and will entitle the cestui que trust to the payment of his debt out of the proceeds of the sale of the land. *Hooper v. Holmes*, 3 Stockt. 123; *Kimball v. Morton*, 1 Halst. Ch. 26; *Snyre v. Fredericks*, 1 C. E. Gr. 205; *Eaton v. Cook*, 10 Id. 55; 2 Story's Eq. Jur., § 872; 1 Perry on Trusts, § 85; *Benbow v. Townsend*, 1 M. & K. 508; *Childs v. Jordan*, 108 Mass. 321. *Danser v. Warwick*. Opinion by Van Fleet, Vice Chancellor.

PENNSYLVANIA SUPREME COURT ABSTRACT.

FRAUDULENT CONVEYANCE—VOLUNTARY CONVEYANCE BY ONE IN DEBT NOT FRAUDULENT AS TO FUTURE CREDITORS.—Notwithstanding the many loose declarations in the books to the contrary, the statute of 18th Elizabeth does not make voluntary conveyances void as to future creditors unless there is some evidence to indicate that the grantor intended to withdraw his property from the reach of such creditors (*Snyder v. Christ*, 3 Wr. 400); and it is properly said in *Williams v. Davis*, 10 F. F. Smith, 21, that even an ex-

pectation of future indebtedness will not render a voluntary conveyance void when there is no fraud intended by such conveyance; and so, also, in *Thomson v. Dougherty*, Duneau, J., citing *Barton v. Wheaton*, 8 Wheat. 229, says: "Marshall, C. J., decided that a post-nuptial settlement on a wife and children by a man who is not indebted at the time, was valid against subsequent creditors, and that the statute does not apply to such creditors if the conveyance be not made with a fraudulent intent." A similar ruling will be found in *Townsend v. Maynard*, 9 Wr. 193, and in *Greenfield's Estate*, 2 Har. 499. In the latter case, which involved a deed of trust of all the grantor's property, it was alleged by Bell, J., to be a sound rule of law that subsequent indebtedness cannot be invoked to invalidate a voluntary settlement made by one not indebted at the time, or who reserves sufficient to pay all existing debts, unless there be something to show that the settlement was made in anticipation of future indebtedness. See also *Matter v. Hassine*, 3 P. & W. 161; *Monroe v. Smith*, 20 P. F. Smith, 459. *Harlan v. Maglaughlin*. Opinion by Gordon, J. [Decided Oct. 6, 1879.] Also *Kimble v. Smith*. Opinion by Paxson, J. [Decided June 18, 1880.]

PURCHASE FROM INSOLVENT BY CREDITOR KNOWING INSOLVENCY—DEALING BETWEEN RELATIVES.—A father, to secure a debt due him by a son who was insolvent, purchased of such son a farm he owned for the full value, applying the debt toward payment and paying the balance in cash. A portion of the cash the father borrowed from his daughter. The son was indebted to the daughter, and used all but a small sum of the money received from his father in payment for the farm in paying that indebtedness. Held, that if the father's motive in the purchase of the property was the security of his own debt, his purchase cannot be impeached, though he may have paid the difference between the amount of the debt and the price agreed upon for the property, in money. In this we must look to the motive of the creditor; if that was honest and lawful the intent of his debtor does not enter into the question. As was said in *Scott v. Hellager*, 2 Har. 238, "One man cannot be prejudiced by the fraud of another of which he has no notice nor opportunity of receiving notice." If the intention of the parties was not only to secure the debt due to the father, but also to put the balance of the property into such a shape that it could not be reached by the son's creditors, then as to such creditors the whole transaction would be void. The dealings between father, son and daughter were not evidence of fraud. Business dealings between parents and children and other near relatives are not per se fraudulent. They must be treated just as are the transactions between ordinary debtors and creditors; as in the latter case, where the bona fides of such transactions is attacked, the fraud alleged must be clearly and distinctly proved, so likewise in the former. *Reckling v. Byers*. Opinion by Gordon, J. [Decided May 17, 1880.]

GRANTEE REPRESENTING ESTATE TO REMAIN IN GRANTEE STOPPED AGAINST SUBSEQUENT CREDITOR.—J. conveyed an estate to his uncle without consideration and for the purpose both on the part of the grantor and grantee of defrauding the creditors of J. The uncle subsequently declared to D. that J. still retained his interest in the property thus fraudulently conveyed, and D. loaned money to J. solely upon the faith of the representations of the uncle. Held, that D. was entitled to have his debt paid out of surplus moneys arising from the estate in preference to the claim of the uncle thereto. As between the parties to the fraudulent conveyance, neither law nor equity would lend its aid to either of them; and thus, while the uncle might as against J. claim and hold the surplus, he stands in a

very different relation to D. He is estopped from claiming the fund as against J. *Mosory's Appeal*. Opinion by Sterritt, J. [Decided May 24, 1880.]

LIEN—OF ARTISAN FOR REPAIRS TO DIFFERENT ARTICLES.—It cannot be doubted that a lien is given by the common law to a tradesman or artisan who in the course of his trade or occupation receives personal property upon which he bestows labor, etc., and his right to a lien on the property is equally good whether there be an agreement for a stipulated price, or only an implied contract to pay a reasonable compensation. *Story on Bailm.*, §§ 440, 441, a; *Mathias v. Sellers*, 5 Nor. 486. It is equally clear on principle as well as authority that where there is an entire contract for making or repairing several articles for a gross sum, the tradesman has a lien on any one or more of the articles in his possession, not only for their proportionate part of the sum agreed upon for repairing the whole, but for such amount as he may be entitled to for labor, etc., bestowed upon all the articles embraced in the contract. *Blake v. Nicholson*, 3 Maule & Sel. 167; *Chase v. Westmore*, 5 id. 180. *Hensel et al. v. Noble*. Opinion by Sterritt, J. [Decided Oct. 23, 1880.]

RECENT ENGLISH DECISIONS.

ATTORNEY AND CLIENT—DUTY OF SOLICITOR AS TO CONFLICTING RIGHTS OF CLIENTS—NOTICE.—S. borrowed £6,000. of B., his solicitor. Of this money £800. belonged to R., another client of B. B. took a mortgage in his own name without disclosing to S. that any part of the money belonged to B., but gave R. a declaration that he held £800. on trust for him. The mortgage of £8,000. was paid off in B.'s life-time. B. appropriated R.'s £800., but continued to pay interest till his death, when his estate was found to be hopelessly insolvent. An action was then brought by the trustees of S. for the administration of his estate. R. claimed to have his debt paid out of the estate of S. on the ground that S. had constructive notice that the £800. belonged to him. *Held*, that it was the duty of B., as the solicitor of S., to give him notice that part of the mortgage money belonged to R., but it was more incumbent upon him to give such notice as the solicitor of R., and therefore R. must suffer for the breach of duty which was committed by B. as his solicitor. Ch. Div., Dec. 4, 1880. *Allen v. Lord Southampton Roper's claim*. Opinion by Malins, V. C., 43 L. T. Rep. (N. S.) 625.

CARRIER OF PASSENGER—LIABILITY FOR INJURY TO BAGGAGE.—The plaintiff took a through ticket at E., on the Great Western Railway, to Euston. At B., where the Great Western and London and North-Western Railways meet, the plaintiff's portmanteau was put into a van belonging to the London and North-Western Company, but upon the arrival of the train at Euston it could not be found. About three months afterward the portmanteau was delivered to the plaintiff by the defendants much damaged, and the contents destroyed. *Held*, that the defendants were bound to take proper care of the portmanteau, and were liable for negligence irrespective of any express contract. Cases referred to, *Mylton v. Midland R. Co.*, 33 L. T. Rep. 287; *Foulkes v. Metropolitan Dist. R. Co.*, 42 L. T. Rep. (N. S.) 345. C. P. Div., Dec. 2, 1880. *Hooper v. London & North-Western Railway Co.* Opinions by Denman and Lindley, JJ., 43 L. T. Rep. (N. S.) 570.

CORPORATION—ACT OF LESS THAN REQUIRED NUMBER OF DIRECTORS VOID—FORFEITURE.—By the articles of association of a limited company, it was provided that the office of director should be vacated if any director ceased to be the holder of twenty shares in the company, or if he became bankrupt or insolvent,

and also that the business of the company should be conducted by not less than five or more than seven directors. In 1877, B., a director of the company and the holder of 250 shares partly paid up, filed a petition for the liquidation of his affairs. At this time there were only five directors including B. Subsequently to the liquidation, a resolution was passed at the usual quarterly meeting of the shareholders that the business of the company should be conducted by four directors; and shortly afterward the remaining four directors made a call on the shares, and the call not having been paid in respect of B.'s shares, the same directors passed a resolution declaring that the 250 shares standing in the name of B. were forfeited in accordance with certain clauses in the articles of association. B. paid his creditors a compensation, and the liquidation proceedings were closed. Afterward B. applied to be re-registered on the register as the holder of the 250 shares in the company, which had gone into voluntary liquidation, and made a tender to the liquidator of the amount due for calls on such shares. On a summons taken out by the liquidator for a declaration that B. was not entitled to be registered as the holder of the shares, *held*, that, as the articles provided that the business of the company should be conducted by not less than five directors, four directors had no power to make the call or to enforce it, and that the forfeiture was invalid. *Garden Gully Co. v. McLister*, 1 App. Cas. 39; *Kirk v. Bell*, 16 Q. B. 290; *Thames Haven Dock, etc., Co. v. Rose*, 4 Man. & G. 552. Ch. Div., Nov. 13, 1880. *Re Alma Spinning Co.* Opinion by Jessel, M. R., 43 L. T. Rep. (N. S.) 620.

SPECIFIC PERFORMANCE—WHERE IT INVOLVES FRAUD ON PUBLIC WILL NOT BE ENFORCED.—Where a person who had undertaken to edit a guide-book to London, refused to deliver up his manuscript (for which he had received the agreed price) unless his employer consented to abandon his intention of stating on the title-page that the work was "edited" by a person who had taken no part in the preparation of the work, "assisted" by the true editor. *Held*, that the editor could not be compelled to carry out his agreement under circumstances which involved the commission of a fraud upon the public. Ch. Div., Dec. 3, 1880. *Post v. Marsh*. Opinion by Fry, J., 43 L. T. Rep. (N. S.) 628.

NEW BOOKS AND NEW EDITIONS.

SICKELS' MINING LAWS.

The U. S. Mining Laws, and the Decisions of the Commissioners of the General Land Office and the Secretary of the Interior thereunder; together with the circular instructions from the General Land Office, and forms for establishing proof of claims; also the decisions of the Supreme Court of the United States under the Mining Acts. By D. K. Sickels, General Land Office, Washington, D. C. San Francisco: A. L. Bancroft & Co., 1881. Pp. xii, 677.

THIS is probably a useful and important manual for the mining country, where they dig the money for us to spend. It is arranged in an orderly manner, has indices of contents and cases, and is well printed.

LEE'S HAND-BOOK FOR CORONERS.

Hand-book for Coroners; containing a digest of all the laws in the thirty-eight States of the Union, together with a historical resume from the earliest period to the present time. A guide to the Physician in Post-mortem Examinations and Valuable Miscellaneous Matter never before collated. By John G. Lee, M. D., Coroner's Physician of the City and County of Philadelphia, Penn. Published by Wm. Brodhead, Agt., Philadelphia, 1881.

The title-page pretty fully describes the scope and contents of this book. The introductory chapter on the history of the office is instructive and interesting. The practical hints to physicians as witnesses as to the



means of escape from the "bullying and brow-beating of lawyers," are sensible, especially the instructions not to use technical phrases nor volunteer opinions. The purely scientific portion is sound and valuable. This book indicates the sentiment, beginning to prevail, that the coroner's duties are professional and should be performed by an educated physician who has also a medico-legal training sufficient to enable him to discharge the important duties with discretion; that the office should be abolished, and its duties performed by qualified persons, auxiliary to the boards of health, and entirely removed from political influence. The chapter of Joe Miller jests at the end of the book does not enhance its value.

VII BRADWELL'S REPORTS.

This volume of the reports of the Illinois appellate court contains many interesting decisions, among which are the following: *Little v. Williams*, p. 67—A decedent's estate so insolvent that it cannot pay the physician's bill and other expenses of his last illness must not indulge in a tombstone worth \$42.35. *Hansen v. Dennison*, p. 73—A mortgage on a planted crop is valid. *City of East St. Louis v. Lockhead*, p. 83—A city, having permitted a bridge company to construct permanent approaches from their bridge to a street, is not liable for the nuisance produced by baskets of dust thrown by the employees of the company from such approaches and blown into neighboring windows. *Duncan v. Jackson*, p. 119—Crops raised by husband on wife's land are his by presumption. *Manton v. Gammon*, p. 201—Where goods are sold and delivered, payable by note on time, and the note is not given, the seller cannot maintain an action for goods sold until the term of credit has expired, but may at once sue for breach. *City of Joliet v. Walker*, p. 267—A defect in a sidewalk, to charge a city with notice, must be such as to cause a reasonably prudent man in charge of the streets to suspect, or to put him upon inquiry as to, the condition of the way. *Woolsey v. White*, p. 277—A son-in-law is not impliedly liable to pay his mother-in-law for her services rendered in his family as a member of it, making his house her home. *Anderson v. Smith*, p. 354—One is not justified in killing a valuable dog trespassing on his grounds, for fear it might kill his fancy hens. *Hoffman v. Culver*, p. 450—On sale of a car-load of grain, quantity unknown, payable in cash as soon as weighed, weighing to be done by buyer, title does not pass until the weighing, in absence of other understanding. *City of Chicago v. Garrity*, p. 474—When land leased for years is condemned for public use, the tenant remains liable for the entire rent. *Stillman v. Stillman*, p. 524—A divorced wife, marrying a new husband who cannot support her, is not liable to forfeiture or reduction of her alimony. *Jones v. Duntun*, p. 580—An employee, wrongfully discharged, cannot wait till the expiration of the term and sue for constructive service, but his action is for the breach. *McLean v. Matthews*, p. 599—An old, disused and nearly sunken boat, fastened to a pier in a river in such a way as to obstruct navigation, may be removed by the public authorities as a nuisance.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, March 1, 1881:

Judgment affirmed with costs—*Boardman v. The Lake Shore & Michigan Southern Railroad Co.*; *Frank v. The Chemical National Bank*; *The Trustees of the Town of East Hampton v. Kirk*; *Brassell v. The N. Y. C. & H. R. R. Co.*; *Masteron v. The N. Y. C. & H. R. R. Co.*; *Ham v. Van Orden*; *Stevens v. The Mayor, etc., of New York*; *Stephens v. Waite*; *Stranahan v.*

The Sea View Railway Co.; *McCabe v. Fowler*; *Fagan v. The Mayor, etc., of New York*; *Smyth v. Monroe*; *Sperling v. Connor, Sheriff*; *Fordham v. Hendrickson*; *Hibernia National Bank v. Lacombe*; *Coine v. Weaver, Sheriff*; *Graham v. National Bank of Norfolk*; *Sullivan v. The Howe Machine Co.*; *First National Bank of Whitehall v. Tisdale*.—Judgment affirmed—*Farrell v. The People*; *Bowe v. The People*.—Judgment reversed and new trial granted, costs to abide event—*Toles v. Adee*; *Duryea v. Traphagan*.—Judgments of General and Special Terms reversed and remanded to Special Term to render judgment in accordance with decisions of this court—*Ireland v. Ireland*.—Judgment of General Term reversed and judgment of Special Term affirmed with leave to the defendant, within twenty days hereafter, to withdraw its demurrer and answer over upon payment of costs in the Supreme Court and in this court—*Riggs v. The American Tract Society*.—Judgment affirmed, with one bill of costs to the executors first named, to be paid by appellants, but without costs or disbursements to any other party—*Svenarton v. Hancock*.—Order affirmed with costs—*Johnston v. Harvey*; *People v. Denton*.—Orders reversed with costs—*People ex rel. Higgins v. McAdam, Justice, etc.*—Orders of General and Special Terms reversed and case remanded to Special Term for rehearing, costs to be awarded and adjusted below—*Duncomb v. The N. Y. Houseboat & Northern R. R. Co.*—Orders of General and Special Terms reversed and motion granted, without costs—*Gormley v. McGlynn*.—Order of General Term reversed and decree of surrogate affirmed, with costs—*Ormiston v. Olcott*.

NOTES.

THE *Law Magazine and Review*, for February, contains leading articles as follows: Crown prosecutions—right of reply, by John Kinghorn; Statute of Uses and present system of conveyancing—ought the statute to be repealed? by W. H. Upjohn; Abolition of canvassing at Parliamentary elections, with a draft bill, by George G. Gray; Extra-Territorial oaths, by Sir Sherston Baker; the Vacant chiefship, by Q. C.—The *American Law Register*, for February, contains a leading article on Contempt of Court, by Charles Chauncey; and the cases of *Brain v. Marfell*, concerning breach of contract to allow water from a spring to be conveyed over vendor's land, caused by act of a second vendor, with note by Edmund H. Bennett; *Bartle's Petition*, concerning devise after death of life tenant to the testator's then heirs, with note by John H. Stewart; *Casper v. Walker*, concerning requirement in will that devisee shall reside on land devised, with note by John H. Stewart; and *State v. Spaulding*, concerning opinion rendering jurors incompetent, with note by Henry Wade Rogers.

In *Shorter v. State*, 63 Ala. 129, Judge Stone utters the following excellent sentiments on carrying concealed weapons: "We have had occasion heretofore to remark, that carrying concealed weapons is one of the most pernicious practices that modern civilization has developed. See *McManus v. State*, 36 Ala. 285; *Mitchell v. State*, 60 id. 28. It is the *causa causans* of perhaps three-fourths of the homicides which stain our criminal jurisprudence. Could Legislatures and courts discover some method by which this causeless, evil practice can be reformed, the result would be a vast saving of valuable lives to the Commonwealth. A more vigorous prosecution, and severer punishment of violators of this wholesome statute, would mark an era of reform, and of a more peaceful state of society. If offenders in high social position were made an example of—were made to know and to suffer the sterner penalties the law has provided—this dangerous practice would become much less prevalent, and homicides much less frequent."

The Albany Law Journal.

ALBANY, MARCH 12, 1881.

CURRENT TOPICS.

AN interesting question in the law of perjury was passed upon by Justice Westbrook, at the Albany Oyer and Terminer last week. The prisoner was indicted for perjury in an affidavit. He had called on the notary early in the day, and told him he wanted to swear to some affidavits, and the notary being busy told him to call later. He accordingly called again, and the notary asking, "where is the paper?" he laid before him the paper already signed, or signed it in the notary's presence, and the notary then signed the *jurat*, without any other words or formality. Justice Westbrook held that if the jury were satisfied that the prisoner meant to swear to the affidavit, this was perjury if the affidavit was false. But the indictment is for false swearing, not for intending to swear falsely. And the difficulty seems to be that this evidence shows no intention to take an oath. Undoubtedly the prisoner meant the notary to understand that he had come to swear, but *did* he swear?—was there any attestation?—did the prisoner call God to witness?—can an oath be administered unless the person appointed to administer and certify the oath says something to which the affiant by words or signs assents, or the affiant himself declares that he swears? The Court of Appeals held in *Case v. People*, 76 N. Y. 242, that the affiant and the officer must be face to face; that the affiant cannot send the signed affidavit to the officer by another person. But Justice Westbrook says: "When, however, the officer and the would-be affiant are face to face, and when communication is thus clearly directly established between them, thought and intent can be expressed by the one to the other, either in uttered words or in writing, and when conveyed in either way, the one is as clear and as forcible as the other. The statutes require no particular form of oath," And he details the essentials of the ceremony as follows: "1st. The meeting of the prisoner and the officer for the avowed and declared purpose of verifying the account in the manner prescribed by statute. 2d. A declaration, partly printed and partly written, subscribed by the prisoner, in which he distinctly states he has been 'duly sworn' and on his oath deposes. 3d. The delivery of the declaration thus subscribed to the commissioner, who reads it, and thereby is fully informed of what the prisoner states to him by written and printed words. 4th. The acceptance by such commissioner to and in the presence of the party deposing, of such written and printed statement as a verbal declaration and oath before him, as evinced by the officer's signature to the *jurat*. And 5th. The declaration of the officer to the prisoner that an oath has been administered, by the delivery of the statement to him as one duly verified, and its acceptance as such by

the prisoner, with his proclamation to the world that he has been duly sworn, evinced by its delivery to the board of supervisors for action thereon." This looks to us like predicating perjury upon estoppel, which, we take it, cannot be done. If it is necessary to have the parties face to face, this must be for some other purpose than merely conveying the paper. That could be done just as well by a messenger. If the judge's position is correct, that the intent can be expressed in writing, we do not see why a letter from the prisoner, addressed to the officer, and accompanying the signed affidavit, and saying that he swore to it, would not answer the purpose. We think the intent to swear must be gathered from something outside the affidavit itself.

The Court of Appeals have unanimously sustained the position of Attorney-General Ward and Justice Westbrook in the *Belden-Dennison* case. The point decided is, that in an action by the State against a citizen, on contract, in which the citizen sets up a counter-claim, the State failing to recover at all, the citizen cannot in any event have judgment for his counter-claim. This interesting question was argued by Senator Conkling for the State, and Mr. W. C. Ruger, for the defendants. We have received and read their arguments, printed in pamphlet, with great interest. Mr. Ruger's argument is very ingenious, acute, and lawyer-like. Senator Conkling's is very senatorial and eloquent. Mr. Ruger had the better in morals; the senator the better in the law. The senator's appearance in the case was because the attorney-general's conduct of the original case had been impugned by partisans and political newspapers, and as the senator remarked, that his "presence might defend him from the licentious and truthless insinuation that in some way or other, he had been in sympathy with, or in lenity with the interests of somebody concerned in this case." We do not exactly see, however, why the senator "should have liked a professional brother to have come to my side had I been gibbeted for nothing at the cross-roads of public condemnation." That would seem a rather late appearance to help the attorney-general. But the senator wound up rotundly, if rather confusedly, by declaring that he appeared to testify "that there is nothing so valuable, nothing so honest, nothing so void of offense in these times that it should not be dragged through the hurricane and the surfeit of mire and detestable accusation." The attorney-general scarcely needed this distinguished championship, and has been amply vindicated by the result. We call attention in this connection to Mr. Royall's article, in another column, on the Enforceability of State Contracts.

Senator Astor's bill to make Good Friday a legal holiday does not seem to us advisable. There is really no religious reason for compelling a man whose note falls due on Good Friday to pay it the next day before—for that is about what the bill amounts to. To be sure, the bank officers may shut

up the bank on that day, but they have to work twice as hard the next in consequence. We never met with a bank officer who did not regret these holidays. The notary is the only man who favors them, and he may well do so, for he reaps an unaccustomed harvest of fees from the protests accruing through the forgetfulness of the business community of the occurrence of the holiday. We already have New Year's, Washington's Birth-day, Decoration Day, Thanksgiving, the glorious "Fourth," and Christmas, and this is enough, if not too much. God knew what was best when he appointed one day's rest in seven. A multiplication of holidays is a sure indication of the decadence of a nation. As for the matter of sentiment, it is purely sectarian, for only the Catholics and Episcopalians set store by the day, and we can see no reason why a Presbyterian, a Methodist or a Baptist should be compelled to pay his note one day ahead of time, simply in deference to the sentimental regard of these other sectarians for a day not sacred by divine appointment, and destitute of national or patriotic significance. There is no legal obstacle to the Episcopalian's paying his note a day beforehand, if he desires; the Presbyterian wants all the "grace" the law allows him.

Bills have been introduced in both houses of our Legislature to define more particularly the word "land" in the chapter of the Revised Statutes on taxation, and to make it include wharves and piers, wharfage, cramage and dockage; bridges; telegraphs; railways, on, under or above ground; and all their structures and appurtenances; and all kinds of mains and tanks for gas, air, oil, steam or water.

In connection with the decision of our Court of Appeals in *Cowley v. People*, ante, p. 182, upon the admission in evidence of the photographs of the boy whom the gentle shepherd maltreated, we call attention to a similar decision of the Iowa Supreme Court, in *Reddin v. Gates*, 52 Iowa, 213, an action of assault and battery, where the court admitted a ferrotype showing the condition of the defendant's back three days after the injury. The court said: "The person who took the picture testified it was a correct representation of the plaintiff's back at the time it was taken. If it had been possible, it would have been competent for the jury to have examined the back at the time the picture was taken, for the purpose of more readily understanding the other evidence. The ferrotype was therefore admissible."

The late law firm of Lincoln & Isham, of Chicago, was ambitious of promotion, it seems. Mr. Lincoln has received the Secretaryship of War;—why, unless because he is a clever middle-aged lawyer, the son of President Lincoln, and a great admirer of General Grant, and utterly ignorant of war, we cannot conceive. And now the other partner, Mr. Edward S. Isham, is the victim of a "strong movement" on the part of the Chicago bar to secure his

nomination for the vacancy in the Federal Supreme Court. Why, we cannot conceive, unless because he is also a clever middle-aged lawyer, a son of the late Judge Isham of the Vermont Supreme Court, utterly without judicial experience, and because Illinois is determined to have this place. We shall probably hear of a great many similar "strong movements" in different parts of the West. Our readers already know our preference, and we simply reiterate that Judge Cooley is our candidate. There are probably five hundred lawyers as fit for this post as Mr. Isham; there are probably not fifteen so fit as Judge Cooley. — The appointment of Mr. Wayne McVeagh as Attorney-General is generally deemed a highly respectable one.

We commence this week, and shall continue at intervals of perhaps a month, the publication of abstracts of the more important local practice decisions. We have never proposed to make this department a specialty, for there are publications taken by our profession generally which supply this want, such as the Practice Reports, the New York *Daily Register*, and the like; but we yield to the suggestion from a number of subscribers that such a course would be useful. As for keeping up with the myriad decisions under the new Code and involving its construction, we do not undertake it.

NOTES OF CASES.

ANOTHER contribution on the vexed question of the effect of a stipulation for attorney's fees in a note, is the decision by the North Carolina Supreme Court, in the very recent case of *First National Bank of New Windsor v. Dymum*, where it is held that a paper, to be negotiable, must be certain as to the time of payment and the amount to be paid; and an instrument (in other respects) in the form of a note which contains a promise to pay a certain sum, with current rate of exchange on New York, together with counsel fees and expenses in collecting it, if placed in the hands of an attorney for collection, and which further provides that the payees shall have power to declare said note due at any time they may deem it insecure, even before maturity, is non-negotiable for uncertainty, (1) as to the amount to be paid, by reason of the stipulation for attorney's fees and rate of exchange, and (2) as to the time of payment, by reason of the provision which makes it payable before maturity at the future option of the payee. The court cited *Woods v. North*, 84 Penn. St. 407; S. C., 24 Am. Rep. 201; *Bank v. Gay*, 63 Mo. 33; S. C., 21 Am. Rep. 430; *Brooks v. Hargreaves*, 21 Mich. 255; 1 Pars. on Bills and Notes, 30, 46. See ante, 163.

In *National Bank of Fayette County v. Dushane*, Pennsylvania Supreme Court, November, 1880, 9 W. N. C. 472, it is held that usurious interest paid to a National bank cannot be set off in a suit on the note, but the remedy is by action of debt against

the bank. The court said: "This case, on the authority of the recent decision of the Supreme Court of United States, *Barnet v. National Bank*, 98 U. S. 555; S. C., Browne's Nat. Bk. Cas. 18, must be reversed. It was there held that usurious interest previously received by a National bank, though taken in the renewals of a series of bills, of which the one in suit was the last, could not be pleaded by way of set-off, and that the only remedy was by an action of debt founded on the penal clause of the act of Congress. This case, of course, overrules *Lucas v. The Bank*, 78 Penn. St. 228; S. C., 21 Am. Rep. 17; *Thomp. Nat. Bk. Cas.* 872; *Overholt v. The Bank*, 82 Penn. St. 490; S. C., *Thomp. Nat. Bk. Cas.* 883; and cases of similar character, at least so far as they hold that illegal interest taken by a National Bank can be used by way of set-off or payment. In a transaction like the one in hand, from the case above cited, it will be found that the defendant's only remedy was by a penal action for double the illegal interest paid, and that the forfeiture of the interest upon the note only occurs where illegal interest has been stipulated for but not paid." The *Barnet* case seems also to overrule the doctrine of *National Bank of Auburn v. Lewis*, 75 N. Y. 516; S. C., 31 Am. Rep. 484; Browne's Nat. Bk. Cas. 305; *National Bank of Winterset v. Eyre*, 52 Iowa, 114; S. C., Browne's Nat. Bk. Cas. 234; and *Hade v. McVey*, 31 Ohio St. 231; S. C., Browne's Nat. Bk. Cas. 353. The principal case accords with *First Nat. Bk. of Clarion v. Gruber*, 87 Penn. St. 465; S. C., Browne's Nat. Bk. Cas. 395.

In *Mayor, etc., of Baltimore v. O'Donnell*, 53 Md. 110, the city let repairs of a street to a contractor. The contractor employed C. to superintend it. The street being impassable, C. caused a rope to be stretched across it, and directed a lamp to be suspended from the rope. The person whom he left in charge did suspend such lamp, but it was immediately broken and extinguished by stones thrown by boys. The person in charge took the lamp to his home in the vicinity to repair or replace it, but did not replace it that night. During his absence, the plaintiff, in attempting to pass up the street, driving his hack, came in contact with the rope, of which he had no warning, and received injuries. No officer of the city had notice of the rope being stretched across the street, and C. had no orders on the subject from any one. In an action to recover damages from the city, held, that the city was liable. The court said: "This is a question upon which there is some conflict of authority, and is therefore not entirely free from difficulty. The cases of *Barry v. St. Louis*, 17 Mo. 121, and *Painter v. Mayor*, 46 Penn. St. 213, cited by the appellant, strongly sustain their position, but the weight of authority is the other way, and upon full examination we think that sound reason and proper public policy do not sustain the decisions in Missouri and Pennsylvania on the subject. The case of *Storrs v. City of Utica*, 17 N. Y. 109, is precisely analogous to this case and lays down the law, as we think, in accordance with

sound principle. In that case there was a sewer to be built, and the city let out the contract of building it. In making the sewer an excavation was made in the street which was left open in the nighttime, without guards, lights or warnings of the danger it created. Plaintiff drove into it and was injured. Defense was made that the contractor was liable and not the city; but this defense was not sustained by the court and plaintiff recovered against the city. On appeal the Supreme Court affirmed Judge Pratt's ruling, and on further appeal to the Court of Appeals, that court affirmed the decision. Judge Comstock, in delivering the opinion of the court, puts the decision on the express ground that the obligation rested on the municipal corporation to keep the streets in a safe condition for travel." "The same doctrine is maintained by the Supreme Court of the United States in *City of Chicago v. Robbins*, 2 Black, 418, and in *Robbins v. Chicago*, 4 Wall. 657. The weight of authority is now so much in favor of this view, that Judge Dillon in his excellent work on Municipal Corporations, §§ 791, 792, 793, states this to be the better doctrine. In *Eyler v. County Commissioners of Allegany*, 40 Md. 257; S. C., 33 Am. Rep. 249, the court had occasion to examine the many cases on this subject, and recognized the authorities to which we have adverted as properly defining the law." The contrary doctrine is held in *City of Erie v. Caulkins*, 85 Penn. St. 247; S. C., 27 Am. Rep. 642; and the various cases are reviewed in note, page 647. In *City of Joliet v. Harwood*, 86 Ill. 110; S. C., 28 Am. Rep. 17, it is held that if the work in a public street is intrinsically dangerous, as blasting, the city is liable for an injury resulting from it, although the contractor was duly careful. But *contra*, *Murphy v. Lowell*, 128 Mass. 396.

In *Robinson v. State*, 52 Md. 151, R. was indicted for burglary with intent to steal. At the trial he offered to prove that the prosecutrix, whose house he entered, was a lewd woman, and that he had had improper intimacy with her; which evidence the court below refused to admit. Held, error. The court said: "According to the common-law definition of a burglar, as given us by Lord Coke (3d Inst., 63), it is 'he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.' This definition has been adopted by Hale, Hawkins, and Blackstone. 1 Hale P. C., 549; Hawk. P. C., b. 1, ch. 38, § 1; 4 Black. Com., 224. One of the elements essential to constitute the crime, according to this definition, is the felonious intent with which the breaking and entry of the house may have been effected. If not with such intent, then the breaking and entry would be, at the common law, nothing more than a trespass. 4 Bl. Com. 227. Therefore the breaking and entry of a dwelling-house at night, with intent to commit a battery, or with an intent to commit adultery, is not a felony. Com. v. New-

all, 7 Mass. 247; *State v. Cooper*, 18 Vt. 551. It was therefore very material, on the question of intent, to show for what object the prisoner broke and entered the house. If he really entered the house solely for the purpose of having illicit connection with the prosecuting witness, he could not be found guilty of burglary. Proof of the fact of such being his object would be difficult to furnish otherwise than as it might be inferred from the previous relations of the parties, and such circumstances as would be calculated to induce a belief in the mind of the prisoner that he would be readily and willingly received by the witness." "If it be true as offered to be shown, that the prisoner had knowledge, at the time of his entry into the house, of the lewd and lascivious habits and character of the witness, or that he had had improper intimacy or intercourse with her, these were circumstances proper to be left to the jury for their consideration in passing upon the question of intent with which the act was done."

LEGAL DEFINITIONS OF COMMON WORDS.

IX.

"SLEEPING with a man" is equivalent to lying awake with a man, and being "in bed with a man" is equivalent to sleeping with him. So held in an action of slander for charging a woman with unchastity in "sleeping with a man" not her husband, and where the proof showed the words to have been that she was "in bed" with the man. *Barnett v. Ward*, Ohio Supreme Court, January, 1880.

Our valued contemporary, the *Irish Law Times*, speaking of the case of *Gholson v. State*, 53 Ala. 519; 8 C., 25 Am. Rep. 652; 18 Alb. L. J. 865, agrees with our disapproval of the word "traveler" there given, and says: "Be this as it may, however, it appears that there was more to be said about travellers and their classification than occurred to Sterne when he took out his pen and ink in the *Desobligant* to write the preface to the *Sentimental Journey*; nor is it under all circumstances an easy matter to determine, despite the definition in the act of 1874, who will be as clearly a *bona fide* traveller as he of whom Dryden wrote,

'Three miles he went, nor farther could retreat,
His travels ended at his country seat.'

"At" is not equivalent to "in," under a statute requiring the posting of notices "in" certain public places, and where the proof is of posting "at" such places. *Holgers v. Quinney*, Wisconsin Supreme Court, January 11, 1881.

"Intemperate habits" is defined in *Tatum v. State*, 63 Ala. 147. The court said: "What is meant by the expression in the statute, 'intemperate habits?' Habit is defined to be 'Fixed or established custom; ordinary course of conduct.' Webster. Dic. It need not be the uniform or unvarying rule, but to be a habit it must be the ordinary course of conduct—the general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But

unless, when occasion offers, there is a disposition, or probable inclination, to drink to excess, intemperate habits cannot be predicated. If sobriety is the rule, and occasional intoxication the exception, then the case is not brought within the statute. On the other hand, if the rule or habit is to drink to intoxication when occasion offers, and sobriety or abstinence is the exception, then the charge of intemperate habits is established. Now, to make out this charge, it is not necessary that this custom shall be an every-day rule. There are persons whose custom is to remain sober while at home, and who, when in company, or visiting the town or village, generally drink to excess, although occasionally they abstain, and remain sober. In such case, drunkenness is shown to be the rule, or ordinary course of conduct; and to sell or give to such person, knowing him to be such, spirituous, vinous, or malt liquors, is a violation of the statute." So one may be of "intemperate habits" without being drunk every day, but the court held that getting drunk two or three times a year was not an "intemperate habit."

"Furniture" is defined in *Fire v. Hubbard*, 63 Ala. 410. It was held that the "furniture" of a drug-shop not only included show-cases and chairs, but a soda-fountain with its bottles and glasses. The court said: "The word relates, ordinarily, to movable personal chattels. It is very general, both in meaning and application; and its meaning changes, so as to take the color of, or be in accord with, the subject to which it is applied. Thus, we hear of the furniture of a parlor, of a bed-chamber, of a kitchen, of shops of various kinds, of a ship, of a horse, of a plantation, etc. The articles, utensils, implements, used in these various connections, as also those used in a drug or other store, as the furniture thereof, differ in kinds according to the purposes which they are intended to subserve; yet being put and employed in their several places as the equipment thereof, for ornament, or to promote comfort, or to facilitate the business therein done, and being kept, or intended to be kept, for those or some or one of those purposes, they pertain to such places respectively, and collectively constitute the furniture thereof."

An apothecary, visiting a patient and sending in medicines for his cure, does not "practice physic," unless he charges for the visits as well as the medicines. *College of Physicians v. Ross*, 6 Mod. 44.

Loaning money is "business," within the Sunday Act. *Troewert v. Decker*, Wisconsin Supreme Court, January 11, 1881.

Door-steps are not "projections" within a statute pertaining to "balustrades or other projections upon the roofs or sides of buildings," in respect to "public safety." *Cushing v. City of Boston*, 128 Mass. 380. See 22 Alb. L. J. 2.

"Declare" is defined in *Knecht v. Mutual Life Ins. Co.*, 90 Penn. St. 118. There an applicant for life insurance "declared" that he had never practiced any pernicious habit tending to shorten life, and that he never would. Afterward he took to

the wine-cup. *Held*, that his policy was not avoided. The court said he did not covenant, promise, agree or warrant that he would not do so. "He declared that he would not. To declare is to state; to assert; to publish; to utter; to announce clearly some opinion or resolution; while to promise is to agree; 'to pledge one's self; to engage; to assure or make sure; to pledge by contract.' Worcester." The court concluded that this declaration was not "taking the pledge" by contract. The word was too "tender."

The night is night, though ever so light — which is poetry, though not so intended. So, in *State v. Morris*, 47 Conn., it was held that it will not avail a prisoner on a charge of burglary that there was light enough from the moon, street-lights, and lights of buildings, aided by newly-fallen snow, to enable one person to discern the features of another.

A corporation engaged in the removal of petroleum from place to place by means of pipes or tubes, is a "transportation company." *Columbia Conduit Co. v. Commonwealth*, 90 Penn. St. 307. The court said: "It is contended that this moving of petroleum by means of pipes is not 'transporting,' and therefore, that this is not a transportation company. The defendant's counsel contends, that to transport is 'to carry,' and that this transit company does not carry, but the petroleum flows — we consider this too narrow a construction. If we look into the dictionary for the meaning of the word 'transport,' Webster defines it, 'to carry or convey from one place to another,' again, 'to remove from one place to another,' and throughout all of the derivations from the word transport we find the same part of the definition 'to remove;' as transported is, *inter alia*, defined 'removed.' This petroleum is certainly removed. To look into the origin of the word, composed of *trans*, 'over,' 'from one place to another,' and *portus*, 'moving or carrying,' and *portatus*, 'bearing or bringing,' is going into too much refinement, but such was the character of the argument. We must construe words, not according to their original etymology, but by the common parlance of the country. In the present case, we have a much better guide — the words of the charter of incorporation, the third section of which authorizes the company to transport petroleum, and for that purpose, to lay down pipes from the points named, and for the purpose of transportation of petroleum, oil, etc., may lay down pipes or tubing." But would the court say that a drover is a carrier of cattle? Or that a lumberman driving logs down a shoot on a mountain is a carrier of logs? The cattle and the logs transport themselves, and so does the petroleum.

The act of a cripple, in passing along the sidewalk and silently holding out his hand and receiving money from passers, is "begging for alms or soliciting charity." *Matter of Haller*, 3 Abb. N. C. 65. The court said: "In many instances words are far less effective to accomplish the end than simple acts. The deaf and dumb man, real or pretended, who stands with a placard on the breast, and with extended hat or hand, is as completely a

solicitor for charity as though he spoke to the passers-by. And so is every one where disease or crippled condition appeals to the sympathy, if he places himself in a position to attract attention, or passes along the street, calling attention by sign, act, or look, to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking. Indeed, the class of silent beggars who exhibit deformities, wounds or injuries, which tell plainer than words their needy and helpless condition, are the most successful of solicitors for charity."

"Mail" is defined in *Wynen v. Schappert*, 6 Daly, 588. It is there held that delivery of a notice of protest, properly addressed, to a government letter-carrier, is good service by mail. The court said: "The word mail, which with some changes in the orthography is found in many languages, means in its original signification a wallet, sack, budget, trunk, or bag, and in connection with the post-office, means the carriage of letters, whether applied to the bag into which they are put, the coach or vehicle by means of which they are transported, or any other means employed for their carriage and delivery by public authority. It came originally into use as referring to the valise which postillions or couriers had behind them, and in which they carried letters, at an early period; and after the establishment of post-offices, post-routes, and post-coaches, it became, as it is now, a general word to express the carriage and delivery of letters by public authority. The carrier in this case carried a bag having two compartments, in one of which letters to be delivered were put, and in the other letters to be sent by mail, the kind of bag such officials were accustomed to carry."

"Worry" is defined in *Marshall v. Blackshire*, 44 Iowa, 475, when applied to a dog, as "to run after, to chase, to bark at." The court said: "Mr. Webster's definition is general and embraces a worrying by mankind, and other animals besides dogs; while the court, as was right and proper, confined its definition to dogs. It is impossible for us to conceive how a dog can worry chickens in any other way than by running after, chasing, or barking at them. How can a dog harass chickens with 'importunity,' or 'vex,' 'annoy,' 'torment,' 'trouble,' or 'plague,' unless he runs after, chases or barks at them?"

A "fast train" means one that goes more than eight miles an hour. *Indianapolis, etc., R. Co. v. Peyton*, 76 Ill. 340.

"Gambling" includes playing billiards for beer, oysters, or cigars. *State v. Bishel*, 39 Iowa, 42.

"Stump" is defined in *Cramer v. Town of Portland*, 36 Iowa, 92. This was an allegation of an injury by a defect, to wit, a stump, in a highway, and the objection was taken that it was not alleged that it had been there long enough to convey implied notice; but the court adopted Webster's definition, "the part of the tree or plant remaining in the earth after the stem or trunk is cut off; the stub;" and held that it must be presumed that the word indicated a stump rooted in the soil, and not one cast there.

ENFORCEABILITY OF STATE CONTRACTS.

THERE are many persons who are very much interested in the question how far the States of this Union are bound to perform the contracts that their Legislatures enter into in their behalf, and what remedies, if any, exist to compel such performance. The very interesting character of the questions themselves, coupled with the very large number of persons who have material interests depending upon them, justifies some consideration of them. I was sole counsel for the holders of the bonds of the State of Virginia in the case of *Hartman v. Greenham*, decided by the Supreme Court of the United States in January, and for the past eight years my attention has been constantly occupied with a consideration of these questions in connection with the debt of the State of Virginia. I hope therefore I may without presumption offer some account of the present state of the law relating to this subject as it is to be gathered from the decisions that have been made by the Supreme Court of the United States. It is to be regretted that a critical examination of all the decisions which this tribunal has made touching this matter leaves the mind in a most painful state of uncertainty in regard to some of the most vital and important bearings of it. I shall endeavor to present an intelligible view of them all.

It is an elementary principle of every jurisprudence that a sovereign power cannot be sued save by its own consent. "By the Revolution the prerogative of the Crown and the transcendent power of Parliament devolved upon the States that form this Union in a plenitude unimpaired by any act, and controllable by no authority" save by the surrender of powers which those States themselves, or the people thereof, have made by the Constitution. *Rhode Island v. Massachusetts*, 12 Pet. 720. By the Constitution they agreed that the judicial power of the Union should extend to themselves in certain cases, and in 1793 the Supreme Court of the United States, upon just consideration, held in the case of *Chisholm v. The State of Georgia*, 2 Dallas, 419, that it authorized one who was not a citizen of Georgia to sue her in that tribunal to compel payment of a debt due by her. See to same effect *Grayson v. Virginia*, 3 Dallas, 320; *Osceola v. New York*, 2 id. 415; *Hayser v. South Carolina*, 3 id. 339.

Thereupon, in 1798 the eleventh amendment to the Constitution was adopted which provided that "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State." This leaves a State liable to be sued in admiralty by a citizen for any thing cognizable by the admiralty jurisdiction. *Ex parte Murrado*, 7 Pet. 627. (It is interesting to consider in this connection a resolution drawn by Patrick Henry and passed by the Virginia Legislature in 1784, to be found in *Rive's Life and Times of James Madison*, vol. 1, p. 564, also *id.*, vol. 2, p. 41. This resolution was voted for by many of the fathers of the Constitution.) The status of direct proceedings against a State by an individual is therefore very clearly fixed and determined.

However, section 4 of article 1 of the Constitution provides that no State shall pass any law impairing the obligation of contracts, and many cases have arisen and may yet arise in which States have entered into substantially self-executing contracts—contracts which require no judicial proceedings against the State for their enforcement, and the most interesting part of this inquiry concerns these. They arise in the main through proceedings undertaken to have some State law alleged to impair the obligation of a contract declared void. When it was first contended that a State law was void as impairing the obligation of one of her own contracts, it was insisted that this clause in the

Constitution was not intended to take within its protective power the contract of a State, but was intended altogether for the protection of contracts by individuals. This was very much of a party fight between the Democrats and the Republicans of our early politics, the Democrats of that day calling themselves Republicans, and the Republicans of that day calling themselves Federalists. The Supreme Court pronounced against the claim and held a State's contract to be likewise within the inhibition of impairing laws. This was first held in 1810 in *Fletcher v. Peck*, 6 Cranch, 57, and soon afterward in *Tenett v. Taylor*, 9 id. 43; *Town of Pawlett v. Clark*, id. 300; *New Jersey v. Wilson*, 7 id. 164, and in dozens and dozens of cases since, too numerous and too familiar to be mentioned.

In the famous *Dartmouth College Case*, 4 Wheat. 518, Mr. Wirt contended that "it was the individuality of private contracts and private rights acquired under them which was intended to be protected; and not contracts which are in their nature matters of civil policy, nor grants by a State of power and even property to individuals in trust to be administered for purposes merely public." This was in a case where a State had attempted to amend, without its consent, in most material particulars, the charter of a college. The court seemed to concede this proposition in the main (see pp. 629-30), yet it pronounced the act void, and the case has always been accepted by the profession as a final decision, after consideration of all that had gone before, of the proposition that a State's contract, as to its right to impair it where private rights were involved stood upon the same footing as an individual's. In *Stone v. Mississippi*, 101 U. S., the court says, p. 816; "The doctrines of *Trustees of Dartmouth College v. Woodward*, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself." We shall see how this holds with the cases as we go on.

The general principle that a State could no more impair the obligation of her own contract than that of an individual, being now established, efforts at once commenced to engraft on it qualifications and exceptions. A State having made a contract to exempt certain land perpetually from taxation, it was insisted that such a contract was void because one Legislature could not make a binding contract which might debar their successors from power to raise revenue to conduct the operations of the government. This was first pronounced against in *New Jersey v. Wilson*, 7 Cranch, 164. The same question has been repeatedly considered since, and the same judgment arrived at. The cases are *Gordon v. Appeal Tax Court*, 8 How. 133; *Piqua Bank v. Knoop*, 16 id. 369; *Ohio Life and Trust Company v. Debolt*, id. 416; *Dodge v. Wolsey*, 18 id. 331; *Mechanics & Traders' Bank v. Debolt*, id. 380; *McGee v. Mathis*, 4 Wall. 143; *Home of the Friendless v. Rouse*, 8 id. 430; *Wilmington R. R. Co. v. Reid*, 13 id. 204; *New Jersey v. Gard*, 95 U. S. 104; *Farrington v. Tennessee*, id. 679.

It is the settled and horn-book law of the Supreme Court that in construing the Constitution and laws of a State, it will follow the latest decision of the highest court of that State construing them. This has been held from the beginning of the government, though several exceptions have been grafted upon this rule, notably that it will not be applied to commercial contracts—that is, bills of exchange and negotiable notes. *Swift v. Tyson*, 16 Pet. 1; *Oates v. National Bank*, 100 U. S. 239, and very many intermediate cases. Efforts have been made to evade the provision of the Constitution under the operation of this rule. Thus, when a State has desired to escape the obligation of a contract which her own highest court has held to be a binding one, she has turned out the judges who made this decision and filled their places with others who have held

that the alleged contract was not a binding contract. The Supreme Court thereupon engrafted another exception on its rule and held that in determining the validity of a State law which authorizes the making of a contract, it would follow the first instead of the latest decision of the highest court of the State, when that first decision affirmed the validity of the contract. *Gelpcke v. Dubuque*, 1 Wall. 176; *Lee County v. Rogers*, 7 id. 181; *Havemeyer v. Iowa County*, 3 id. 294; *Mitchell v. Burlington*, 4 id. 270; *Olcott v. Supervisors*, 16 id. 678; *City of Kenosha v. Lawson*, 9 id. 477.

States have sought to make the same rule a shelter for other evasions of contracts, and the Supreme Court has made another exception to it, to wit: that the Supreme Court will itself construe a law which it is claimed makes a contract for the State herself, and will pay no attention to the construction which the highest court of the State has put upon it, when such decision holds that the law does not make a contract. The substance of this is that the court will not allow a State to get any money on the faith of an act that appears to bind her to return it and then create her own court to hold that the act does not constitute a contract binding upon her. *Jefferson Branch Bank v. Skelley*, 1 Black, 436; *Franklin Branch v. Ohio*, id. 474; *Wright v. Sill*, 2 id. 544; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 145; *Delmas v. Insurance Co.*, 14 id. 668; *University v. People*, 99 U. S. 300; *Wright v. Nagle*, 101 id. 794.

There is another most important series of decisions running in the same direction. The court has held that where a State is under an obligation, if her officers can be reached by the process of the court, suit may be maintained against them even though the State be the party substantially and really interested, and that that fact will not oust the court's jurisdiction. The principle has been carried to great lengths. In *Osborne v. The Bank of the United States*, 9 Wheat. 738, the treasurer of the State of Ohio was required to deliver to the Bank of the United States \$98,000 which the State authorities had taken from it in the way of a tax forbidden by the Constitution of the United States, even though the money had actually been covered into the treasury of the State. In *Davis v. Gray*, 16 Wall. 203, the doctrine of the foregoing case was expressly affirmed. A railroad company had been granted certain public lands by the State of Texas before the war. After the war the constitutional convention of Texas undertook to revoke the grants, and provided that settlers upon the land should have a right to a patent and deed in the name of the State, to be executed and granted by the governor. The company prayed the court to enjoin the governor from executing this ordinance, and the governor defended upon the ground that the suit was one against the State of Texas. The court, applying the principles of *Osborne v. The Bank*, awarded the injunction. (See *vide Governor of Georgia v. Madrazo*, 1 Pet. 110.) To the same effect are *Curran v. Arkansas*, 15 How. 305; *Bartings v. Danbury*, 19 Wall. 1.

These principles have been strikingly applied in other cases. *Woodruff v. Trapnall*, 10 How. 96, was as follows: The Legislature of Arkansas, in chartering the Bank of Arkansas, provided in the charter that the notes of the bank should be receivable in payment of all debts due the State. The State got into financial embarrassments, and passed an act forbidding its officers to receive them. A debtor to the State applied for a mandamus to compel the State's officers to receive the notes in payment of his debt, which he refused to do, relying upon the act aforesaid. The court held the act void and ordered the mandamus to issue. The very same experience for Tennessee is reported in *Furman v. Nichol*, 8 Wall. 44. The facts are identical with those of *Woodruff v. Trapnall*, and the decision was the

same. *Keith v. Clark*, 97 U. S. 454. South Carolina had an experience identical with these two in *State v. Stoll*, 17 Wall. 425, and Virginia the same in *Hartman v. Greenhow*, January Term, 1881.

From a very early period in the history of the court it has been held that the laws providing remedies to enforce contracts, existing when the contracts are made, enter into them and form part of them, and cannot be repealed unless an equally efficient remedy be provided. *Green v. Biddle*, 8 Wheat. 1, 75; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 608; *Sturges v. Crowninshield*, 4 Wheat. 122; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Walker v. Whitehead*, 16 id. 314; *Edwards v. Kearzey*, 96 U. S. 595.

In the cases of *Woodruff v. Trapnall*, 10 How. 96, *Furman v. Nichol*, 8 Wall. 44, *State v. Stoll*, 17 id. 425, and *Hartman v. Greenhow*, January Term, 1881, it was held that these principles applied to the contracts of States as well as to the contracts of individuals.

The court has repeatedly declared the following proposition: "One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." *Planter's Bank v. Sharp*, 6 How. 327; *Von Hoffman v. Quincy*, 4 Wall. 553; *Walker v. Whitehead*, 16 id. 318; *Farrington v. Tennessee*, 95 U. S. 683; *Edwards v. Kearzey*, 96 id. 601.

With these repeated decisions of the Supreme Court, running through the entire history of the government, holding that a State's contract was within the protection of the Constitution; that the remedy existing at the time became part of the contract, which the State could not repeal without affording one just as good; and that one of the tests of this was the effect such a substitution would have on the market value of the contract; together with the repeated and emphatic instances in which it had made its settled principles of practice bend so as to head off attempted evasions of their liabilities to States — with this view of their decisions before him, a counsellor could not have had much difficulty in giving his client advice upon any given case. It is to be regretted, however, that we have seen only one side of the picture, and that it has an obverse side which we must now consider.

Stone v. Mississippi, 101 U. S. 62, decided at October term, 1879, puts us at sea upon the question of what contracts a State is bound by. In 1867 the Legislature of Mississippi granted certain persons a charter to conduct a lottery. There was nothing at that time in the Constitution of the State to forbid it to do so. The charter was to last twenty-five years. It required the parties to pay the State \$5,000 for the use of the University, and to give bond and security for \$1,000 per annum, and for one-half per cent on the amount of their receipts. All these requirements were complied with. In 1868 the constitutional convention of the State repealed this charter, and the authorities of the State proceeded to oust them from their chartered privileges. The Supreme Court held the contract a void one, upon the ground that lotteries are of an immoral and demoralizing nature and that the Legislature of a State cannot part with its control over the subject. To those who know that the "Father of his country" was a devoted friend to lotteries and one of their patrons, it will be a startling announcement to say that they are inherently so immoral and vicious that a contract relating to them is tainted with corruption, and is therefore void. Heretofore, most persons had supposed that they stood much upon the footing of businesses like pawn-brokers' establishments, shaving shops, and such, which some persons think it derogatory to engage in, whilst others do not.

But it had never been supposed that they were of those things which have the elements of moral poison and disease so deeply imbedded in them as to be pestilences in themselves; and even now, it will still be insisted by many that the moral complexion of lotteries belongs rather to the domain which condemns violations of the laws of God, than to that, the exclusive jurisdiction of which is the temporal welfare of man. For the State of Mississippi to be permitted to offer these people these privileges in consideration of the payment by them of large sums to her—for her to have received the sums and then to be permitted to repudiate her obligations under the contract, on the plea of the morals of the public, is very like accomplishing the ends of high morals by the methods of highway robbery. It had already been held that the contracts of States were subject to the right of eminent domain (*West River Bridge v. Dix*, 6 How. 507; *Richmond, etc., R. R. Co. v. Louisa R. R. Co.*, 13 id. 71), but in such cases compensation is made; and all men have always conceded that they were subject to the police power. This case, however, has introduced the principle that they are liable to be declared void upon principles of public policy, and this is a phrase which never has and never can be defined. It is like the chancellor's foot for measuring equity; or to quote Lord Camden's fine expression regarding the discretion of a judge: "It is the law of tyrants, it is always unknown." But uncertain as this case has made the question, by what contracts is a State bound, this is easy of solution compared with the other, how far may a State destroy the remedies for enforcing her contracts and making them available? How far may she escape her obligations under contracts which it is conceded bind her, by depriving the holder of the remedies that she stipulated, when he took them, that he should have?

The State of Tennessee chartered the Bank of Tennessee in 1838, and provided in the charter that its notes should be received in payment of all taxes and other moneys due the State. The Supreme Court has repeatedly held that this was a contract by the State to receive them. In 1873 it enacted that no proceedings by mandamus or otherwise, to compel its officers to receive these notes should be maintained, and that a debtor to the State for taxes, or in other ways, might pay his debt under protest, and within thirty days sue the said officer to recover it back; and if the suit should be determined in his favor, the comptroller should return his money to him. It is obvious that the value of contracts of this sort depends upon the power to sell them to tax payers with which to pay their taxes. The tax payer will buy them if he can force the State's officers to receive them in payment of his taxes, but if he must first pay his taxes in money and then sue the officer to get that money back, he will not buy the notes. Their value is thus practically destroyed. Holders of the notes attacked this law as one impairing the obligation of a contract, and the Supreme Court decided that it was a valid law. *Tennessee v. Sneed*, 96 U. S. 69. No judges are noted in the report as being absent, but I have been informed that Mr. Justice Field did not sit in this case. It is possible to reconcile the point actually decided in this case with the preceding decisions of the court. The Supreme Court of Tennessee had certified to the Supreme Court of the United States that by the laws of Tennessee there never existed any right to a writ of mandamus to compel a State's officer to receive the notes, and under its rule the Supreme Court was bound to accept it as a fact that mandamus did not exist in Tennessee, and therefore was never any part of the contract. But there can be no question that it was in the minds of the court to decide that supposing mandamus had been a part of the contract, yet the remedy provided was a reasonable one, and all that the noteholder could ask for. This is declared expressly to be

the opinion of the court. At October term, 1879, the precise question came again before the court in *Douglas & Jackson ex rel. v. Gaillard*, 1 Am. Law Rev. (N. S.) 361-452, in a case in which mandamus against the State's officers was a remedy when the contract was made, and the court divided equally, Hunt, J., being absent. It would seem that the case of *South Carolina v. Gaillard*, 101 U. S. 433, ought to have involved the same point, but the court expressly decided it upon the ground that it did not involve it, and that case can therefore be omitted, I suppose, from the consideration of the subject.

Under the law laid down in *Sneed v. Tennessee*, it is impossible to say what the value or obligation of a State's contract is. That case is an absolute repudiation of the proposition so often declared by the court that any change of the remedy which injures the market value of the contract is unlawful. Two-thirds of the debt of the State of Virginia is in the form of bonds, with negotiable interest coupons, which are receivable for the State's taxes. The power to enforce this term in the contract by mandamus upon the tax collectors makes the bonds and coupons of great value. The bonds are selling above 80, and the coupons sell for 93 and above. Suppose Virginia's Legislature passes a law similar to that passed by Tennessee. If it is to be held valid, it would destroy the value of these coupons, and bonds and coupons both would go down to little or nothing. Those of her bonds without these coupons are worth almost nothing. The tax payers are in the main persons who pay small sums. Before they will be annoyed with the necessity of tendering in coupons, then paying in money and suing the officer to recover it back, they will pay at once in money and dismiss the subject. There is no profit to them in the other thing, commensurate with the trouble and cost of it.

And if such a device as this may be sanctioned, why may not many more, equally effective for destroying the value of the coupons, and far more reasonable in themselves, be also approved of? It is known that a number of fraudulent coupons have been issued, for which the State is not liable; that is, coupons which she has redeemed and which have since been fraudulently issued. Suppose that under the pretense of protecting herself against these fraudulent coupons the State requires every person tendering coupons in payment of his taxes to produce proof of title; to show every link in the chain from the time the coupon was issued by the State until it came to his possession. This would require a separate suit by each tax payer; and before he will do this, he will pay his taxes at once in money. Would it not be more reasonable to sanction this than to sanction the law of *Tennessee v. Sneed*? and just this would destroy the value of the coupons. If space afforded, it would be interesting and curious to point out some of the many ways by which the case of *Tennessee v. Sneed* might enable a State to evade her liability. I fear that a counsellor, when asked whether or not a State is bound to redeem any given contract, would be obliged to say to his client, "I cannot tell you whether the State law made her liability on that contract or not, until the court has passed upon it." I can imagine his client replying, in Edmund Burke's language: "Is that the law of the land upon which, if a man go to Westminster Hall and ask counsel by what title or tenure he holds his privilege or estate according to the law of the land, he should be told that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed he will then know what the law of the land is? Will this be said to be the law of the land, by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?"

WM. L. ROYALL.

INJUNCTION AGAINST NUISANCE—LEAD SMELTING WORKS.

PENNSYLVANIA SUPREME COURT, JANUARY 3, 1881.

APPEAL OF PENNSYLVANIA LEAD COMPANY.

Where the damage sought to be prevented is irreparable, that is, where the wrong is repeated from time to time, or is of a continuing character, or productive of damages which cannot be measured by ordinary standards, equity may be invoked. In case of a nuisance the plaintiff's right need not be established by law to authorize an injunction, and such injunction is not a matter of grace but of right, in a proper case.

A smelting-house for lead, erected by defendant on his own land, emitted from its chimneys poisonous fumes, which descended upon plaintiff's lands, hitherto fertile, and poisoned the grass and herbage thereon, causing plaintiff's animals to die. The fumes were nauseating to persons living on the lands and the lands were diminished in value by reason of them. Held, that an injunction restraining defendant from operation his works so as harmfully and injuriously to affect plaintiff's lands, and from permitting the fumes, etc., to fall upon said lands, was proper.

Held, also, that the fact that defendant's works were erected at a great outlay of capital, and employed many men, would not affect the right to an injunction. Nor would the fact that plaintiff gave no notice at or before the erection of the smelting works.

PLAINTIFF filed his bill in equity in June, 1877, (1) to abate defendant's works for smelting lead, as a nuisance; (2) to enjoin defendant from operating such works so as harmfully or injuriously to affect plaintiff's farm and vegetation, and from permitting the gases, fumes and vapors therefrom to descend and fall upon his land. Defendant filed an answer and the case was referred to a master. The facts are these: Plaintiff, Joseph P. McIntyre, in 1871, became the owner of a fertile farm of about 46 acres, located in Allegheny county, Pennsylvania, which he occupied for farming purposes. In 1873 defendant, the Pennsylvania Lead Company, purchased a tract of land adjoining plaintiff's farm, and erected smelting works for the purpose of smelting lead and other minerals. The master, to whom the case was referred, found substantially as follows:

That defendant's works had a larger capacity than any other in the United States, the value of the production for first six months 1878 being \$1,111,772.73; that its appliances and furnaces are abreast of the times as to improvements, and every known precaution had been taken for the prevention of escape of lead from fumes, etc.; that defendant's works were in a farming district; that plaintiff's land was fertile before works of defendant were built; that defendant's works emitted from their chimneys offensive and poisonous fumes and vapors, which are blown, descend and rest upon plaintiff's farm, injuriously affecting it, poisoning vegetation, killing a number of horses and cattle eating grass and fodder growing on the land; and that the injury is continuing; that the fumes and vapors from defendant's works were offensive and nauseating to persons living on the land; that the farm was greatly diminished in value; that the lead works were a nuisance to plaintiff's farm. The master recommended a decree in accordance with second prayer of plaintiff's bill.

The defendant excepted to the master's finding. The court below overruled the exceptions, and confirmed the report, delivering the following opinion:

BROWN, P. J. The defendant's interest in the maintenance of their works is such, and the public is so much concerned in the same result, that I have felt it my duty to scan, not only closely, but critically, the evidence in this cause, with the purpose of escaping if possible, from the conclusion arrived at by the master. After a very careful examination of the whole case, I

am compelled to concur entirely with his finding of the facts, and see no way of avoiding the result indicated by him, without palpably disregarding the principles established by judicial authorities and decisions, not only in England, but in this country as well.

From the first I could see no hope for defendant, except it might be in the application of the principle laid down by Chief Justice Thompson, in *Richards' Appeal*, 7 P. F. Smith, 105, where he says: "A decree in equity is never of right, but of grace. Hence the chancellor will consider whether he would not do greater injury by enjoining, than would result from refusing, and leaving the party to his redress at the hands of a court and jury. If in conscience, the former should appear, he will refuse to enjoin."

Were it not for the dangerous quality of the fumes thrown out by defendant's works, which certainly affect growing vegetation so as to make it not only unfit for food, but when eaten, destructive of animal health and life; the extremely nauseous character of effluvia emitted, and the evident uncertainty at what point that which is now shown to be merely offensive to the senses may begin to be pernicious, I could, most probably, have been content to refuse the injunction prayed for, and have remitted the plaintiff to his action at law, to recover such damages as he might show had accrued to his real estate, by reason of injury to its productive capacity or general value for farming purposes.

But these are disadvantages and injuries incident to risks arising from the peculiar character of the fumes emitted, which will not admit of compensation, and the possibility, if not probability, that the health and personal safety of persons living upon plaintiff's land will sooner or later be involved, renders the case such that I am constrained to agree with the master, and conclude that a decree such as he recommends should be made.

The defendant appealed to this court, assigning for error, *inter alia*, the decree entered.

Hampton & Dazell, for appellant.

George Chitras, Jr., T. H. Baird Patterson and M. W. Acheson, for respondent.

GORDON, J. The power of the Courts of Common Pleas of Pennsylvania to entertain bills for the restraint or abatement of nuisances, where they affect private rights, is undoubted; neither is the exercise of this power prevented by the fact that the party complaining may have a remedy by indictment or by an action at law. *Bunnell's Appeal*, 19 P. F. S. 59; *Dennis v. Eckhardt*, 3 Gr. Ca. 390.

It is true, indeed, that this power is limited to those cases where common-law forms of action do not furnish an adequate remedy, and the chancellor may also refuse to act where greater injury would result from an injunction than by leaving a party to his redress before a court and jury. *Richards' Appeal*, 7 P. F. S. 105. But where, in ordinary parlance, the damage sought to be prevented is irreparable, that is, where the wrong is repeated from time to time, or is of a continuing character, or productive of damages which cannot be measured by ordinary standards, equity may be invoked. *Commonwealth v. Railroad Company*, 12 Har. 159.

The appellant, however, contends that an injunction ought not to issue until the complainant's right has been established by an action at law. This suggestion would, in a doubtful case, have force, for the chancellor, in a case like the present, will act only when he can do so without hesitancy. If the case be doubtful he will refuse to interfere until the right, upon which the claim for relief is based, is definitely settled by a trial on the common-law side of the court. But to say that equity cannot move in any case until a jury has determined the nuisance to be an existing fact, is to make our equity system a mere dependent

on the common-law courts, and its jurisdiction servient and inferior. But a conclusion such as this does not accord with the intent of the act of 1836, for by it the judges of the Common Pleas are clothed, not with partial and dependent, but with full and independent chancery powers over all the subjects therein mentioned. We may, then, adopt the language of Earl, J., in *Campbell v. Seaman*, 63 N. Y. 568, when speaking of injunctions against nuisances: "It was formerly rarely issued in the case of a nuisance until the plaintiff's right had been established at law, and the doctrine which seems now to prevail in Pennsylvania, that the writ is not a matter of right, but of grace, to a large extent prevailed. But a suit at law is no longer necessary, and the right to an injunction in a proper case, in England and most of the States, is just as fixed and certain as the right to any other provisional remedy. The writ can rightfully be demanded to prevent irreparable injury, interminable litigation and a multiplicity of suits, and its refusal in a proper case would be error to be corrected by an appellate jurisdiction. It is a matter of grace in no sense except that it rests in the sound discretion of the court."

Nor have our own courts been less ready of adopting the same doctrine; hence, it has been held that an injunction would be issued to prevent the cutting down of timber and ornamental trees to the injury of the reversion (*Denny v. Brunson*, 5 Casey, 382); or to restrain a trespass of a permanent or continuing character. *Masson's Appeal*, 20 P. F. S. 26. So may acts of trespass or nuisance be restrained to prevent a multiplicity of suits, or when such wrongful acts might become the foundation of an adverse right. *Sheets's Appeal*, 11 Casey, 88.

Nor do we understand how *Richards' Appeal* can help the defendant, for whilst no one disputes the position that a bill for the suppression of a nuisance may be dismissed on general demurrer for want of equity, unless it appears from the subject-matter affected by the alleged nuisance that there is danger of irreparable mischief, or of an injury such as cannot be adequately compensated in a suit at law, yet we apprehend even under this authority, a general demurrer would scarcely have sufficed to turn the bill before us out of court. In it we find these several allegations: that the defendant's works are so constructed as to emit noxious and poisonous gases, fumes and vapors, and that they are so located that these noxious and poisonous gases fall upon the plaintiff's land, thereby poisoning and destroying both soil and vegetation; that cattle and horses have died from eating the fodder and herbage thus poisoned; that these fumes and vapors are offensive and noxious to persons resident upon said farm, and that these injuries are continuous and irreparable. It would certainly be a very bold solicitor who would risk the admission of such facts on a general demurrer, and it is a significant fact that the learned counsel for the defendant have attempted no such experiment.

The bill, then, is sufficient to evoke the action of a court of equity, and all that remains is to ascertain if the bill be supported by the evidence. As to this, after a careful examination of the testimony, we conclude that the findings of the master are correct, and that the complainant's plaint is fully sustained by the proofs. And indeed it is to be remembered, *in limine*, that whether a smelting-house for lead is, or is not, a nuisance, *per se*, to adjacent land, depends very much upon its situation.

"If," says Blackstone, "one erects a smelting-house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance." All intelligent persons are aware that lead vapors are poisonous, and this the more so, as they are often, as in the case in hand, accompanied with arsenic. In this matter we

need not chemists and experts to teach us, for common experience is sufficient. When, therefore, we learn that the works of the defendant are to the windward of the plaintiff's land, within seventy-five feet of his northern line, and but five or six hundred feet from his farm-house, we need but little evidence to satisfy us that the smoke from these works is seriously injurious to his property. But in addition to what we might naturally expect from the design and character of this business, and which might in themselves have been sufficient to have sustained a bill to restrain the erection of these works, we have the findings of the master, based on undoubted testimony, as follows: "That prior to the time the defendant's smelting operations began the plaintiff's land was fertile and well adapted to farming and grazing. That the defendant's works emit from the chimneys and stacks thereof, in the process of smelting ores and refuse, and desilvering lead, offensive and poisonous fumes and vapors, which are blown upon, descend and rest upon the plaintiff's farm, and that lead is thus distributed over said farm to a distance of at least fifteen hundred feet from said works. That these lead fumes and vapors have injuriously affected and are injuriously affecting the plaintiff's farm. That they have lessened the fertility of a portion of the farm lying nearest the lead works; that they have poisoned and are poisoning the vegetation and products of said farm, rendering the latter unfit for consumption, and that these injuries are continuing. That horses and cattle grazing upon the plaintiff's farm, and eating the products thereof, have died from lead poisoning, and that the lead was communicated to them through the herbage and fodder on which they fed. That the horses and cows of Jacob Wehrle, who was a tenant of the plaintiff's farm, April 1, 1875, to April 1, 1876, and those of his son, Frederick Wehrle, that died upon the plaintiff's farm, were poisoned in the manner above stated. That since April 1, 1876, the only crop cultivated upon the farm is corn, which is husked on the stalk, and the fodder left on the ground; and no horses, cattle or live stock of any kind are reared or pastured on the farm. That the fumes and vapors from the defendant's works are offensive and nauseating to persons living upon the land or inhaling them. That the plaintiff's farm is greatly diminished in value by reason of the lead deposited and being deposited upon it from the defendant's works. Its rental value is also greatly depreciated."

To this he might well have added, that the plaintiff's farm was thereby rendered, not only uncomfortable, but dangerous as a place of human habitation; for a place where not only herbage and ground are so literally poisoned by deposits of lead that it is readily discoverable by chemical analysis, but where at times, also, the air is so filled with the noxious vapors of lead and arsenic as to make those sick who encounter them, might certainly be called dangerous to human health and life.

In this connection another important circumstance must be considered; that is, the cumulative character of this injury. It increases from year to year, not only as the works are enlarged, but as more and more lead is added to the ground. The deposit is an indestructible metal, that is neither evaporated nor absorbed, and necessarily it must accumulate as long as the cause of the deposit continues. Hence, as it was observed, at first, even on the land nearest the works, the effect was scarcely observable, but as time went on it became more and more apparent, until finally the soil was wholly unfitted for agricultural purposes. So, in like manner, may these blighting influences continue until the whole farm is made barren and unproductive. Thus it is that we find in this case every element necessary to call forth the exercise of equity powers. The business complained of is a dangerous nuisance; the

injury continuous and cumulative, and the mischief irreparable. If, as in *Dennis v. Eckhardt*, 3 Gr. Ca. 380, a tin shop was enjoined on account of its noise, or as in *Campbell v. Seaman*, the use of a brick-kiln was restrained because the vapor therefrom was destructive to the plaintiff's trees and vines, much more should a business be enjoined which is destructive alike to vegetable and animal life. The rule, *sic utere tuo ut alienum non laedas*, is a most valuable one, and must be maintained if our civilization is to be cherished and preserved, and it is not at all to the purpose to answer the charge of a violation of this rule, that the defendant's works have been erected at a great outlay of capital; that they are important to the public at large, and give employment to many men. Says Wood in his work on Nuisances, section 794: "A person cannot go on and build extensive works and make heavy expenditures of money for the exercise of a trade or business that will invade the premises of another with smoke, noxious vapors or noisome smells, to an unwarranted or unlawful extent, and then, when called upon to desist, turn around and claim immunity for his trade or business on the ground that to stop it would involve him in ruin, nor that it is a necessary result of carrying on his trade at all, and that he has adopted the most approved methods known to science, or which human skill has devised, nor that his trade is a useful one and beneficial to the community, or to the nation, or that by bringing a large number of workmen into the community it has enhanced the value of the plaintiff's property." Where justice is properly administered, rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to impose upon the weak. Whether it be the great corporation with its lead works, or the mechanic with his tin shop, the rule is the same—"so use your own as not to injure others." Moreover, there is, after all, one underlying principle which influences both, and that is private gain. Lead works and tin shops alike may result incidentally in the public good, but this is only an incident, for the primary object which induces the exercise of either trade is personal good; therefore to neither party is the general community under any special obligation, and as a consequence, there is no good reason why the rules of law should be relaxed in the one case rather than the other.

Again, we cannot but regard this company as unfortunate in the selection of a place for the erection of its works. To undertake the business of lead smelting in the midst of a rich suburban valley, occupied by farms and country residences, was, to say the least of it, not very prudent. Lord Cranworth, in the case of *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Ca. 652, quoting Mr. Justice Mellor, says: "It must be plain that persons using a lime-kiln, or other works which emit noxious vapors, may not do an actionable injury to another, and that any place where such an operation is carried on so that it does occasion an actionable injury to another, is not, in the meaning of the law, a convenient place."

If, however, any place is improper for a business of this kind where injury may result from it to others, surely a situation like that selected by the defendant ought, in the outstart, to have been regarded as improper, since common knowledge and prudence should have informed its managers that injury, sooner or later, must result to the adjacent property.

But it is insisted that the plaintiff has no equity as against this company, because he gave it no notice before or at the time of the erection of its works. But of what would he give it notice? Of the effect the fumes would have upon his farm? But the master has found that he knew nothing of lead works and their probable effect on adjacent lands; he could not, therefore, notify it of that of which he was ignorant. One

would suppose that in this matter the managers of the corporation would be fully posted; if they were so posted, if they knew what the effect would be upon the surrounding property, then they acted with knowledge, wantonly, and notice to them was unnecessary; but if they were ignorant, if they knew not the consequences which would follow the business in which the company was about to engage, then they ask too much of the plaintiff when they require of him a knowledge of their own business, which they themselves did not possess.

Decree affirmed.

HOTEL SIGN-BOARD, WHEN NOT A FIXTURE.

ENGLISH COURT OF BANKRUPTCY, DEC. 13, 1880.

EX PARTE SHEEN: RE THOMAS, 43 L. T. R., p. 638.

A sign-board was painted by a well-known artist for the tenant of an inn in 1847, and was fixed to the outside wall by iron holdfasts. In 1866 it was removed, and after having been framed by the then tenant, was placed in the hall of the inn, where it was screwed to a wooden plug let into the wall. Held, that this picture was not a fixture but was a chattel, and could not be claimed by the owner of the inheritance.

THIS was an appeal from a decision of the judge of a county court whereby it was declared that the sign-board of an hotel was not a chattel under the reputed ownership clause of the Bankruptcy Act, 1869, and the trustees were ordered to deliver up the same to the owner of the freehold.

The debtor, Mary Ann Thomas, was occupier of the Royal Oak Hotel, Bettws-y-Coed, North Wales, and the sign-board was a picture of King Charles in an oak, with cavaliers on horseback riding underneath, and was painted by the late David Cox in 1847, for his friend Edward Roberts, who was tenant of the inn from year to year.

The picture was painted over the old sign-board of the inn, and was fastened to the outside wall over the doorway of the inn by means of iron holdfasts. In 1849 David Cox retouched and varnished the picture.

In 1866, owing to alterations in the house and the representations of artists, it was removed to the inside of the inn, and at first placed in the sitting-room and afterward, having been encased in an old oak frame by the then tenant and glazed, was removed into the hall, and there fastened by means of a screw to a wooden plug let into the wall. It remained in that position during the changes which subsequently took place in the occupancy of the inn, and was still in that position when the liquidation proceedings commenced. In 1861 Edward Roberts died and was succeeded by his son Robert Roberts, who took a lease of the Royal Oak Inn and its appurtenances from the owner of the freehold for twenty-one years. In this lease there was a covenant by the lessee at the end or sooner termination of the term to surrender to the lessor the messuage, etc., "and all other fixtures and things set up, or to be set up, fixed or fastened to the said messuage."

Robert Roberts died in 1863. His devisee, Mrs. Richards, on the 1st of August, 1871, surrendered the lease, and on the same day a lease for fifty-eight and a half years was granted to David Richards of the inn, together with its appurtenances.

In this lease was contained a covenant by the lessee "at the end or sooner determination of the term to yield up the premises, etc., and all fixtures which at any time during the last seven years of the said term should be fixed or fastened to the said premises, except such fixtures, etc., as were usually put up and belonged to a tenant or lessee."

Upon the death of David Richards in 1876, Mrs. Richards conveyed all her interest in the inn to the

debtor, but expressly reserved (*inter alia*) the picture or sign-board. An arrangement was made that the picture should be allowed to remain hung up in the inn for two years, after which time Mrs. Richards should be entitled to claim it. At the expiration of the two years she did claim it, but had not removed it at the commencement of the liquidation proceedings, but she now relinquished her claim to the owner of the freehold, the respondent.

In April, 1879, Peter M'Intyre, agent to Lady W. D'Eresby, gave notice to Miss Thomas not to permit the picture to be moved without his consent. Miss Thomas filed her petition for liquidation.

On the 21st October, 1879, Lady D'Eresby having claimed the picture from the trustee, the County Court judge on the 15th September, 1880, made the order appealed from.

In the course of his judgment his honor expressed his opinion that the picture was painted for the house and was a fixture, but he rested his judgment mainly upon the ground that the notoriety of the article, and the general knowledge of its history as the sign-board of the hotel absolutely excluded all legitimate ground for supposing that there could be any reputation of ownership in Miss Thomas.

It was in evidence that the residents in the neighborhood and the tradespeople supplying the hotel frequently came to see the signboard of the hotel, and always regarded it as belonging to the house and not to Miss Thomas.

THE CHIEF JUDGE. I have listened to this case with great interest, mainly on account of the rarity of the occurrence, because I do not recollect any case in which such a point as this has been the subject of any legal discussion. The history of this picture, which was called upon one side a fixture, is clearly made out from the evidence. It is quite unnecessary to advert to the old law upon the subject, because it has undergone very great fluctuations and changes. In the year books, which have been cited in the course of this discussion upon the subject of the removal of fixtures, no doubt the law has been frequently changed. Questions have arisen between heirs and executors in which the old decisions have been disregarded; and in like manner questions have also arisen between debtors and assignees in bankruptcy, and the owners of chattels. With regard to these it is quite plain and distinct, and it must be admitted that certain things, which under the old law were not permitted to be removed are now removable either by executors on the one hand or by assignees in bankruptcy on the other or by any other person who may be entitled and who claims to be the owner of such chattels by inheritance. At the same time the general law of fixtures is very plain, and applying it to the facts of the present case, what is the story before the county court? Edward Roberts, an innkeeper in Wales, having as a visitor a picture painter, who afterward became very celebrated, and being on terms of friendship with that painter, induced him to paint a picture relating to the subject of the sign of his house. Accordingly David Cox painted for Mr. Roberts the picture, of which he made him a present. The title to that picture is perfectly free from all possibility of doubt. It belonged to Edward Roberts for all purposes, being the gift of the person who painted it. Then what did E. Roberts do? This picture, which had reference to the well-known sign of his inn, he first of all fixed over the door, above the sign-board, and fastened it by holdfasts to the wall of the house. Did he lose any property in it by doing that? Did he convey any property in it to any person? It was his to fix up, and surely not less his to take down. How can it be said that D. Cox painted the picture for the inheritance? That he painted it for his friend is a fact of which there can be no doubt; there-

fore in my opinion it was his property to do what he liked with. It was fixed in front of his house, and at a later period it was taken down and hung up, first in one room and then in another, just as he pleased, and was fastened to the wall by means of an iron screw. The manner of fastening it can have nothing whatever to do with the question. It has been decided over and over again that looking-glasses, which are in no way different in their nature from pictures, may be taken down at any time although they are so fastened. Edward Roberts was the tenant from year to year of the inn, until upon his death in 1861 his son, Robert Roberts, took the first lease. At that time it is not very clear whether the picture was hanging on the wall in the front of the house, or anywhere else, but still it was as much R. Roberts's property as the coat upon his back. The lease which was granted did not contain any provisions touching the question in the slightest degree. It said that at the end or sooner determination of the term, the lessee should deliver up all fixtures, but this picture never was such a thing. R. Roberts might have taken it down at any time, and have sold it or given it away or done with it whatever he liked. It is true that that tenancy came to an end in 1861, when a lease was granted; but all that was said was that when the term came to an end, either by effluxion of time or in any other manner, the tenant should deliver up the fixtures. But how does that help the case? How can it affect the case of a picture which was simply held by a nail or screw to the wall? How can that become the property of the freeholder? Added to this the tenant has a lawful right to remove fixtures during the term. Upon all the grounds upon which the case can be put, and certainly not least of all upon the ground of common sense, this picture cannot possibly be the property of the freeholder. It is said that that lease was surrendered by R. Roberts to the freeholder, but what were the consequences of that? The surrender of the lease has not the effect of turning R. Roberts out of the house. He did not deliver up the seizin, but he simply surrendered upon the terms that he might take up another lease; and when the other lease is looked into, the only construction that can be put upon it is, that whatever fixtures may be placed upon the premises during the last seven years of the term shall be delivered up at the end of the term to the freeholder. But so far as regards the interval of time between 1861 and 1871, the tenant had the right to deal with those chattels in any way he thought fit. It certainly would be a monstrous thing to say that the inheritance had a right to claim the chattels which E. Roberts had passed to others, and which had been used simply for the purpose of decorating at one time the outside and at another time the entrance hall of the hotel. R. Roberts may have considered that the picture was a great attraction to the hotel, and in point of fact he knew that it was, although I must say that the beauty and picturesqueness of the surrounding scenery of Bettws-y-Coed is of far greater attraction to artists and visitors than this picture could possibly be. It has been argued that this picture has passed from the possession of the owner and has become a part of the inheritance, because in the lease which was surrendered, that was the lease between 1861 and 1871, there was a provision that all fixtures and other appurtenances should be given up, but I cannot discover any ground whatever for saying, in the face of the evidence, that this picture was ever in any sense a fixture. The evidence of the auctioneer, although I certainly lay less stress upon it than upon the evidence of some of the other witnesses, and the whole of the facts plainly establish this, that R. Roberts was the owner of the picture. Then it is argued that because there was another agreement to deliver up fixtures at the end of the term, this picture, for no better reason than because it was fastened to the wall

by an iron screw or nail, is a fixture. But ever since my recollection will serve me there have been many remarkable signs of different trades which have been exhibited over shop doors, and in point of fact at one time bankers used to have sign-boards. I can certainly remember shops that had, but they were never treated as fixtures in the sense in which it is endeavored to make this picture a fixture. They are simply exhibited as signs emblematic of the trade carried on in that particular place, and have no reference whatever to the landlord of the house. I have listened with attention to the arguments, and quite admit that the learned counsel for the respondent has shown considerable ingenuity, but he was unable to put forward any thing to induce me to say that this particular chattel has ever been the property of Lady Willoughby D'Eresby, or that it was not a fixture used by the tenant for the purpose of his business, and which he was at liberty, notwithstanding the terms of his several demises, covenants and surrenders, to treat as his own property. It was certainly not in the position of those fixtures which have been alluded to, and particularly in some case where even loose bricks upon a wall were held to be fixtures; nor can it be held that upon the strictest construction of the instruments which have been referred to it was a fixture with which the landlord had any thing to do. I therefore think that the decision of the court below was erroneous, and that the order must be discharged with costs.

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Appeal allowed.

CONFLICT OF LAW—MARRIAGE BY DIVORCED HUSBAND.

NEW YORK SUPERIOR COURT, GENERAL TERM,
FEBRUARY 7, 1881.

— ♦ —
THORP, Appellant, v. THORP.

E., the first wife of T., obtained a decree of divorce against him in New York for adultery, in which decree he was forbidden to marry during the life-time of E. During the life-time of E., T. and L., both residing in New York, for the purpose of evading its laws went into Pennsylvania and were married there. *Held*, in an action in New York by T. against L. for divorce for adultery, that their marriage, although valid in Pennsylvania, would in this action be adjudged under the law of New York by which it was void.

ACTION for divorce. The referee reported in favor of plaintiff. The court at Special Term refused to confirm the report, and directed a dismissal of the complaint. From the order and judgment entered thereon, plaintiff appealed.

SPEER, J. The answer in substance denies the adultery charged in the complaint, and sets up counter-charges against the plaintiff, and as a defense charges a former marriage of the plaintiff with one Emma C. Reed, in 1855, and a judgment of divorce in an action brought by her against the plaintiff in this action for adultery, in the Supreme Court, Kings county, in October, 1861, and a decree entered in November, 1861, in the usual form, forbidding the plaintiff to marry again during the life of the said Emma; that the said Emma was living when the plaintiff married the defendant herein.

The defendant gave no evidence as to the adultery charged in her answer, nor did she give any testimony contradicting the evidence charged against her in the complaint, but rested her defense solely upon the invalidity of the alleged marriage between her and the plaintiff.

It appears in the case that the said plaintiff, Gould H. Thorp, and the defendant, Laura M. Thorp, both

residing here, to evade the laws of this State and said judgment and decree, went from the State of New York to the city of Philadelphia, entered into the contract of marriage mentioned in the complaint, returned to this State, and continued their residence therein ever since said marriage.

When the plaintiff left this State for Pennsylvania and had the marriage ceremony there performed, it was, as must be assumed from the immediate return of the parties, to be their intention to continue and make this State their domicile and enjoy the protection of its laws. A marriage contracted by a person situated as is this plaintiff is forbidden by express statute of the State. "Whenever a marriage shall be dissolved pursuant to the provisions of this article, the complainant may marry again during the life-time of the defendant; but no defendant convicted of adultery shall marry again until the death of the complainant." By another section it is provided that any violation of this provision "shall be absolutely void."

It must be admitted that the validity of a marriage like the present has been heretofore an open question. We are not informed that the court of last resort in this State has determined any of the questions presented in this case. The Supreme Court of this district has decided them against the validity of the marriage by a majority of the court, upon able opinions delivered by two of the learned judges on both sides of the question (reported in 2 Hun, 238), and we believe the Supreme Court of the Second District have lately adopted the views of the court of this district.

Among the objections urged are that the statutes are fully satisfied by a construction which limits their prohibition to a second marriage contracted within this State. If this be conceded, it necessarily follows that the intention of the statutes was to permit either party to the contract, divorced for either his or her adultery, to go outside of its jurisdiction and marry again while the former husband or wife were living within that jurisdiction. It seems plain to us that this view of the case wholly overlooks the object and intention of the Legislature. The statute not only forbids the marriage by prohibitory words, declaring it to be wholly void, but also attaches to the violation of the contract of marriage a punishment by depriving the guilty party of the power of entering into the marriage state during the life-time of the injured party.

The question is one of policy of the law in its administration. It is the duty of those who administer the laws to see that they shall not be disregarded or violated by any of its citizens while enjoying its protection and privileges. The plaintiff here, by a decree of the court exercising jurisdiction, being forbidden to enter into the contract of marriage during the life of the partner he was bound to cherish and protect, goes into a foreign jurisdiction, sets at defiance the mandate of the court of his domicile by a second marriage, and now appeals to be relieved from the consequences of a contract illegal and void by the laws of his own State.

The case here is not one of domicile in Pennsylvania, for it is stated that the parties were domiciled here and went to Pennsylvania in fraud of our law. If the law of Pennsylvania allow of such a marriage, and although it be true that that marriage is to be judged by the *lex loci contractus*, it is but reasonable that every State must so far respect its own laws and their operation upon its own citizens as not to allow them to be evaded by acts in another State for the purpose of defeating them.

We are of the opinion, that in determining the matter before us, a preliminary consideration is presented, that is, the capability of the party to contract the second marriage; and the question is, whether that capability is to be determined by the law of Pennsylvania or the law of New York.

The plaintiff here appeals to the tribunal of the State to which he owes allegiance, and presents the question for its decision whether he has the capacity to contract a marriage out of the State and which by a decree of one of its tribunals he was absolutely forbidden to contract.

The answer to this question is settled by a direct adjudication in *Conway v. Beasley*, 3 Hagg. 639, which is precisely our case, in which persons domiciled in England were divorced in Scotland, and then one of them married again in Scotland, and upon coming again into England that second marriage was declared null, though it was admitted to be good by the law of Scotland.

The plaintiff has chosen the tribunal exercising jurisdiction within the State of his residence to decide a question involving the validity of a contract entered into by him outside of that jurisdiction which he was forbidden to make by a judgment or decree of one of his own tribunals.

The order and judgment appealed from should be affirmed, with costs.

JUDGMENT AS EVIDENCE OF FACTS IN COLLATERAL ACTION.

NEW YORK COURT OF COMMON PLEAS, GENERAL TERM, FEBRUARY 7, 1881.

ANDERSON V. THIRD AVENUE RAILROAD CO.

A minor, by his guardian, obtained a judgment for personal injuries by negligence. In an action by the minor's father against the same defendant for a loss of services by the same injuries, *held*, that the judgment was admissible as evidence, and was sufficient proof of defendant's negligence.

ACTION to recover for loss of services of plaintiff's son, injured through defendant's negligence. The opinion states the case.

DALY, C. J. It is through the paternal relation that the plaintiff has a right of action against the defendant for injuries to his son, arising from their negligence, because he is entitled to the services of his son during his minority, and an injury to the son which deprives the father of the benefit of the son's services is a loss and injury to him. If in an action brought against the defendants for the son by his guardian, it has been judicially determined that the accident which caused the injury was not owing to any negligence on the part of the son, but was due solely to the negligence of the defendants, there is no reason why that question should be tried over again in the action brought for the loss of the son's services, as it would involve an inquiry which has been already made and settled between the party to whom the accident happened and the defendants. In this action the plaintiff is limited to the recovery only of such damages as he may have sustained by the loss of his son's services, and I can see no reason why, to establish his cause of action, he should be required to prove that the action which deprived him of his son's services was caused by the defendants' negligence, when that fact has been judicially determined against the defendants in the action brought for the benefit of the son. In my opinion, the plaintiff is entitled to give the judgment in evidence to establish that the accident which deprived him of his son's services was solely from the defendants' negligence; and if the record shows that it was so determined in that action, that that is sufficient proof of the fact in this.

The order, therefore, denying the application to strike out of the complaint the averment of the recovery of the judgment should be affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

ATTACHMENT—OF JUDGMENT IN FAVOR OF NON-RESIDENT—SERVICE OF COPY WARRANT MUST BE ON DEBTOR—ON ATTORNEY OF CREDITOR NOT SUFFICIENT.

—The M. bank, a foreign corporation, through J., S. & B., its attorneys in New York, recovered a judgment against B. Within two years thereafter, the judgment being unpaid, H., a creditor of the M. bank, brought suit in New York against it. The summons and complaint were served by publication, and a warrant of attachment issued against its property to the sheriff of New York county. A return was made by him showing the execution of the attachment "by leaving a certified copy of the said warrant of attachment with J., the individual holding such judgment as plaintiff's attorney, with a notice showing the property levied upon." Judgment by default was rendered in this suit, and the judgment against B. sold upon execution, under an order of the court directing such sale. *Held*, that the service upon the attorney was not a valid execution of the attachment against the judgment, under Code, section 235, and the administrator of B. was justified in refusing to pay the same to the purchaser of such judgment at the execution sale. The section referred to requires an attachment to be executed upon "debts or other property incapable of manual delivery, by leaving a certified copy of the warrant with the debtor or individual holding such property." A judgment is property of the kind mentioned, but it is not in possession of any one. The attorney by whom it is procured does not "hold" the judgment. His powers are only such as are prescribed by law; they are limited to a representation of the plaintiff in the action, the management of the controversy therein, to the collection of the judgment when recovered, and its discharge, if paid within two years from its recovery. He can neither assign nor sell nor deliver it. The only way to subject a judgment to attachment for the payment of a debt of the plaintiff therein, is to serve the warrant upon the debtor in such judgment. Order affirmed. *In re Flandreau*. Opinion by Danforth, J. [Decided Feb. 1, 1881.]

CRIMINAL LAW—ADMISSION OF IMPROPER EVIDENCE BEFORE GRAND JURY NOT PLEADABLE TO INDICTMENT

—CONVICTION ON GOOD COUNTS NOT AVOIDED BY BAD COUNTS—ROBBERY—OF KEYS FOR USE IN OPENING BANK TO ROB IT—EVIDENCE OF ANOTHER OFFENSE—OF SCHEME TO COMMIT CRIME.—(1) That the grand jury which indicted a prisoner had before them, in their investigation of the matter, *ex parte* affidavits, taken before a police magistrate, in the proceeding before him, and the examination taken by him, *held* not a ground for a plea to the indictment. There is no authority for the position that the sufficiency of the evidence upon which an indictment is found by the grand jury is a question which can be raised by plea to the indictment, or that the reception of incompetent evidence by such jury can be pleaded. *People v. Hulbut*, 4 Den. 133, is to the contrary. (2) Where a part of the counts in an indictment are good and sufficient to sustain a conviction, the fact that there are other counts relating to the same offense that are bad will not render the conviction erroneous, even though the verdict is general. (3) The defendant was indicted for robbery of keys from W., the robbery being committed by him and others, they together entering the room of W. masked, and binding him, and compelling him to give up the keys by threats of personal violence, and to disclose to them the combination of the safe lock, in a bank to which the keys belonged. The keys were not returned. *Held*, no defense that the purpose of obtaining the keys was a mere temporary use of them in opening the bank for the purpose of despoiling it, and that there was sufficient to warrant a conviction

for robbery in the first degree, under 2 R. S. 677, section 55. It was for the jury to say whether the defendants intended to appropriate the keys to their own use. (4) Evidence relating to a burglary committed in the bank, the breaking of the safe and the taking of valuables therefrom, held admissible for the purpose of showing that defendant was one of the gang that took the keys. It is true that as a general rule, on a prosecution for one crime, it is not proper to prejudice the jury against the prisoner by showing him to have been guilty of another, but where the evidence is relevant and material on the question of the guilt of the prisoner of the crime for which he is upon trial, it cannot be excluded merely because it also proves him guilty of another crime. (5) Evidence showing a scheme to rob the bank, to which defendant was a party, and his presence at the bank at the time when the crime was consummated, and that such presence was not accidental or innocent, but that he was one of the persons connected with the criminal transaction, and thus to connect him with the robbery of the keys, held admissible. Judgment affirmed. *Hope, plaintiff in error, v. People of New York*. Opinion by Rapallo, J. [Decided Jan. 18, 1881.]

DAMAGES—FOR BREACH OF BUILDING CONTRACT BY BUILDER.—By a contract between K. and M. the latter was to take from the former a deed of certain premises, to give back mortgages to the former, to build four houses upon the premises by a specified time, and to leave \$3,000 on deposit with a trust company as a collateral security for the performance of his agreement. K. agreed that his mortgages should be next in lien after mortgages given to one G., and that he would make some advances. K. kept his agreement, but M. did not perform his as he failed to complete the houses and abandoned the same to K. In an action against M. by K. upon the contract, held, that plaintiff had a right to resort to the collateral security, the deposit, and that he was entitled to have from M. as much as would put him in as good plight as he would have been had the houses been finished. His damages were the difference in the value of the premises as they were with the houses unfinished at the time agreed for their completion, and what the value of them would have been had the houses been finished on that day according to the contract. Cases referred to: *Laraway v. Perkins*, 10 N. Y. 371; *Morrill v. Irving Fire Ins. Co.*, 33 id. 429, 439, 453, 447; *Bell v. Walker*, 5 Jones' Law (N. C.), 43; *Vivian v. Champlin*, 2 Ld. Raym. 1125; *Yates v. Dunster*, 24 Law J. 226; *Smith v. Peat*, 9 Exch. 101; *Luxmore v. Robson*, 1 B. & Ad. 684; *Strutt v. Farlar*, 16 M. & W. 249; *Robinson v. Harman*, 1 Exch. 856; *Evelyn v. Raddish*, 1 Holt. 543 (see 7 Taunt. 410); *Tracy v. Albany Exch. Co.*, 7 N. Y. 472; *Holliday v. Marshall*, 7 Johns. 211. The rule of damages in such a breach of a building contract by the builder is that plaintiff is to have that compensation which will leave him as well off as he would have been had the contract been fully performed. He has a right to a house as good as that which the defendant agreed to furnish, and his damage is the difference between the value of the house furnished and the house as it ought to have been furnished. To pay just what it would cost to finish the house would not make plaintiff whole, as he would, by delay from the time when the house should be finished to when he could complete it, be subjected to a loss of income to which he is entitled. Judgment affirmed. *Kidd v. McCormick et al.*, appellants. Opinion by Folger, C. J. [Decided Jan. 18, 1881.]

RIPIARIAN RIGHTS—USE BY UPPER OWNER—DIVERSION BY RAILROAD COMPANY OF WATER FOR USE OF LOCOMOTIVES NOT PROPER, AND LOWER OWNER MAY ENJOIN.—A railroad company, a riparian owner,

diverted the water of a creek for its use in furnishing water to its locomotives so as to perceptibly reduce the volume of water flowing therein and to materially reduce the grinding power of the mill of plaintiff, a riparian owner below the railroad company, and in consequence thereof he sustained damage to a substantial amount. Held, that plaintiff was entitled to an injunction restraining the railroad company "from diverting the water to the injury of plaintiff." The cases *Elliott v. Fitchburg R. Co.*, 10 Cush. 102; *Earl of Sandwich v. Great Northern R. Co.*, L. R., 10 Ch. D. 707, distinguished. In such a case preventive relief is proper. 2 Story's Eq. Jur., § 927; *Gardner v. Newburgh*, 2 Johns. Ch. 103; *Swinton Water-Works Co. v. W. & B. Canal Co.*, L. R., 7 Eng. & Ir. Ap. Cas. 697; *Campbell v. Seaman*, 63 N. Y. 668. Each riparian owner has the use of the water *ad larandum et portandum* for domestic purposes and his cattle, though some portion be exhausted, and this without regard to the effect upon the lower owner. He may use for irrigation or manufacturing, but this privilege is connected with the land through which the stream runs, and cannot be exercised if thereby the lawful use of the water by a lower proprietor is interfered with to his injury. *Miler v. Gilmour*, 12 Moore's P. C. 150; *Tyler v. Wilkinson*, 4 Mason, 397. The railroad company did not merely use the water, returning it to the stream, but diverted it from the land. The fact that plaintiff as well as the railroad company used the water for artificial purposes would not affect plaintiff's rights. The case presents no exception to the rule that a riparian proprietor has no right to divert any part of the water of the stream into a course different from that in which it has been accustomed to flow, for any purpose to the prejudice of any other riparian proprietor. This is the doctrine of the civil and the common law (3 Kent's Com. 585), and it stands upon the familiar maxim *sic utere tuo ut non alienum laedas*. Judgment affirmed. *Gurwood v. New York Central & Hudson River Railroad Co.*, appellant. Opinion by Danforth, J. [Decided Jan. 18, 1881.]

NEW YORK PRACTICE ABSTRACT.

ATTACHMENT—AGAINST RESIDENT DEFENDANT FOR DISPOSING OF PROPERTY—MUST BE HIS OWN PROPERTY, AS UNDER OLD CODE. CODE, § 636.—The old Code, section 227, provided for an attachment against the property of a resident defendant who has disposed of or is about to dispose of "his property," with intent to defraud creditors. The new Code, section 636, provides for attachment in case such defendant, who has disposed of or is about to dispose of "property" with such intent, the "his" being omitted. Held, that the meaning of the provision is not changed in the new Code, and an attachment would not lie for a disposal of property not belonging to defendant. Where a law antecedently to a revision of the statutes is settled, either by clear expressions in the statute or adjudications on them, the mere change of phraseology will not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the Legislature to work a change. Case of *Yates*, 4 Johns. 318; *Douglass v. Howland*, 24 Wend. 35; *Matter of Hart*, 2 Hill, 380; *Parmelee v. Thompson*, 7 id. 77. What the Legislature seemed to have intended was to re-enact the previously existing provisions defining the cases in which the property of a debtor might be seized by means of an attachment, and not to enlarge the scope of that remedy to such bounds as to render it an engine of oppression and injustice, and the language made use of should be so construed as to maintain and promote that object. *New York Supreme Ct.*, 1st Dept., Sp. T., Dec. 28, 1880. *German Bank of London v. Dash et al.* Opinion by Daniels, J.

DISCONTINUANCE—WHEN COUNTER-CLAIM INTERPOSED NOT ALLOWED TO ENABLE A REARREST OF DEFENDANT.—Plaintiff, in an action for a balance of account, in which defendant interposed a counter-claim, procured an order of arrest, which was discharged on the ground that it did not apply to the whole account. Plaintiff asked leave to discontinue the action with the object of commencing a new action and obtaining a new order of arrest. *Held*, that leave should not be granted. The courts are opposed to arresting a defendant twice for the same cause of action. See *Wright v. Rutterman*, 1 Abb. (N. S.) 423; *Enoch v. Ernst*, 21 How. Pr. 96. If the plaintiff's action were not maintainable, he should be allowed to discontinue, and a new order of arrest for a new action might be granted. *People v. Tweed*, 63 N. Y. 202. But if the second action be brought merely for the purpose of arresting defendant, after plaintiff has failed through his own fault to sustain the first arrest, the proceedings in the second action might well be regarded as intended only to vex and harass defendant. *New York Com. Pleas, Sp. T., Jan. 11, 1880. Livermore et al. v. Herdell.* Opinion by J. F. Daly, J.

DIVORCE—STATUTE OF 1879, CHAPTER 321, NOT REPEALED BY CODE, SECTION 1761.—The provision of Laws 1879, chapter 321, modifying the prohibition against marriage by a defendant in an action of divorce, convicted of adultery of 2 R. S. 146, § 49, was not repealed by section 1761 of the new Code, being excepted by the repealing act, which took effect at the same time. *New York Com. Pleas, Sp. T., Jan., 1881. Peck v. Peck.* Opinion by Larremore, J.

ENLARGEMENT OF TIME—CONSTRUCTION OF STIPULATION.—The twenty days to answer the complaint would expire April 11. On April 6th plaintiff's attorney gave this stipulation: "The time for the defendant, Dennis J. O'Connor, to answer the within complaint is hereby extended twenty days. Dated New York, April 6, 1880. S. E. Brown, attorney for plaintiff." *Held*, that the defendant had twenty days from April 11th to answer, and a demurrer served April 30th was in time. *Supreme Ct., 1st Dept., Gen. T., Dec. 17, 1880. Pattison v. O'Connor.* Opinion by Davis, P. J.

IMPRISONED DEBTORS—DISCHARGE OF PARTNER IMPRISONED FOR FIRM FRAUD—BURDEN OF PROOF.—In the statute regulating the discharge of imprisoned debtors the duty is imposed upon the opposing creditor to show that the proceedings upon the part of the prisoner are not just and fair. Consequently a judgment that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property, does not necessarily preclude the discharge of one partner, because the statute regulating such discharges requires evidently personal participation in the fraud by the applicant in order to justify the court in denying such discharge. It is upon the opposing creditor to show that the petitioner was himself cognizant of the fraud, otherwise the petitioner will be discharged. *New York Com. Pleas, Gen. T., Feb. 7, 1881. Matter of Benson.* Opinion by Van Brunt, J.

INJUNCTION—AGAINST OFFICER OF CORPORATION WILL NOT BE ISSUED ON PETITION WITHOUT ACTION. CODE, §§ 416, 603, 1788, 3333. —The Supreme Court has no jurisdiction to issue an injunction restraining an officer of a corporation from collecting claims due such corporation and disposing of its effects upon a verified petition, no action having been commenced. As a general rule none of the powers appertaining to the original jurisdiction of the Court of Chancery could be called into operation until a bill had been filed. 3 Daniels' Ch. Pr. 2776. In certain cases under statutory provisions, powers have been conferred upon this

court to be exercised in a summary manner, by petition, but there is no statute which authorizes in such a case as the one mentioned, a proceeding by petition. See new Code, §§ 416, 3333, 603. The case *Matter of Foster*, 15 Hun, 387 is not an authority in support of the propriety of such a proceeding, as the question was not raised and the proceeding was of a different character. Section 1781 of the Code provides for a redress by an action for the misconduct of an officer of a corporation. *New York Supreme Ct., 1st Dept., Chambers, Jan. 15, 1881. Manneck Manufacturing Co. v. Manneck.* Opinion by Van Vorst, J.

TRIAL—BEFORE REFEREE—WAIVER OF IRREGULARITIES—JUDGMENT BY DEFENDANT AGAINST CO-DEFENDANT. CODE, §§ 521, 1204. —D. obtained a judgment by default against defendant L., which he assigned to S. L. had the default opened and put in an answer. The issues were referred, by consent, to a referee to hear and determine. D. died and the action was revived in the name of his administratrix, by an order which directed her to serve a supplemental complaint and make S. a defendant, which was done. L. again answered, and S. answered, admitting the complaint, but claiming to be entitled to judgment as the owner of the claim against L. The trial proceeded before the referee, who found L. liable, as claimed in the complaint, and that S., as assignee, was entitled to judgment against L., and judgment was entered accordingly, from which L. appealed. *Held*, that L. was too late to claim that the only judgment that could be rendered was a dismissal of the complaint or that he was entitled to a trial by jury. *Held*, also, that the referee had authority for his decision under sections 521 and 1204 of the new Code. These sections are not limited to actions of foreclosure, partition and similar actions of an equitable character. *New York Superior Ct., Gen. T., Jan., 1881. Desham v. Lee.* Opinion by Freedman, J.

UNITED STATES SUPREME COURT ABSTRACT.

BANKRUPTCY—ASSIGNEE AND NOT CREDITOR MUST BRING ACTION TO SET ASIDE FRAUDULENT CONVEYANCE OF BANKRUPT DEBTOR—STATUTE OF LIMITATION. —In an action in equity to subject land held by the wife of a judgment debtor to the judgment, on the ground that the land was purchased with the debtor's money, and the title made to his wife with intent to defraud his creditors, the defense was that the debtor had been discharged in bankruptcy. *Held*, that if any right existed to subject the land in question to the payment of the judgment which existed prior to the bankruptcy proceedings, that right was in the assignee in bankruptcy. If that right was barred by the failure of the assignee to sue within two years, it would, if it had any effect on the title, make good the title of the wife; it would not transfer the assignee's right of action to the judgment creditor. *Glenny v. Langdon*, 98 U. S. 20; *Meeks v. Olpherts*, 100 Id. 564. Decree of U. S. Circ. Ct., Kentucky, affirmed. *Trimble, appellant, v. Woodhead et al.* Opinion by Miller, J. (Decided Jan. 31, 1880.)

CONFLICT OF LAW—RIGHT OF APPEAL FROM STATE COURT TO U. S. SUPREME COURT—FEDERAL QUESTION—ACTION IN STATE COURT AGAINST MARSHAL FOR SEIZURE OF GOODS UNDER BANKRUPT PROCESS. —In an action in a State court against a United States marshal for seizing goods which were in possession of defendants in error and claimed by them, the defense was that the goods were the property of certain bankrupts, that they were lawfully seized under a warrant which directed the marshal "to take possession provisionally of all the property and effects of said"

bankrupts. The State court upon the trial charged the jury that under such a warrant the marshal "has authority to take goods belonging to a bankrupt and which are in his possession. He has no authority under such a warrant to take goods from a third person, having possession for himself of the goods, and claiming as a matter of right to be entitled to their possession." The goods seized were in actual custody of persons other than the bankrupts under claim of title to them, and there was evidence tending to show that they had been purchased by such persons in fraud of the bankrupt law. *Held*, (1) that this presented a case in which the marshal asserted a right under the laws of the United States which was refused to him, and that the case was therefore a proper one for a writ of error from this court; and (2) that the charge to the jury was erroneous. If a writ issues from a court of competent jurisdiction and directing an officer to seize property which is described in the writ, as in case of admiralty or replevin or in the writ of ejectment, the writ itself is a protection when the officer is sued in trespass. If, however, the writ in general terms directs or authorizes him to seize the property of an individual, without a special description of the property to be seized, he exercises the authority conferred at his own risk as regards the ownership of the property and whether it is liable to seizure under that process. Such is the rule of law in ordinary writs of attachment and in the writ of *fiat facias* at common law. When, however, the officer is sued by some one other than the defendant in trespass for a wrongful levy of the writ, it has never been doubted that the title to the property and the rightfulness of the seizure under the writ was open to inquiry in such a suit, and that unless plaintiff made out his case before the jury, he must fail. *Buck v. Colbath*, 3 Wall. 334. The marshal is not limited in his right and duty of seizure to such property as he may find in actual possession of the bankrupt. As in the writ of attachment or the ordinary execution on a judgment for the recovery of money, the officer is authorized to seize the property of the defendant wherever found, so here it is made his duty to take into his possession the bankrupt's property whenever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found property which he believed would belong to the assignee when appointed, as a sufficient reason for failing to take possession of it. Judgment of Superior Court of New York (which was affirmed by the Court of Appeals of New York) reversed. *Sharpe, plaintiff in error, v. Doyle et al.* Opinion by Miller, J. [Decided Jan. 24, 1881.]

CONSTITUTIONAL LAW—MUNICIPAL AID TO RAILROAD—STATUTORY CONSTRUCTION—BONA FIDE HOLDER.—The Constitution of Missouri forbids the Legislature to authorize any city to become a stockholder in or loan its credit to any corporation without two-thirds of the qualified voters at an election shall assent thereto. The charter of the city of L. in that State provides in one section that the funded city debt, including \$100,000 to be subscribed to railroads terminating at or passing through the city, shall not exceed \$200,000, provided that it may be increased to \$250,000 by ordinance submitted to the tax payers of the city at an election. A majority of the votes cast at such election shall determine the question for or against such ordinance. Another section provides that it may subscribe for the stock of a railroad company connecting with the city, upon a similar submission and vote. Another section provides that no subscription to stock of any corporation shall be made except as provided by law, and that no appropriation shall be made for

any improvement beyond the city limits unless a majority of all votes cast at an election at which the question is submitted shall be in favor of the appropriation. *Held*, that the statute gave no authority to the city to subscribe for stock in a railroad corporation, and that bonds issued by the city under such statute would be void in the hands of an innocent holder for value. Judgment of U. S. Circ. Ct., E. D. Missouri, affirmed. *Allen, administrator, plaintiff in error, v. City of Louisiana.* Opinion by Waite, C. J. [Decided Jan. 10, 1881.]

RAILROAD AID BONDS—BONDS BY STATE UNDER INVALID LAW—MORTGAGE TAKEN BY STATE TO SECURE ITS BONDS INURES TO BENEFIT OF HOLDER OF VOID STATE BONDS.—By an act of the Legislature of Florida, passed in 1869, the governor of that State was authorized to exchange the bonds of the State with the F. Railroad Company and the J. Railroad Company, dollar for dollar, to a specified amount per mile of railroad, the bonds of the railroad companies to be a statutory lien upon the roads to secure the payment of the State bonds. This was done in order to aid the railroads by lending to them the credit of the State. The exchange was duly made, the F. Railroad Company receiving \$1,000,000, and the J. Railroad Company \$3,000,000 of the State bonds. These bonds the companies sold to purchasers in Holland through an agency established in London. The railroad companies soon defaulted upon the interest of their bonds given to the State, and the State in turn defaulted upon its bonds given to the railroad companies and by the latter sold to purchasers in Holland. Soon afterward the Supreme Court of Florida adjudged the bonds of the State given to the railroad companies to be null and void for want of authority (see 15 Fla. 455-690; 16 id. 708), and the railroad companies sought to evade the payment of their own bonds by alleging that they were issued and exchanged without the sanction of the companies in their corporate capacity. In this condition of affairs Schutte and others, the Dutch bondholders, claimed to be entitled to the bonds of the railroad companies held by the State, and brought action to have it declared that they as holders of the State bonds have a lien on the railroads to the amount of the bonds so held by them, and to have the railroad sold to satisfy the same. The railroad companies brought suit to have their bonds cancelled. *Held*, that the bondholders of the State bonds are in the position of purchasers for value and in good faith, and are entitled to relief accordingly; that although the State bonds are unconstitutional the railroad companies are not free from responsibility to the holders. The bonds as obligations of the State are void, but as against the companies which sold them they are good. Having been put on the market by the companies as valid bonds, the companies are estopped from setting up their unconstitutionality. A statutory lien in the nature of a first mortgage having been given to the State to secure such bonds on the property of the railroad companies, the governor of the State has full power to take possession of the railroads and sell them and hold the proceeds for the redemption of the State bonds held by bona fide holders. Decree of U. S. Circuit Court, N. D. Florida, affirmed. *Florida Central Railroad Company, appellant, v. Schutte et al.*, and two other cases. Opinion by Waite, C. J. [Decided Jan. 17, 1881.]

CRIMINAL LAW.

BURGLARY—THAT PRISONER COMMITTED LARCENY IN CLOSED STORE NOT SUFFICIENT TO ESTABLISH.—Where the evidence showed the presence of the de-

defendants in a store at night, that they fled through the front door when opened by the proprietor, and that certain articles were gone, but did not show how they obtained entrance nor any indication of the use of force, a request to charge that if they broke and entered, the crime would be burglary, not larceny, was properly refused. *Georgia Supreme Ct., Jan. 4, 1881. Parks et al. v. State of Georgia.*

FORGERY — OF UNCERTAIN INSTRUMENT — TRIAL COURT ORDERING ARREST OF WITNESS. — (1) For forging an instrument in these terms: "George, let the boy have \$2 worth of what he wants," an indictment will lie, the other constituents of forgery concurring, the brevity and uncertainty of this instrument will not hinder a conviction. Such a paper was not inadmissible in evidence on account of uncertainty. (2) It is error for the court to order the arrest of the defendant's witnesses in the presence of the jury before whom they have just given their testimony, and to have them then and there arrested on account of what they have testified. To do so amounts to an intimidation from the bench that their evidence is false. *Georgia Sup. Ct., Jan. 4, 1881. Burke v. State of Georgia.*

JUROR — GRAND JUROR NOT LIABLE CIVILLY FOR ACTION. — A grand juror cannot be held civilly responsible for any act done by him as such. "The secret inquisitorial proceedings of the grand jury may work very oppressively and unjustly; for only so far as guarded and restrained by an oath, their action is generally irresponsible and conclusive in finding an indictment. During the whole of their proceedings they are protected in the discharge of their duty; and no action or prosecution can be maintained, no matter how they may be actuated by malice or indiscretion." *Proffatt on Jury Trial, § 55.* "Nor can an action be maintained against a jurymen, or the attorney-general, or a superior military or naval officer, for an act done in the execution of his office, and within the purview of his general authority." *1 Chitty on Pl. 89.* "But I prefer to place the decision on the broad ground that no public officer is responsible, in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only when the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself." *Weaver v. Devendorf, 3 Den. 120.* In *Bradley v. Fisher, 13 Wall. 335*, it is held that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly — a distinction as to their liability being made, between acts done by them in excess of their jurisdiction and acts done in the clear absence of all jurisdiction over the subject-matter. In *Downer v. Lent, 6 Cal. 94*, the court says: "It is beyond controversy that the power of the board of pilot commissioners is quasi judicial, and that they are not civilly answerable. They are public officers to whom the law has intrusted certain duties, the performance of which

requires the exercise of judgment." This is equally true of grand jurors. "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Scott v. Staufeld, L. R., 8 Exch. 220. California Supreme Ct., Sept. 30, 1880. Turpen v. Booth et al. Opinion by Morrison, C. J.*

VENUE — SALE OF LIQUORS TO BE SENT BY CARRIER FROM ANOTHER PLACE. — Plaintiff in error was indicted in Mercer county for selling there intoxicating liquors without a license. It appeared that he was a travelling agent for a licensed wholesale liquor dealer, doing business in the city of Erie, in another county. Orders for whisky which he solicited and received in Mercer county were transmitted to his employer, who filled them at his store in Erie, and shipped the whisky, by freight or express, consigned to the parties respectively from whom the orders were obtained. It was put up in packages, addressed to the consignees in Mercer county, delivered to the carrier at Erie and transported thence, according to the usual course of business. There was no evidence that the plaintiff in error had any whisky in his possession in Mercer county or that he personally delivered any there. It also appeared that he collected bills for some of the orders which he obtained. Held, that Erie was the place of delivery of the whisky, and in law the sales were made there and not in Mercer county. The place of sale is the point at which goods ordered or purchased are set apart and delivered to the purchaser, or to a common carrier, who, for the purposes of delivery, represents him. For example, a merchant in New York orders goods from a Boston house, and they are consigned thence to him, either by a carrier of his own selection or in the usual course of trade; the transaction is an executed Boston contract. *2 Pars. on Cont. 585.* The same principle is recognized in *Shriver v. Pittsburgh, 16 P. F. Smith, 446; Finch v. Mansfield, 97 Mass. 89. Pennsylvania Supreme Ct., Jan. 3, 1881. Garbracht, plaintiff in error, v. Commonwealth of Pennsylvania. Opinion by Sterrett, J.*

NEW JERSEY COURT OF CHANCERY ABSTRACT.

OCTOBER, 1880.*

CONSTITUTIONAL LAW — ACT AUTHORIZING RAILROAD TO TAKE LANDS WITHOUT TENDERING PAYMENT TO OWNER VOID. — That section of the general railroad law which authorizes a railroad corporation to enter on lands and begin constructing their road, after paying into the Circuit Court of the county where the lands lie the amount awarded, pending their appeal from such award, is unconstitutional in that compensation or a tender thereof to the land-owner does not precede the use and occupation of his lands; and for want of such tender he may enjoin the company from entering upon his lands and constructing their road thereon. See *Browning v. Camden & W. R. Co., 3 Gr. Ch. 47; Jersey City & Bergen R. Co. v. Jersey City & Hob. R. Co., 5 C. E. Gr. 61; Metler v. Easton & Amb. R. Co., 10 Id. 214; Morris & Essex R. Co. v. Hudson Tun. R. Co., Id. 384; Starr v. Camden & Atl. R. Co., 4 Zab. 502, 598; Metler v. Easton & Amb. R. Co., 8 Vr. 222; Doughty v. Somerv. & Easton R. Co., 1 Zab. 442; S. C., 8 Halst. Ch. 81; Mercer & Somerset R. Co. v. Delaware & Bound B. R. Co., 11 C. E. Gr. 464;*

* To appear in 6 Stewart's (35 N. J. Eq.) Reports.

Lowree v. Newark, 9 Vr. 151. *Redman v. Philadelphia, Marlton & Medford Railroad Co.* Opinion by Van Fleet, V. C.

CORPORATION—RECEIVER—COURT WILL AID FOREIGN—ULTRA VIRES—CONTRACT NOT MADE VALID BY CONSENT OF STOCKHOLDERS—PROPERTY OF CORPORATION A TRUST FUND.—(1) Independent of the statute, and simply as a matter of courtesy, this court may extend its aid to the receiver of a foreign corporation for the purpose of enabling him to get possession of property which should in equity be applied in payment of the debts of the corporation. This court may appoint a receiver of a foreign corporation having property in this State, as auxiliary to the proceedings instituted against it in the State which created it, and confer upon him the same powers that it is authorized to grant to the receiver of a domestic corporation, so far as they may be necessary to the recovery and collection of the assets of the corporation. And the court is bound to give such receiver the same remedies and aid in the collection of the assets of the corporation he represents that it would give to the receiver of a domestic corporation. *Bidlock v. Mason*, 11 C. E. Gr. 230. (2) It is a cardinal rule of the law of corporations that a corporation created by statute can exercise no power and has no rights except such as are expressly given or necessarily implied. Nor can the powers of a corporation be in the slightest degree enlarged or extended by the assent of the stockholders, or by any action they may take. A contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action. *Huntington v. Savings Bank*, 96 U. S. 388; *Grant on Corp.* 13; *Ang. & Ames on Corp.*, § 111; *Green's Brice's Ultra Vires*, 29; *Trent. Mut. Ins. Co. v. McKelway*, 1 Beas. 133; *Black v. Delaware, etc., Can. Co.*, 9 C. E. Gr. 455; *Thomas v. West Jersey R. Co.*, 101 U. S. 71. (3) Equity regards the property of a corporation as a fund held in trust for the payment of its debts, and if others than bona fide creditors of the corporation or purchasers possess themselves of it, they take it charged with this trust, which a court of equity will enforce against them. *Bartlett v. Drew*, 57 N. Y. 587; *Lawrence v. Nelson*, 21 id. 158; *McLaren v. Pennington*, 1 Paige, 102; *Nathan v. Whitlock*, 3 Edw. Ch. 215; *S. C.*, on appeal, 9 Paige, 152; *Curran v. State of Arkansas*, 15 How. 304; *Wood v. Dummer*, 3 Mason, 308; *Sawyer v. Hoag*, 17 Wall. 610; *Field on Corp.*, § 403. *National Trust Co. v. Miller.* Opinion by Van Fleet, V. C.

MARRIED WOMAN—WIFE MAY ENJOY ESTATE DEEDED TO HUSBAND AND WIFE JOINTLY.—By the common law, when lands become vested during coverture in husband and wife, the husband is entitled to the exclusive use and possession of them during their joint lives. This rule, so far as it excludes a wife during coverture from the enjoyment of property thus held, was abolished by the statute of 1852, securing to married women the use of their separate property. *Wyckoff v. Gardner*, Spen. 556; *Washburn v. Burns*, 5 Vr. 18; *Bolles v. State Trust Co.*, 12 C. E. Gr. 308; *Lee v. Zabriskie*, 1 Stew. Eq. 422; *Freeman on Part.*, § 75. *Kip v. Kip.* Opinion by Van Fleet, V. C.

USURY—PURCHASER OF MORTGAGED PREMISES CANNOT SET UP AGAINST MORTGAGE.—A purchaser of the mere equity of redemption in premises covered by a usurious mortgage who purchases subject to the lien of the mortgage cannot set up usury as a defense. *Dolman v. Cook*, 1 McCart. 63; *Brolasky v. Miller*, 1 Stockt. 814; *Conover v. Hobart*, 9 C. E. Gr. 120; *Lee v. Stiger*, 3 Stew. Eq. 610. *Pinnell v. Boyd.* Opinion by Van Fleet, V. C.

NEW BOOKS AND NEW EDITIONS.

BENNETT'S FARM LAW.

Farm Law: a Treatise on the Legal Rights and Liabilities of Farmers. Containing articles upon such subjects as the following: how to buy a farm; how far the farm extends; what a deed of a farm includes; hiring help; rights in the road; ways over the farm; as to farm fences; impounding cattle; farmer's liability for his animals; dogs; liability for his men; about fires; water rights and drainage; trespassing on the farm; overhanging trees; with copious index. Adapted to the statutes of all the States. By Edmund H. Bennett, LL. D. Portland, Me.: Hoyt, Fogg Donham. New York: Orange, Judd & Co. Pp. 120.

THIS is an entirely admirable monograph. It is written in a familiar and direct style, having been originally delivered as a lecture before the Massachusetts State Board of Agriculture. Its distinguished author has done a good thing for the profession in putting it out, for if the sturdy yeomanry to whom it is addressed undertake to dispense with a lawyer by reason of dependence upon its precepts, they will incur the fate of every man who is his own lawyer; and if they carefully study it they will see the necessity for resorting to our profession. The book has a good deal of humor. The learned professor, in commenting on the English case where a cow was killed by feeding on a bit of wire from a wire fence, says "your wife or maid-servant should be careful where she throws her old hoop-skirt." We think this remarkably good and funny—mainly because we ourselves had previously said the same thing of the same case in this JOURNAL. We speak of it now only because we intend publishing a new series of "Humorous Phases of the Law" this summer, and we do not want the professor charging us with stealing this idea from him. By the way, the author says that it is quite erroneous to suppose that by force of general custom the public have a right to fish over another's ground. But in *Marsh v. Colby*, 39 Mich. 626; 33 Am. 439, the contrary was held, in the absence of notice against trespass. Pretty much every thing pertaining to farm life is embraced, even to lightning rod agents and poisoning one's neighbor's hens; but we miss something about exemption from execution of farming stock and implements, and license to cut timber or quarry stone; and is not the author in error in intimating that one who buys a stolen horse is entitled to pay for his keeping, from the true owner? The case cited to this is of the finding and rescue of a lost and drifting boat, where the captor undoubtedly has lawful possession, and we think the authorities cited in that case are cases only of lost property.

BIGELOW'S JARMAN ON WILLS.

A Treatise on Wills: by Thomas Jarman, Esq. 5th Am. from 4th Eng. ed. By Melville M. Bigelow, Esq., Ph. D., of the Boston Bar. In two volumes. Boston: Little, Brown & Co., 1880.

Every lawyer is familiar with the text-book "Jarman on Wills." The first English edition was issued in 1843, about, and it has gone through four editions in England and more in this country, and has always been a standard work of high repute. There is no need to speak of the text of the book; it is favorably known to the profession and the courts. This edition is from the fourth English edition, which is enriched with notes of the cases in England. And this American edition is copiously annotated with citations of American decisions. We have tested the fidelity with which this has been done, by seeking the cases from the various volumes of the New York Reports, and finding those that we sought. The merits of Mr. Bigelow as an author and editor have insured fidelity and discrimination and a well directed use of material. In

the first volume (the only one yet issued) the authorities are brought down to October, 1880. In the second, now in press, they will be brought down to January, 1881. Thus the lawyer may have before him, on this important topic of the law, the latest results of forensic discussion and judicial decision. These results are presented compactly, without lengthy extracts from cases, the points decided being briefly set forth by the editor and sustained by citations. The notes that we have read state the law with definiteness, arranging and comparing the cases, and stating conclusions fully and fairly. The varying statute law of the different States is exhibited. There is a mass of valuable matter in the first volume before us, but in type as just to the pocket as it is fair to the eye; so that in two volumes will be put material that with large type and broader margin would easily have made three. We think that these volumes will be a useful addition to the library of the lawyer and the judge.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Wednesday, March 9, 1881:

Judgment affirmed with costs—*Golden v. The Mayor, etc., of New York*; *O'Brien v. The Mayor, etc.*; *Kennedy v. The Mayor, etc.*; *The Town of Springport v. The Teutonia Savings Bank and ano.*; *The Town of Springport v. The German Uptown Savings Bank and ano.*; *The Town of Springport v. The Franklin Savings Bank*; *Devlin v. Cooper*; *Dunford v. Weaver*.—Decision of General Term affirmed with costs—*The People ex rel. Jourdan v. Donohue*.—Order and judgment reversed and new trial granted, costs to abide event—*Southwick v. The First National Bank of Memphis*.—Order affirmed and judgment absolute for defendant on stipulation, with costs—*Lastus v. The Union Ferry Company of Brooklyn*.—Order affirmed with costs—*Rider v. Vrooman*; *Bergen v. Wyckoff*.—Orders of General and Special Terms reversed and taxation of costs by clerk affirmed with costs—*The First National Bank of Meadville, Pa., v. The Fourth National Bank of New York*.—Appeal dismissed with costs—*Bassett v. Wheeler*; *People ex rel. Foley v. Police Commissioners of New York*.—Appeal from order of General Term, as to General Term costs, dismissed without costs to either party, and order of General Term as to costs in this court reversed, and order of Special Term affirmed without costs to either party—*Van Gelder v. Van Gelder*.—Ordered that the Supreme Court be requested to return remittitur, and on its return motion be granted on payment of costs of default and \$10 costs of opposing motion, and case be put upon calendar and heard next motion day—*McCarthy v. McCarthy*.—Motion denied with \$10 costs—*Flandreau v. Van Drunt*.—Motion denied without costs—*Phipps v. Carman*.

NOTES.

THE current number of *Abbott's New Cases* contains, among other matter, two recent decisions on marriage fraudulently contracted out of the State by parties divorced and forbidden here to remarry.—Hon. John H. Dillard, of the North Carolina Supreme Court, has resigned on account of ill-health, and the governor has appointed as his successor Thomas Ruffin, a son of the illustrious Chief Justice Ruffin.—We have received a communication, of considerable length, criticizing Mr. Hun's edition of the new Court Rules. These strictures may be arranged under three heads: As to the citation of law journals, and the omission to cite the reports in which the cases are subsequently published; as to notes and references upon

matters not embraced in the Rules; as to decisions superseded by the Code. A few instances are found of the citation of overruled cases. In regard to the first objection, while we regard the citation of this JOURNAL as quite venial, we think the citations of the published volumes of reports should also have been given. This would save the practitioner considerable labor. As to impertinent matters, so long as there is no complaint of "padding," this would seem of no great weight. Probably few will complain of getting more than they are promised. As to matters apparently superseded by the Code, it is perhaps better to embrace them and let others decide whether they are in force. On the whole, while Mr. Hun's pamphlet undoubtedly has minor faults unavoidable in any such work, we are convinced that it is useful, and at present indispensable. In a new edition some of the above matters might be amended.—The March number of the *American Law Review* contains a continuation of Mr. Arthur G. Sedgwick's article on Trustees as Tortfeasors, and an article on Discrimination in Fares by Carriers, by Ward McAllister, Jr.—We have received volume 4 of the proceedings of the New York State Bar Association.—The *Criminal Law Magazine*, for March, contains an article on Calligraphy and the Whittaker case. (We do not see what calligraphy has to do with the Whittaker case, for it is not understood that Mr. Whittaker wrote a peculiarly "fair and elegant" hand. Perhaps the author means "chirography.") Also a note on *State v. Moore*, concerning repeal of limitation of time in which an indictment may be found.

Even the very competent article whose book notices in the *Southern Review* are so readable, in speaking of the paging of a volume, calls it the pagination. We expect soon to hear of the foliation of a pleading and the filation of a lis pendens.—*N. Y. Daily Register*.—We have received the third edition of Judge Dillon's excellent manual on Removal of Causes, published by Wm. H. Stevenson, St. Louis, Mo. The work is entirely unrivalled, and of very considerable practical importance.

The annual meeting of the International Code Committee of America was held at the city of New York, March 8th. The following were elected: President, David Dudley Field; Secretary and Treasurer, A. P. Sprague; Executive Committee, Theodore D. Woolsey, Charles A. Peabody, S. Irèneus Prime, F. A. P. Barnard, William H. Hunt, Thomas M. Cooley, Edward S. Tobey, G. Washington Warren, Alfred H. Love, James B. Angell, John F. Dillon, Frederick Coudert, William Preston Johnson, Matthew P. Deedy, Amasa J. Parker, Howard Payson Willis. The following delegates were appointed to the next conference of the association for the reform and codification of the law of nations at Cologne in August: David Dudley Field, Charles A. Peabody, F. A. P. Barnard, A. P. Sprague, Amasa J. Parker, Andrew P. Peabody, F. R. Coudert, Vincenzo Botta, George W. Cullum, John Jay, John Jacob Astor, Charles P. Baldwin, Franklin H. Delano, S. I. Prime, William Preston Johnston, T. Platt, Paul S. Forbes, Henry M. Herman and Alexander Porter Morse.

"There are several ways of stating one's disagreement with the views of another. The following strikes us as peculiarly neat. It appears that a certain 'Col.' Tom Buford murdered Judge Elliott of Kentucky. The ALBANY LAW JOURNAL says: 'It seems that the Colonel was insane. He is probably now enjoying a lucid interval which will last during the remainder of his useless and accursed life unless interrupted by more seasons of debauchery and bad temper, and a fresh grudge against somebody who may offend him.'"—*Canada Law Journal*.

The Albany Law Journal.

ALBANY, MARCH 19, 1881.

CURRENT TOPICS.

IN speaking of the pending Field Codes, *The Nation* says: "There are, however, substantial objections to codification in this State, which ought not to be treated lightly. The main objects to be attained in any codification of law are certainty, simplicity, and permanence. It is only these qualities which make a Code better than a body of law scattered through volumes of reports and statutes. But with a Legislature such as ours, codification does not secure any one of these objects. The history of the Code of Procedure amply proves this, if any proof is needed. The old Code, drawn up by accomplished and painstaking lawyers a generation ago, was one of the best pieces of legislation of the kind ever adopted. If it had been allowed to remain substantially as it was originally passed, practice and procedure in the New York courts would be simple and comprehensible. But not only has it been amended in detail by successive Legislatures, but it was finally placed in the hands of a commission, not specially qualified for the task, and so overhauled and remodelled by it that it will require another thirty years of decisions to settle the practice under it. In fact, 'practice' in New York has become an abstruse and highly technical branch of professional learning, which many lawyers do not pretend to know any thing about, but trust to clerks and attorneys to manage for them. This is not the result of the work of the courts but of the Legislature, and judging by experience, we think that lawyers in this State may well feel considerable distrust of any further legislative attempts at sweeping law reforms." It ought to be a good answer to these objections, that the pending Codes were "drawn up" by the same "accomplished and painstaking lawyer" to whom the old Code of Procedure was mainly to be credited, and if not "a generation ago," yet half a generation ago. There has been plenty of time and endeavor to get these Codes right, and the best proof that they are substantially right is the fact that so little fault has ever been found with them, even in Gov. Robinson's veto message, understood to be the work of one of the most acute and persistent opponents of general codification in our profession. We think, too, that *The Nation* exaggerates the difficulties about the new Code of Procedure.

The Albany *Argus* has made the discovery that the new secretary of the navy is the successful defendant in the divorce suit of *Hunt v. Hunt*, 73 N. Y. 217; 8 C., 28 Am. Rep. 129. Mr. Hunt's defense was a prior divorce in his favor in Louisiana. The account given by the *Argus* shows some rather disreputable special legislation under which Mr. Hunt's divorce was procured. With that we have

nothing to do. Nor do we see, as the *Argus* intimates, that this divorce renders Mr. Hunt unfit for the post of secretary of the navy. He may be a bad ship's "husband" or "mate," perhaps; but all this is beyond our jurisdiction. But the *Argus* says that Judge "Folger had to decide that this surprise on Mrs. Hunt was in strict accordance with Louisiana law; that while she was actually a resident of New York, her legal domicile had to be construed to be that of her husband, whom she had left at his request; that while the 'notice by publication' (in some obscure weekly) did not reach her, it must be presumed to have reached her; that while *ex post facto* laws are forbidden in criminal cases, they could be operative in a civil one for divorce; that while the husband should not have been a witness for himself, his being so was not a fatal defect; and that no matter what the merits either of the law or case were, the legality was unquestionable, by Louisiana rules, and the Constitution of the United States required judgment of the courts of one State, to be recognized by the courts of the other States. No matter how wronged, Mrs. Hunt was remediless. There is no doubt this is law." This is stating the case a little more broadly and unfavorably for the legislation of Louisiana than it deserves. The judgment was not rendered upon "mere notice by publication," although it is doubtless competent for a Legislature to pronounce such notice sufficient for its own citizens. The basis of the decision was that in the Louisiana case, the husband had a "curator ad hoc" appointed to represent the absent wife, which according to Louisiana law was "a valid substitute for a personal service of process in the case of a domiciled defendant in a suit for divorce, who is absent from the State when the suit is commenced." There is no doubt that the case was a hard one for Mrs. Hunt, and we fully assent to the *Argus*' statement that "all through the opinion is moral evidence that it was a reluctant one, and that the Court of Appeals was glad the acts and proceedings construed were chargeable on Louisiana, and not on New York State."

Justice Westbrook has allowed a writ of error, but denied a stay of proceedings, in the case of O'Reilly, convicted of perjury, on which we commented last week. To reinforce his original decision and support the present he delivers an elaborate written opinion. In the course of this he says: "Perjury can be committed by willfully false statements made to an officer or court authorized to administer an oath, if given under what the party declares to such court or officer to be a form and manner of its administration binding upon his conscience, and which is so accepted and received, even though the party did not in his heart and conscience intend to take one." This is unquestionable, if the affiant goes through the form of taking an oath; but in this case there was no form of attestation. If he had kissed his thumb instead of the book, or only pretended to hold up his hand, he would be bound. But in accepting, receiving and taking the benefit

of a writing which says he has been sworn when he has not, he is held guilty, not of perjury, but of false pretenses. In the other cases he *appears*, between the officer and himself, to be sworn. In this case he does not appear to be sworn, but only to be willing to swear, and only to be willing to consent to avail himself of a means of getting money by false pretenses. — In denying a stay, the learned justice says: "Grant, for the sake of argument, the legal inaccuracy of this charge, it is yet undeniably true that the prisoner presented a false and fabricated bill against the county of Albany, which apparently, at least, he had verified by oath, and which he declared over his own signature and also by the act of presentation, was in fact formally verified by an oath legally administered, and that therefore he is morally, if not legally, deserving of punishment. In such a case there should be no stay, to enable the prisoner to see if by some technicality he may not escape that desert, which every right-minded person will declare to be richly his due." This reasoning does not satisfy us. It reminds us of a father, who discovering that he had whipped his son for a fault of which he proved innocent, excused himself by saying: "Never mind, you have got off a great many times when you ought to have been flogged." Here is certainly a grave question, and so far as we know, an entirely novel question; and no harm could result by granting a stay. It looks altogether too much like making sure that the culprit shall get some punishment at all hazards, whether he legally deserves this particular punishment or not. We imagine Justice Westbrook would after all feel rather disturbed in his sense of justice if the superior courts should set aside this verdict.

The House of Lords have affirmed the decision of the Court of Appeal in respect to the cumulative sentence in the *Tichborne* case, without calling on the crown counsel in reply to Mr. Benjamin. The result has very little significance with regard to the decision of our Court of Appeals in the *Tweed* case, except in the opinion of newspapers ignorant of law in general and of the difference between our jurisprudence and the English in this regard. The *New York Times*, which is stronger in its "funny" column than in its judgment of legal matters, says: "No court, and we believe no individual judge, has been found ready to attach the slightest importance to the arguments which proved effective with the majority of our Court of Appeals, and the right to inflict cumulative sentences on the basis of several counts of one indictment has been most emphatically affirmed. The result suggests that Chief Justice Davis had the advantage in point of judicial ability over the judges who overruled him in the Court of Appeals." Now this is very unpatriotic in the *Times* — to assume that the English courts must be right and ours must be wrong — and it is not at all flattering to the English courts for the *Times* to put this opinion on the implied ground of "Chief Justice Davis' judgment.

Mr. Stanley Matthews is again nominated for the vacancy on the Supreme Court bench. He is nominated now by a new president, but we understand he is the same old Stanley Matthews, and that he is from the same old State of Ohio. The nomination of course comes with a better grace from the new than from the old president, but the nominee is exactly as unfit for a judicial place, and the nomination is exactly as little due to Ohio, as before. Why pack this bench with Ohio men? Why not give the place to a man from some other western State now unrepresented? — Michigan, Indiana, Illinois, Wisconsin, Minnesota, Kansas? And why not put on a man with some judicial bent and experience?

The newspapers are quite at fault in announcing that the insurance companies have finally succeeded in the Dwight litigation. They have merely succeeded in getting an order for a bill of particulars of the defense. It was the appeal from this order that the Court of Appeals have just dismissed.

We give an unusual amount of space this week to a single opinion of the Federal Supreme Court, on account of its extraordinary importance and its novelty. The question of the power of either House of Congress to commit a contumacious witness for refusing to answer inquiries into private affairs, is here treated by Mr. Justice Miller with great learning and breadth of judgment, and the conclusion arrived at by the court is eminently just, although contrary to the traditions of congressmen and the common opinion of the people. The decision is one of the most important ever made by this court.

Senator Astor proposes to enable aliens to purchase and hold real estate. Why does not Mr. Astor introduce a bill to abolish our whole theory of government at once? — Senator Robertson's bill to pension judges retired for any cause not involving moral delinquency, now provides that such judges shall receive one-half salary for the balance of the unexpired term, not exceeding \$3,000 a year.

Assemblyman Newman has introduced a bill of twenty-four folio pages to preserve "moose, wild deer, birds, fish, and other game." This is long enough to protect them, it would seem. But Mr. Armstrong introduces one of ten pages to amend the old law on the same subject. — Mr. Dayton wants a new commission to revise the Code of Procedure. This is bad enough, but he does not propose to pay them any thing for services. This is worse. — Mr. Chickering proposes to abolish preferences in assignments for creditors, except for labor claims to amounts not exceeding \$100. — Mr. Shanley proposes to punish vitriol-throwing. Bomb-throwing should be added. — Mr. Hickman proposes to authorize cremation associations. — Mr. Tuthill proposes to discontinue sending to the penitentiaries males convicted of offenses punishable by imprisonment in the State prisons. — Mr.

Patterson proposes that grantees of premises under deeds providing for their assumption of mortgages on the premises shall not be bound thereby unless they subscribe the deeds.—Everybody proposes to amend the Code of Procedure *passim*.

NOTES OF CASES.

THE case of *Jordan v. Hovey*, Missouri Supreme Court, February 7, 1881, 12 Cent. L. J. 215, seems quite novel. The plaintiff alleged that she was a servant in the hotel of defendant, and that while such servant, she and H., a minor son of defendant, mutually promised each other marriage; that during the existence of said contract the defendant unlawfully, wrongfully, and negligently, advised and encouraged plaintiff to have sexual intercourse with H., assuring her that it would be neither criminal nor improper; that relying upon said advice, and upon the promise of marriage, she permitted H. to have sexual intercourse with her twice on or near July 4, 1875; and on July 15 following, said H. repudiated his contract of marriage, and refused to marry plaintiff. The petition concluded that on account of the advice and negligent conduct of defendant, and the violation of the marriage contract by H., the plaintiff was thrown out of employment for six months or more, and otherwise damaged in the sum of \$4,000, for which judgment was asked. Plaintiff recovered judgment below. Held, that as the plaintiff could not maintain an action against her seducer (*Roper v. Clay*, 18 Mo. 383; *Paul v. Frazier*, 3 Mass. 71), she could not maintain it against one who, by immoral and impure advice, assisted in her seduction. Plaintiff could have maintained an action against H. for breach of promise of marriage, provided he did not plead infancy, and the seduction might have been given in evidence in aggravation of damages. *Nilbin v. Johnson*, 58 Mo. 600. Defendant was likewise not responsible for the breach of promise of his son. In *Paul v. Frazier*, *supra*, Parsons, C. J., said: "The declaration amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting." On the other point, the doctrine of the principal case is supported by *Sherman v. Rawson*, 102 Mass. 400; *Kelly v. Riley*, 106 id. 339; S. C., 8 Am. Rep. 336; *Burks v. Shain*, 3 Bibb, 341; *Whalen v. Layman*, 2 Blackf. 194; *Wells v. Padgett*, 8 Barb. 323; *Sauer v. Schulenberg*, 33 Md. 288; S. C., 3 Am. Rep. 174; but denied in *Weaver v. Buchert*, 2 Barr. 82.

Another apparently novel case is *Eaton v. Gay*, Michigan Supreme Court, October, 1880, 11 Rep. 267. A. contracted with B. to furnish a supper for a society known as the Ancient Order of Foresters, at so much for each person partaking. Cigars and wine were furnished the guests by B., who testified

that these were extras, while A. testified that they were explicitly included in the contract. Held, that it was error to instruct the jury that if the contract was silent as to wines and cigars, and if A. saw the guests being supplied at the supper with such articles, and made no objection thereto, an implied contract arose on his part to pay for the same. Cooley, J., said: "If Eaton agreed with Gay and Van Norman upon the bill of fare and the price, he thereby limited what could be furnished on his account, and he had a right to expect that any printed bill which should be placed before the guests would be limited accordingly. No guest would then feel at liberty to call for any thing not there appearing, and if he did, and it was furnished to him, it would be a matter between himself and the proprietors with which Eaton could have no right to concern himself. It would be an extraordinary rule of law that would compel Eaton, under such circumstances, when he saw the guests partaking of wine, to give formal notice to the proprietors that he should pay no debts of their contracting." He had made his contract in advance and stipulated what his liability should be, and the guests were not his agents for the purpose of increasing this liability. If they ordered what he had not bargained for, he not only had a right to assume that they did this on some understanding, express or implied, with the proprietors, but common courtesy required him to refrain from interfering. This supper as agreed upon was his affair; the furnishing of extras was *inter alios*, and the proprietors could no more call upon him to pay for them, on the basis of implied contract, than upon any stranger."

De minimis non curat lex is illustrated in *Roth v. State of Texas*, 4 Tex. L. J. 393, where it was held that under a charge of theft of a bank bill a conviction may be had upon proof of theft of a National bank note. It is also there held that the bill being described as issued by the "Chatam National Bank," and the proof showing that it was issued by the "Chatham National Bank," there was no variance. The court said: "The rule adopted generally seems to be according to the distinction stated by Lord Mansfield, 'that where the omission or addition of a letter does not change the word so as to make it another word the variance is not material.'" 1 Whart. Crim. L. (7th ed.) 309; 1 Bish. Crim. Pro. (3d ed.) 562. Here the word is not changed and is strictly *idem sonans*. We are aware that in some courts a distinction is sought to be drawn between omissions or changes in the spelling of ordinary words and proper names (*Brown v. People*, 66 Ill. 344), but there can be no reason for the rule where the variance is so slight and does not affect the word or name more than in the case before us." For examples of *idem sonans*, see note, 28 Am. Rep. 439. In *Brown v. People*, *supra*, the indictment set out a copy of an alleged forged note, as signed "Otha Carr," while the note offered in evidence was signed "Oatha Carr." Held, a fatal variance. In *Page v. State*, 61 Ala. 16, the indictment charged the murder of "Preyer," and the proof was of "Pryor."

Held, no variance. "Chin Chan" and "Chin Chang" are sufficiently alike for a Chinaman; *Wells v. State*, 4 Tex. Ct. App. 20. "Janury," in an indictment, will answer for "January." *Hatto v. State*, 7 id. 44; so of "Whiteman" for "Whitman." *Henry v. State*, id. 388. "Shiped" and "saide," in a forged instrument, may be properly spelled "shipped" and "said," in the indictment, without variance.

LEGAL DEFINITIONS OF COMMON WORDS.

X.

IN *State v. Mullen*, 35 Iowa, 199, it was held that a flat-boat, floating on a river, with a cabin on it, with men and women eating, sleeping, and living on it, may be a "house of ill-fame;" adopting Webster's definition, "a building or edifice for the habitation of man; a dwelling place, mansion, or abode for any of the human species. It may be any size, and composed of any materials whatever."

In *Kitson v. Mayor*, 26 Mich. 325, "saloon" was held to mean a place of refreshment, and not necessarily a place where intoxicating liquor is sold. The court said: "This is certainly the popular understanding of the term, and it is applied in all orderly communities to all places where persons resort to obtain food or drink, which are not also devoted to some other business: Undoubtedly a narrower meaning is sometimes applied, as it is to 'grocery,' and as it once was to 'tavern.' But saloons, and groceries, and taverns, are mainly designed for innocent purposes." So, in *State v. Mansker*, 36 Tex. 864, where it is said: "That might be the name of a private parlor or residence, a room for the reception of company, or for works of art, or a place for refreshments alone. It is true that a house or room used for retailing spirituous liquors is sometimes improperly called a saloon, but this improper use of the word cannot impart to it any such improper legal signification." But a "saloon-keeper" means a retailer of cigars, liquors, etc. *Cahill v. Campbell*, 105 Mass. 40.

Two is not an "unusual number," when applied to persons violently entering disputed premises. *Pike v. Witt*, 104 Mass. 595.

"In common parlance, a 'dram' means something that has alcohol in it—something that can intoxicate." *Lacy v. State*, 32 Tex. 227.

A watch is not a "jewel or ornament." *Ramaley v. Leland*, 43 N. Y. 539. The court said: "It is not carried or used as a jewel or ornament, but as a time-piece or chronometer, an article of ordinary wear by most travellers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the day-time. It is carried for use and convenience, and not for ornament."

A cook in a hotel is not a "laborer" within a lien act. *Sullivan's Appeal*, 77 Penn. St. 107.

A dangerous place fifty feet from a street is not "contiguous" to the street. *Chapman v. Cook*, 10 R. I. 804; S. C., 14 Am. Rep. 686.

"Militia" are not "troops." *Dunne v. People*, 94 Ill. 120. The court said: "Lexicographers and others define militia, and so the common understanding is, to be 'a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace.' That is the case as to the active militia of this State. The men comprising it come from the body of the militia, and when not engaged at stated periods in drilling and other exercises, they return to their usual avocations, as is usual with militia, and are subject to call when the public exigencies demand it. Such an organization, no matter by what name it may be designated, comes within no definition of 'troops,' as that word is used in the Constitution. The word 'troops,' conveys to the mind the idea of an armed body of soldiers, whose sole occupation is war or service, answering to the regular army. The organization of the active militia of the State bears no likeness to such a body of men. It is simply a domestic force as distinguished from regular 'troops,' and is only liable to be called into service when the exigencies of the State make it necessary."

Singular as it may appear, the loaning of money on Sunday is "business." *Proewert v. Decker*, Wisconsin Supreme Court.

A telephone is a "telegraph," and a telephonic conversation is a "telegram." *Attorney-General v. Edison Telephone Company*, 43 L. T. (N. S.) 697. This was under a statute defining a "telegram" as any message or communication transmitted by telegraph, and a "telegraph" as "a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe inclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication." Stephen, J., in the course of a very long and scientific opinion, observed: "The conversation must be a communication, even if the word 'message' is less appropriate. It is 'transmitted' or sent through a wire used for the purpose of communication, and that communication is telegraphic according to the common use of language, though it involves no writing. The various affidavits filed give a complete history of the word 'telegraph,' and show that from the first invention of semaphores till within the last few years no contrivance of the sort did literally write at a distance, but that the word was applied to a variety of contrivances which, by signals perceptible sometimes by the sense of sight, and sometimes by the sense of hearing, conveyed intelligence to great distances in a much shorter time than a letter could be carried." "No one supposes that the Legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they eventually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence." "We hold that a conversation held through a telephone is either a message, or at all events, a communication transmitted by a telegraph, which is the definition of a telegram. A small question was raised on the

word 'transmitted.' When one person speaks to another it was said he 'makes,' but does not 'transmit,' a communication. The answer is that when he speaks through a wire some miles long he sends what he says through the wire or transmits it. As the defendants contended that the very voice itself was so sent, this seems specially clear as against them."

A single act of personal violence by husband to wife does not constitute "cruelty of treatment" within the statute of divorce. *Hoshall v. Hoshall*, 51 Md. 72; S. C., 34 Am. Rep. 298. Herethe parties had peaceably lived together for thirty years, when, as the court observed, a "quarrel grew out of the employment in the family of a young woman servant, and probably from some feeling of jealousy on the part of the wife. But there is no evidence of any improper conduct on the part of the husband, or any sufficient cause for the old lady's feeling of jealousy and dissatisfaction. Moreover, the woman servant had been sent away some time before, by the wife, which shows that her legitimate authority in the family was not destroyed or interfered with by her husband."

In *Re v. Beardmore*, 1 Burr. 792, it was held that "upon" does not mean "in." This was a motion for an attachment against an under-sheriff for remitting part of a sentence. One John Shebbear had been condemned to "be set in and upon the pillory," but it appeared that the defendant only stood upon the platform of the pillory, unconfined and at his ease, attended by a servant in livery, both servant and livery being hired for the occasion, holding an umbrella over his head all the time; that his head, hands, neck, or arms, were not at all confined or put into the holes of the pillory, but he sometimes put his hands in the holes in order to rest himself. It appeared, too, that the defendant attended as under-sheriff, "with his wand," and that "he treated the criminal with great complaisance in taking him to and from the pillory." Many affidavits were produced to show that the defendant stood in the manner which had prevailed for thirty or forty years in Middlesex, and that ever since one or two persons who had been locked down in the pillory were killed, it had been customary not to fasten their heads in the middle hole, but only to compel them to stand with the head and face showing through that hole, and their hands in the other holes. Defendant's counsel contended that the sentence of quartering traitors and burning their bowels is never strictly executed, "nor the punishment of burning in the hand, which is constantly and notoriously done in the *face*, and with the knowledge of the judges themselves, *with a cold iron*." This last quoted sentence is as pure a specimen of a bull as ever was seen. If, for *face*, we read *presence*, which is evidently what was meant, we get rid of the idea that it could have been imagined more lenient to brand a man in the *face* than on the *hand*, and of the still more terrific idea that the punishment was transferred, for the sake of mercy, from the *hand* of the offender to the *face* of *his judges*; but we do not get rid of the implied

miracle of burning a man "with a cold iron." We think Mr. Reporter Burrow must have come from the west side of the channel. Lord Mansfield found fault with the defensive affidavits, and remarked: "So many affidavits, so studiously and artfully penned, to be safely sworn in one sense and read in another, are an aggravation." Justice Dennison concurred, and said: "It cannot be pretended that standing erect *upon* the pillory, is being set *in* it." Now, if we had been of counsel for the defendant, we should have cited an ancient and conclusive authority, to wit, *The Two Gentlemen of Verona*, where *Launce*, describing what he has undergone for his ungrateful cur, says: "I have *stood on* the pillory for geese he hath killed." The court, however, went against the defendant, saying the criminal was "a gross offender, an infamous libeller of the king and government," and fined the defendant £50, and ordered him to be imprisoned for two months and until the fine should be paid. The court seemed to lay stress on the umbrella, and we ourselves think that was a refinement of mercy, to say nothing of the servant in livery.

CODIFICATION OF THE COMMON LAW AS TO INSANITY.

I AM sure that the acute minds of many of our most distinguished lawyers have not failed to perceive the incongruities and deficiencies of the present law, and yet there are many who seem adverse to any attempt to make the law of insanity more conformable than it is with medical science. Lord Justice Bramwell told the select committee on the homicide bill: "I think that although the present law lays down such a definition of madness * *that nobody is hardly ever really mad enough to be within it*, yet it is a logical and a good definition." He further stated that in his opinion the law was right, because it might deter many insane persons from crime by the threat of punishment. Lord Justice Blackburn, in his testimony before the select committee on the homicide bill, said: "On the question of what amounts to insanity that would prevent a person being punishable or not, I have read every definition which I ever could meet with, and never was satisfied with one of them, and have endeavored in vain to make one satisfactory to myself. I verily believe that it is not in human power to do it. You must take it that *in every individual case you must look at the circumstances* and do the best you can to say whether it was the disease of the mind which was the cause of the crime, or the party's criminal will." He also said: "But we cannot fail to see that there are cases where the person is clearly not responsible, and yet knew right from wrong." He then goes on to give the case of a woman he tried who had killed one child and was going to kill another, but who fortunately dropped the second child and went to a neighbor, telling her what she had done. This woman clearly knew the difference between right and wrong and knew the character of her act, and on the definition in the *McNaughton* case in 1843, was guilty. Lord Justice Blackburn however, as the woman was a raving maniac, so charged the jury on the ground of exceptional cases that the jury found her "not guilty, on the ground of insanity," and rightly. The Lord Chief Justice of England, in his criticism of Sir Fitzjames Stephens' plan of codifying the law of insanity, said: "As the law as expounded by the judges in the House of Lords now stands, it is only when mental disease produces incapacity to distinguish be-

* Italics are mine.

tween right and wrong that immunity from the penal consequences of crime is admitted. The present bill introduces a new element, the absence of the power of self-control. I concur most heartily in the proposed alteration of the law, *having been always strongly of opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control when destroyed or suspended by mental disease becomes, I think, an essential element of responsibility.*" The Lord Chief Justice of England in his weighty and truly scientific opinion, the intrinsic weight of which is immense, deserves the admiration of both the legal and medical profession all over the world. Lord Moncrief, the Lord Justice Clerk of Scotland, has said from the bench that "in point of fact there are very few lunatics who do not know right from wrong," an opinion which I have myself insisted on before the New York Medico-Legal Society in two different papers read there. If we have the *absence of self-control produced by disease of the body affecting the mind*, in any given case of homicide on trial, it seems to me that every fair-minded lawyer in America will concur in acknowledging that we have here a philosophic or scientific principle on which to found the plea of "not guilty, on the ground of insanity," and one which includes the cases of all insane criminals. It does not seem to me that in the question of what constitutes insanity the members of the two great professions of law and medicine should, or at all need to, entertain essentially different and irreconcilable views, or that on the question of the irresponsibility of criminals who are supposed to be insane there should be such a diversity of opinion as exists to-day. The physician naturally studies the whole history of his patient and his ancestry, and searches for the causes of any bodily and mental changes that he finds, and thus arrives at the true pathology of the disease; while the lawyer and jurist is mainly interested in the *existence of mental disease, its degree and its influence on conduct*. We know far more about insanity than they did the last generation, and it is obviously unfair that laws pertaining to insanity when the knowledge of that disease was comparatively in its infancy, should not be amended to keep pace with our increased knowledge of the pathology of mental disease. In that form of homicidal monomania where the patient is possessed of a sudden, blind, motiveless, unreasoning impulse to kill, I do not think that there is any desire, motive or reasoning intention to commit such a deed, the true pathology of this form of insanity consisting, it seems to me, in a *vis a tergo* received from the diseased action of the brain. We have here a *diseased state of mind with absence of self-control*. We have in suicidal monomania also a *vis a tergo* received from the diseased action of the brain, in which while perhaps our patient exhibits no other mental derangement, with no delusion or other intellectual disorder, the blind, motiveless, unreasoning impulse to suicide which, alike with the homicidal impulse, is the joint result of undoubted insanity. In both these cases the impulse is long enduring and gives rise to actions of patient deliberation and of cunning contrivance. The lawyer and physician are willing alike to recognize disease in the suicidal act; why then, the apparent unwillingness to recognize disease in the homicidal act? We must not look at these questions socially and ethically, but by the aid of the light of modern pathology, as the Lord Chief Justice of England has done already. There are many persons born with a predisposition to madness, and symptoms indicating that disease display themselves at frequent intervals through the whole course of life, but for many years may never reach *such a pitch as to induce those in contact with such persons to treat them as insane*. When an overt act

is committed by such persons, can any one question the value of a careful study of the past life and acts of the accused? His life has exhibited the natural history of insanity, and with our present accurate and trustworthy method of investigation a careful and experienced physician in nervous diseases can clearly point out to the lawyer and jurist the unmistakable evidences of mental disease which the latter, necessarily, alone and unaided could not discover. The lawyer and physician should naturally aid each other in such investigations impartially and by the light of science. I have elsewhere pointed out that epileptics are to be classed in the most homicidal group of all, also that puerperal women and women at the climacteric period are subject at times to dangerous delusions, and also that kleptomania is a peculiarity of a certain number of cases of general paralysis. These facts are classical, and should be so accepted by the judiciary and by the legal profession generally. In a paper on "Mental Responsibility and the Diagnosis of Insanity in Criminal Cases," read before the New York Medico-Legal Society and subsequently published in the *English Journal of Psychological Medicine and Mental Pathology*, I suggested a series of eight questions which, it seemed to me, if adopted by jurists in criminal cases would form a most efficient and just test in any given case. Perhaps the legal profession may prefer the simpler proposition which, as the result of Sir Fitz-james Stephen's attempt to codify the common law of England on insanity may be briefly summed up as follows, viz: *Homicide is not criminal if the person by whom it is committed is, at the time when he commits it, prevented by any disease affecting his mind from controlling his own conduct*. This is very simple and very comprehensive, and therefore the legal profession may very properly prefer it to my own. The eight questions which I proposed in my paper are as follows, viz:

1. Have the prisoner's volitions, impulses or acts been determined or influenced *at all* by insanity, and are his mental functions—thought, feeling and action—so deranged, either together or separately, as to incapacitate him for the relations of life?
2. Does the prisoner come of a stock whose nervous constitution has been vitiated by some defect or ailment calculated to impair its efficiency or damage its operations?
3. Has the prisoner been noticed to display mental infirmities or peculiarities which were due either to hereditary transmission or present mental derangement?
4. *Has the prisoner the ability to control mental action; or has he not sufficient mental power to control the sudden impulses of his disordered mind, and does he act under the blind influence of evil impulses which he can neither regulate nor control?*
5. Has the act been influenced *at all* by hereditary taint which has become intensified so that the morbid element has become quickened into overpowering activity, and so that the moral senses have been overborne by the superior force derived from disease?
6. Was the act effected by, or the product of, insane delusion?
7. Was the act performed without adequate incentive or motive?
8. Does the prisoner manifest excitement or depression, moody, difficult temper, extraordinary proneness to jealousy and suspicion, a habitual extravagance of thought and feeling, an inability to appreciate nice moral distinctions, and finally does he give way to gusts of passion and reckless indulgence of appetite? Some or all of these characteristics in number eight are found generally in connection with transmitted mental infirmity.

In closing this perhaps too lengthy paper, I desire to speak briefly upon the subject of *testamentary capacity*. In my opinion the mental unsoundness of a man

If unconnected with the testamentary disposition, ought not to destroy testamentary capacity. If the will of a person is not affected by, or is not the product of, an insane delusion, it should be regarded as valid. Delusions *per se* should not, I think, void a will. A person may be a monomaniac and yet have sufficient mental capacity to make a valid will. In such a case the mental faculties are often unimpaired and undisturbed. The most important point to be looked into is whether the testator has ignored natural affection and the claims of near relationship in the making of the will in question. The testator's mental faculties must be so far normal that he shall understand the nature of the act and also the consequences of it, and he must also have a clear idea as to the amount of property which he is disposing of. There must be a clear, sound moral sense, and the human instincts and affections must be intact. There must be no insane suspicion or aversion and no loss or impairment of reason and judgment. A person should not be considered capable of making a valid will if the act in question has been the product of, or has been actuated or influenced at all by latent hereditary taint which has influenced his volitions, impulses or acts; or 2d, by mental disease or insanity which has weakened, perverted or destroyed the mental functions.

E. C. M.

AUTHORITY OF HOUSE OF REPRESENTATIVES TO IMPRISON CONTUMACIOUS WITNESS—PRIVILEGE OF MEMBERS OF CONGRESS.

SUPREME COURT OF THE UNITED STATES, FEB. 28, 1881.

KILBOURN, Plaintiff in Error, v. THOMPSON ET AL.

No person can be punished for contumacy as a witness before either house of Congress unless his testimony is required in a matter into which that house has the jurisdiction to inquire. And neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

The constitutional provision as to the privilege of members of Congress for any speech or debate in either house is not limited to words spoken in debate, but applies to written reports, resolutions offered in writing, and to the act of voting whether orally or otherwise in short, to things generally done in a session of the house by one of its members in relation to the business before it.

The House of Representatives, upon the proposed ground that the United States was a creditor of a bankrupt firm by reason of the improvident deposit of public moneys with such firm by the Secretary of the Treasury, that the firm had a valuable interest in a matter known as the real estate pool; that the assignee in bankruptcy of the firm had made a settlement with the other members of the pool to the loss of the creditors of the firm including the United States, and that the courts were powerless to afford adequate redress to the creditors, appointed a committee from its own members to inquire into the nature and history of the pool, the character of the settlement, etc., with powers to send for persons and papers. In the progress of the investigation by this committee plaintiff, a witness subpoenaed before them, refused to state the names of the members of the pool and also to produce records relating to the matters required of him, and repeated his refusal before the House, whereupon, at the instance of the committee and upon their report, the House by resolution ordered the imprisonment of the plaintiff for contempt. In pursuance of this resolution the Speaker of the House issued a warrant to the sergeant-at-arms directing such imprisonment, which was duly executed. In an action for false imprisonment against the sergeant-at-arms and members of the committee,

Held, (1) that the resolution authorizing the investigation was in excess of the constitutional powers of the House; the committee were without lawful authority to compel the plaintiff to testify; the warrant of the speaker was void for want of jurisdiction, and the imprisonment of plaintiff was without lawful authority; and (2) that the provision

of the Federal Constitution that "senators and representatives, for any speech or debate in either house, shall not be questioned in any other place," relieved the committee from liability for resolutions and votes in favor of plaintiff's imprisonment.

IN error to the Supreme Court of the District of Columbia. The opinion states the case.

MILLER, J. The plaintiff in error sued the defendant in that court in an action of trespass for false imprisonment, charging them with taking him from his house with force and arms and detaining him as a prisoner in the common jail of the District for forty-five days without any reasonable or probable cause, contrary to law and against his will.

Michael C. Kerr, who was also sued as one of the defendants, died before service of process, and the suit abated as to him.

John G. Thompson pleaded separately: first, the general issue; and secondly, a special plea of justification, which will be more fully considered, founded on the fact that in what he did he acted as sergeant-at-arms of the House of Representatives of the Congress of the United States, and under its orders.

The other defendants pleaded jointly the general issue, and a plea of justification similar to Thompson's, except that they alleged themselves to have been members of the House of Representatives, and members of a committee of that house, and that what they did was in that capacity and was warranted by the circumstances, which they fully set out in the plea.

To both these special pleas the plaintiff demurred, and his demurrer being overruled, a judgment was rendered for the defendants. The case therefore stands before us as it did in the Supreme Court of the District, on the sufficiency of these special pleas. They are somewhat long, are very full in their statement of the facts which are supposed to justify the imprisonment of the plaintiff, and relying as they do on the privileges of the House of Representatives, they present a question, or rather questions, of serious importance for our consideration.

As the plea of Mr. Thompson sets out the facts on which all the defendants rely, with such slight exceptions as will be noticed specifically in regard to the other defendants, we will here give the substance of it. He alleges that the Congress of the United States was in session at Washington during the time of the trespasses with which defendants are charged. That Michael C. Kerr was speaker of the House of Representatives, George M. Adams was clerk, and he, the defendant, was sergeant-at-arms of that body, duly authorized and required to execute the commands of said house, together with all such process issued by authority thereof as should be directed to him by the speaker. The plea then states that the house being in session on the 24th day of January, A. D. 1876, adopted the following preamble and resolution:

"WHEREAS, The government of the United States is a creditor of the firm of Jay Cooke & Co., now in bankruptcy by order and decree of the District Court of the United States in and for the Eastern District of Pennsylvania, resulting from the improvident deposits made by the Secretary of the Navy of the United States with the London branch of the said house of Jay Cook & Co. of the public moneys; and whereas the matter known as the real-estate pool was only partially inquired into by the late joint select committee to inquire into the affairs of the District of Columbia, in which Jay Cooke & Co. had a large and valuable interest; and whereas Edwin M. Lewis, trustee of the estate and effects of said firm of Jay Cooke & Co., has recently made a settlement of the interest of the estate of Jay Cooke & Co. with the associates of said firm of Jay Cooke & Co., to the disadvantage and loss, as it is alleged, of the numerous creditors of said estate, in-

cluding the government of the United States; and whereas the courts are now powerless, by reason of said settlement, to afford adequate redress to said creditors:

"Resolved, That a special committee of five members of this house, to be selected by the speaker, be appointed to inquire into the nature and history of said real-estate pool, and the character of said settlement, with the amount of property involved, in which Jay Cooke & Co. were interested, and the amount paid or to be paid in said settlement, with power to send for persons and papers, and report to this house."

The plea then alleges the appointment of the other defendants as such committee, with one Platt, who is not sued, and their entry upon the performance of the duties imposed by the resolution.

It is set out that in the progress of this inquiry the plaintiff was duly subpoenaed and came before them, and being questioned as to the members of the real-estate pool, refused to answer the following question on that subject: "Will you please state where each of the five members reside, and will you please state their names?"

The plea that further alleges that "the said Hallet Kilbourn, although ordered and commanded by the said subpoena to bring with him and produce before the said committee certain records, papers and maps relating to said inquiry, still when asked the following question by the said committee: 'Mr. Kilbourn, are you now prepared to produce, in obedience to the subpoena duces tecum, the records which you have been required by the committee to produce?' (which records, papers and maps were pertinent to the question of inquiry) the said Hallet Kilbourn knowingly and willfully refused to produce said records."

It is then shown that the committee reported the matter to the house, and further reported that "the committee are of opinion and report that it is necessary for the efficient prosecution of the inquiry ordered by the house that the said Hallet Kilbourn should be required to respond to the subpoena duces tecum and answer the questions which he has refused to answer; and that there is no sufficient reason why the witness should not obey said subpoena duces tecum and answer the questions which he has refused to answer; and that his refusal as aforesaid is in contempt of this house."

Mr. Kilbourn was then, the plea states, arrested on the speaker's warrant on a charge of contempt and brought before the house, and still refusing to answer the same question when propounded to him by the speaker and to produce the papers demanded of him by the order of the committee, the house passed the following resolution:

"Resolved, That Hallet Kilbourn having been heard by the house, pursuant to the order heretofore made requiring him to show cause why he should not answer questions propounded to him by a committee, and respond to the subpoena duces tecum by obeying the same, and having failed to show sufficient cause why he should not answer said questions and obey said subpoena duces tecum, be and is therefore considered in contempt of said house because of said failure.

"1. Resolved, That in purging himself of the contempt for which Hallet Kilbourn is now in custody, the said Kilbourn shall be required to state to the house whether he is now willing to appear before the committee of the house to whom he has hitherto declined to obey a certain subpoena duces tecum, and to answer certain questions and obey said subpoena duces tecum and answer said questions; and if he answers that he is ready to appear before said committee and obey said subpoena duces tecum, and answer said questions, then said witness shall have the privilege to so appear and obey and answer forthwith, or so soon as said committee can be convened, and that in the mean-

time the witness remain in custody; and in the event that said witness shall answer that he is not ready to so appear before said committee and obey said subpoena duces tecum and make answer to said questions as aforesaid, then that said witness be recommitted to the said custody for the continuance of said contempt, and that such custody shall continue until the said witness shall communicate to this house through said committee that he is ready to appear before said committee and make such answer and obey said subpoena duces tecum; and that in executing this order the sergeant-at-arms shall cause the said Kilbourn to be kept in his custody in the common jail of the District of Columbia."

The speaker thereupon issued to the defendant Thompson, as sergeant-at-arms of the house, his writ with the seal of the house and the speaker's name duly affixed to it, which writ, after reciting the foregoing resolutions in *hac verba*, adds, "Now, therefore, you are hereby commanded to execute the same accordingly."

The plea then avers that under the authority of this writ the defendant Thompson did arrest said Kilbourn, using no more force than was necessary, and kept him in custody in the common jail until he was released by a writ of *habeas corpus* issued by the Hon. David K. Cartter, Chief Justice of the Supreme Court of the District of Columbia, which are the same trespasses complained of, and none other.

The other defendants, after pleading the same matters set out in Thompson's plea, add the following, pertinent to themselves and not to him:

"And these defendants state that they did not in any manner assist in the last mentioned arrest and imprisonment of the said Hallet Kilbourn, nor were they in any way concerned in the same, nor did they order or direct the same, save and except by their votes in favor of the last above mentioned resolutions and order commanding the speaker to issue his warrant for said arrest and imprisonment, and (save and except) by their participation as members in the introduction of and assent to said official acts and proceedings of said house which these defendants did and performed as members of the said House of Representatives in the due discharge of their duties as members of said house, and not otherwise.

"Which are the same several supposed trespasses whereof the said Hallet Kilbourn hath above in his said declaration complained against these defendants, and not other or different, with this, that these defendants do aver that the said Hallet Kilbourn, the now plaintiff, and the said Hallet Kilbourn in the said resolutions, orders, and warrants respectively mentioned, was and is one and the same person, and that at the said several times in this plea mentioned, and during all the time therein mentioned, the said Congress of the United States was assembled and sitting, to wit, at Washington aforesaid, in the county aforesaid, and these defendants were and are members of the House of Representatives, one of the houses of said Congress, and as such members, in said participation in the action of the house as above set forth, voted in favor of said resolutions and orders as above set forth, and saving and excepting said participation in the action of the house as set forth in the body of this plea, they had no concern or connection in any manner or way with said supposed trespasses complained of against them by the plaintiff; and this these defendants are ready to verify."

The argument before us has assumed a very wide range, and includes the discussion of almost every suggestion that can well be conceived on the subject. The two extremes of the controversy are, the proposition on the part of the plaintiff that the House of Representatives has no power whatever to punish for a contempt of its authority; and on the part of defendants,

that such power undoubtedly exists, and when that body has formally exercised it, it must be presumed that it was rightfully exercised.

This latter proposition assumes the form of expression sometimes used with reference to courts of justice of general jurisdiction, that having the power to punish for contempts, the judgment of the house that a person is guilty of such contempt is conclusive everywhere.

Conceding for the sake of the argument that there are cases in which one of the two bodies that make together the Congress of the United States may punish for contempt of its authority or disregard of its orders, it will scarcely be contended by the most ardent advocate of their power in that respect that it is unlimited.

The power of Congress itself, when acting through the concurrence of both branches, is a power dependent solely on the Constitution. Such powers as are not found in that instrument, either by express grant or by fair implication from what is granted, are "reserved to the States respectively, or to the people." Of course neither branch of Congress, when acting separately, can lawfully exercise more power than is conferred by the Constitution on the whole body, except in the few instances where authority is conferred on either house separately, as in the case of impeachments. No general power of inflicting punishment by the Congress of the United States is found in that instrument. It contains in the provision that no "person shall be deprived of life, liberty or property without due process of law," the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court and by others of the highest authority that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established. An act of Congress, which proposed to adjudge a man guilty of a crime and inflict the punishment, would be conceded by all thinking men to be unauthorized by any thing in the Constitution. That instrument, however, is not wholly silent as to the authority of the separate branches of Congress to inflict punishment. It authorizes each house to punish its own members. The third clause of the fifteenth section of the first article declares that "Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." And in the clause just preceding it is said that they "may be authorized to compel the attendance of absent members in such manner and under such penalties as each house may provide." These provisions are equally instructive in what they authorize and in what they do not authorize. There is no express power in that instrument conferred on either house of Congress to punish for contempts.

The advocates of this power have therefore resorted to an implication of its existence founded on two principal arguments. These are: 1. Its exercise by the House of Commons of England, from which country we, it is said, have derived our system of parliamentary law; and 2. The necessity of such a power to enable the two houses of Congress to perform the duties and exercise the powers which the Constitution has conferred on them.

That the power to punish for contempt has been exercised by the House of Commons in numerous instances is well known to the general student of history and is authenticated by the rolls of the Parliament. And there is no question but that this has been upheld by the courts of Westminster Hall. Among the most notable of these latter cases are the judgments of the Court of King's Bench in the case of *Brass Colby*, Lord Mayor of London, 8 Wilson, 188, decided in the year 1771; the case of *Burdett v. Abbott*, 14 East, 1, in 1811, in which the opinion was delivered by Lord Ellen-

borough, and in the case of the *Sheriff of Middlesex*, in 11 Ad. & El. 273, in 1840. Opinion by Lord Denman, Ch. J.

It is important, however, to understand on what principle this power in the House of Commons rests, that we may see whether it is applicable to the two houses of Congress, and if it be, whether there are limitations to its exercise.

While there is in the adjudged cases in the English courts little agreement of opinion as to the extent of this power, and the liability of its exercise to be inquired into by the courts, there is no difference of opinion as to its origin. This goes back to the period when the bishops, the lords, and the knights and burgesses met in one body, and were, when so assembled, called the High Court of Parliament.

They were not only called so, but the assembled Parliament exercised the highest functions of a court of judicature, representing in that respect the judicial authority of the king in his Court of Parliament. While this body enacted laws, it also rendered judgments in matters of private right, which, when approved by the king, were recognized as valid. Upon the separation of the Lords and Commons into two separate bodies, holding their sessions in different chambers, and hence called the House of Lords and the House of Commons, the judicial function of reviewing by appeal the decisions of the courts of Westminster Hall passed to the House of Lords, where it has been exercised without dispute ever since. To the Commons was left the power of impeachment, and perhaps others of a judicial character, and jointly they exercised, until a very recent period, the power of passing bills of attainder for treason and other high crimes, which are in their nature punishment for crime declared judicially by the High Court of Parliament of the kingdom of England.

It is upon this idea that the two houses of Parliament were each courts of judicature originally, which, though divested by usage and by statute, probably, of many of their judicial functions, have yet retained so much of that power as enables them, like any other court, to punish for a contempt of these privileges and authority, that the power rests.

In the case of *Burdett v. Abbott*, already referred to as sustaining this power in the Commons, Mr. Justice Bailey said, in support of the judgment of the Court of King's Bench: "In an early authority upon that subject, in Lord Coke, 4 Inst. 23, it is expressly laid down that the House of Commons has not only a legislative character and authority, but is also a court of judicature; and there are instances put there in which the power of committing to prison for contempts has been exercised by the House of Commons, and this, too, in cases of libel. If, then (said he) the house be a court of judicature, it must, as is in a degree admitted by plaintiff's counsel, have the power of supporting its own dignity as essential to itself; and without power of commitment for contempts it could not support its dignity." In the opinion of Lord Ellenborough in the same case, after stating that the separation of the two houses of Parliament seems to have taken place as early as the 49th of Henry III, about the time of the battle of Evesham, he says the separation was probably effected by a formal act for that purpose by the king and Parliament. He then adds: "The privileges which have since been enjoyed, and the functions which have been uniformly exercised by each branch of the Legislature, with the knowledge and acquiescence of the other house and of the king, must be presumed to be privileges and functions which then, that is, at the very period of separation, were statutorily assigned to each." He then asks: "Can the High Court of Parliament, or either of the two houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts."

which is acknowledged to belong, and is daily exercised as belonging to every superior court of law, of less dignity undoubtedly than itself?" This power is here distinctly placed on the ground of the judicial character of Parliament, which is compared in that respect with the other courts of superior jurisdiction and is said to be of a dignity higher than they.

In the earlier case of *Colby*, Lord Mayor of London, De Gray, Chief Justice, speaking of the House of Commons, which had committed the lord mayor to the Tower of London for having arrested by judicial process one of its messengers, says: "Such an assembly must certainly have such authority, and it is legal because necessary. Lord Coke says they have a judicial power; each member has a judicial seat in the house; he speaks of matters of judicature of the House of Commons." Mr. Justice Blackstone, in concurring in the judgment, said: "The House of Commons is a Supreme Court, and they are judges of their own privileges and contempts, more especially with reference to their own members." Mr. Justice Gould also laid stress upon the fact that the "House of Commons may be properly called judges," and cites 4 Coke's Inst. 47, to show that an alien cannot be elected to Parliament, because such a person can hold no place of judicature."

In the celebrated case of *Stockdale v. Hansard*, 9 Ad. & El. 1, decided in 1838, this doctrine of the omnipotence of the House of Commons in the assertion of its privileges received its first serious check in a court of law. The House of Commons had ordered the printing and publishing of a report of one of its committees, which was done by Hansard, the official printer of the body. This report contained matter on which Stockdale sued Hansard for libel. Hansard pleaded the privilege of the house, under whose orders he acted, and the question on demurrer was, assuming the matter published to be libellous in its character, did the order of the house protect the publication?

Sir John Campbell, attorney-general, in an exhaustive argument in defense of the prerogative of the house, based it upon two principal propositions, namely, that the House of Commons is a court of judicature, possessing the same right to punish for contempt that other courts have, and that its powers and privileges rest upon the *lex parliamenti*—the laws and customs of Parliament. These, he says, and cites authorities to show it, are unknown to the judges and lawyers of common-law courts, and rest exclusively in the knowledge and memory of the members of the two houses. He argues, therefore, that their judgments and orders on matters pertaining to these privileges are conclusive, and cannot be disputed or reviewed by the ordinary courts of judicature.

Lord Denman, in a masterly opinion, concurred in by the other judges of the King's Bench, ridicules the idea of the existence of a body of laws and customs of Parliament unknown and unknowable to anybody else but the members of the two houses, and holds with an incontrovertible logic that when the rights of the citizen are at stake in a court of justice, it must, if these privileges are set up to his prejudice, examine for itself into the nature and character of those laws, and decide upon their extent and effect upon the rights of the parties before the court. While admitting, as he does in the subsequent case of the *Sheriff of Middlesex*, in 11 Ad. & El., that when a person is committed by the House of Commons for a contempt in regard to a matter of which that house had jurisdiction, no other court can relieve the party from the punishment which it may lawfully inflict, he holds that the question of the jurisdiction of the house is always open to the inquiry of the courts in a case where that question is properly presented.

But perhaps the most satisfactory discussion of this subject, as applicable to the proposition that the two houses of Congress are invested with the same power

of punishing for contempt, and with the same peculiar privileges, and the same power of enforcing them, which belonged by ancient usage to the houses of the English Parliament, is to be found in some recent decisions of the Privy Council. That body is by its constitution vested with authority to hear and decide appeals from the courts of the provinces and colonies of the kingdom.

The leading case is that of *Keilly v. Carson and others*, 4 Moore's P. C. C. 13, decided in 1841. There were present at the hearing, Lord Chancellor Lyndhurst, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, Vice-Chancellor Shadwell, the chief justice of the Common Pleas, Mr. Justice Erskine, Dr. Lushington, and Mr. Baron Parke, who delivered the opinion, which seems to have received the concurrence of all the eminent judges named.

Measuring the weight of its authority by the reputation of the judges who sat in the case and agreed to the opinion, it would be difficult to find one more entitled on that score to be received as conclusive on the points which it decided.

The case was an appeal from the Supreme Court of Judicature of Newfoundland. John Kent, one of the members of the House of Assembly of that island, reported to that body that Keilly, the appellant, had been guilty of a contempt of the privileges of the house in using toward him reproaches, in gross and threatening language, for observations made by Kent in the house; adding, "your privilege shall not protect you." Keilly was brought before the house and added to his offense by boisterous and violent language, and was finally committed to jail under an order of the house and the warrant of the speaker. The appellant sued Carson, the speaker, Kent, and other members, and Walsh, the messenger, who pleaded the facts above stated and relied on the authority of the house as sufficient protection. The judgment of the court of Newfoundland was for the defendants, holding the plea good.

This judgment was supported in argument before the Privy Council on the ground that the legislative assembly of Newfoundland had the same parliamentary rights and privileges which belonged by usage to the Parliament of England, and that, if this were not so, it was a necessary incident to every body exercising legislative functions to punish for contempt of its authority. The case was twice argued in the Privy Council, on which its previous judgment in the case of *Beaumont v. Barrett*, 1 Moore's P. C. C. 76, was much urged, in which both those propositions had been asserted in the opinion of Baron Parke. Referring to that case as an authority for the proposition that the power to punish for a contempt was incident to every legislative body, the opinion of Baron Parke in the later case uses this language: "There is no decision of a court of justice, nor other authority, in favor of the right, except that of the case of *Beaumont v. Barrett*, decided by the judicial committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their lordships do not consider that case as one by which they ought to be bound in deciding the present question. The opinion of their lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every legislative assembly, was not the only ground on which that judgment rested, and therefore was in some degree extra-judicial; but besides this, it was stated to be founded entirely on the *dictum* of Lord Ellenborough in *Burdett v. Abbott*, which *dictum*, we all think, cannot be taken as authority for the abstract proposition that every legislative body has the power of committing for contempt. The observation was made by his lordship with reference to the peculiar

powers of Parliament, and ought not, we all think, to be extended any further. We all, therefore, think that the opinion expressed by myself in *Beaumont v. Barrett* ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the common law that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the exercise of their functions and duties, but they have not what they erroneously supposed themselves to possess—the same exclusive privileges which the law of England has annexed to the House of Parliament." In another part of the opinion the subject is thus disposed of: "It is said, however, that this power belongs to the House of Commons of England; and this, it is contended, affords us authority for holding that it belongs, as a legal incident by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament before its division, and the House of Lords and Commons since, are invested with many privileges, that of punishment for contempt being one." The opinion also discusses at length the necessity of this power in a legislative body for its protection, and to enable it to discharge its law-making functions, and decides against the proposition. But the case before us does not require us to go so far, as we have cited it to show that the powers and privileges of the House of Commons of England, on the subject of punishment for contempts, rest on principles which have no application to other legislative bodies, and certainly can have none to the House of Representatives of the United States—a body which is in no sense a court, which exercises no functions derived from its once having been a part of the highest court of the realm, and whose functions, so far as they partake in any degree of that character, are limited to punishing its own members and determining their election. The case, however, which we have just been considering, was followed in the same body by *Fenton v. Hampton*, 11 Moore's P. C. C. 347, and *Doyle v. Falconer*, L. R., 1 P. C. App. 328, in both of which, on appeals from other provinces of the kingdom, the doctrine of the case of *Kelly v. Carson and others*, is fully reaffirmed.

We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or breach of its privileges, can derive no support from the precedents and practices of the two houses of the English Parliament nor the adjudged cases in which the English courts have upheld these practices. Nor can it be said, taking what has fallen from the English judges, and especially the later cases on which we have just commented, that much aid is given to the doctrine, that this power exists as one necessary to enable either house of Congress to exercise successfully their function of legislation.

This latter proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.

As we have already said, the Constitution expressly empowers each house to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the house for the preservation of order.

So, also, the penalty which each house is authorized to inflict in order to compel the attendance of absent

members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.

Each house is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature.

The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means, that courts of justice can in like cases.

Whether the power of punishment in either house by fine or imprisonment goes beyond this or not, we are sure that no person can be punished for contumacy as a witness before either house, unless his testimony is required in a matter into which that house has jurisdiction to inquire, and we feel equally sure that neither of these bodies possesses the general power of making inquiry into the private affairs of the citizen.

It is believed to be one of the chief merits of the American system of written constitution law, that all the powers intrusted to governments, whether State or National, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other. To these general propositions there are in the Constitution of the United States some important exceptions. One of these is, that the president is so far made a part of the legislative power, that his assent is required to the enactment of all statutes and resolutions of Congress.

This, however, is so only to a limited extent, for a bill may become a law notwithstanding the refusal of the president to approve it, by a vote of two-thirds of each house of the Legislature.

So, also, the Senate is made a partaker in the functions of appointing officers, and making treaties, which are supposed to be properly executive, by requiring its consent to the appointment of such officers and the ratification of treaties. The Senate also exercises the judicial power of trying impeachments and the house of preferring articles of impeachment.

In the main, however, that instrument, the model on which are constructed the fundamental laws of the States, has blocked out with singular precision, and in bold lines, in its three primary articles, the allotment of power to the executive, the legislative, and judicial departments of the government. It also remains true, as a general rule, that the powers confided by the Constitution to one of these departments cannot be exercised by another.

It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is

not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal government, presents powerful and growing temptations to those to whom that exercise is intrusted to overstep the just boundaries of their own department, and enter upon the domain of one of the others, or to assume powers not intrusted to either of them.

The House of Representatives having the exclusive right to originate bills of revenue, whether by taxation or otherwise; having with the Senate the right to declare war, and to fix the compensation of all officers and servants of the government, and vote the supplies which must pay that compensation; and being also the most numerous body of all those engaged in the exercise of the primary powers of the government, is for these reasons least of all liable to suffer encroachments upon its appropriate domain.

By reason, also, of its popular origin, and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people—the great source of all power in this country—encroachments by that body on the domain of co-ordinate branches of the government would be received with less distrust than a similar exercise of unwarranted power in any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separate from and independent of all other depositaries of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it, that it should receive the most careful scrutiny.

In looking to the preamble and resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because the power was in its nature clearly judicial.

The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress, or either branch of it, save in the cases specifically enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make was one that was judicial in its character, and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it is not legislative.

The preamble to the resolution recites that the government of the United States is a creditor of Jay Cooke & Co., then in bankruptcy in the District Court of the United States for the Eastern District of Pennsylvania.

If the United States is a creditor of any citizen, or of any one else on whom process can be served, the usual, the only legal mode of enforcing payment of the debt is by a resort to a court of justice. For this purpose, among others, Congress has created courts of the United States, and officers have been appointed to prosecute the pleas of the government in these courts.

The District Court for the Eastern District of Pennsylvania is one of them, and according to the recital of the preamble, had taken jurisdiction of the subject-matter of Jay Cooke & Co.'s indebtedness to the United States, and had the whole subject before it for action at the time the proceeding in Congress was initiated. That this indebtedness resulted, as the preamble states, from the improvidence of a secretary of the navy, does not change the nature of the suit in the court nor vary the remedies by which the debt is to be recovered. If, indeed, any purpose had been avowed to impeach the secretary, the whole aspect of the case would have been changed. But no such purpose is disclosed. None can be inferred from this preamble, and the characterization of the conduct of the secretary by the term improvident, and the absence of any words implying suspicion of criminality, repel the idea of such purpose, for the secretary could only be impeached for "high crimes and misdemeanors."

The preamble then refers to "the real estate pool," in which it is said Jay Cooke & Co. had a large interest, as something well known and understood, and which had been the subject of a partial investigation by the previous Congress, and alleges that the trustee in bankruptcy of Jay Cooke & Co. had made a settlement of the interest of Jay Cooke & Co. with the associates of the firm of Jay Cooke & Co., to the disadvantage and loss of their numerous creditors, including the government of the United States, by reason of which the courts are powerless to afford adequate redress to said creditors.

Several very pertinent inquiries suggest themselves as arising out of this short preamble.

How could the House of Representatives know, until it had been fairly tried, that the courts were powerless to redress the creditors of Jay Cooke & Co.? The matter was still pending in a court, and what right had the Congress of the United States to interfere with a suit pending in a court of competent jurisdiction? Again, what inadequacy of power existed in the court, or, as the preamble assumes, in all courts, to give redress which could lawfully be supplied by an investigation by a committee of one house of Congress, or by any act or resolution of Congress on the subject? The case being one of a judicial nature, for which the power of the courts usually afford the only remedy, it may well be supposed that those powers were more appropriate and more efficient in aid of such relief than the powers which belong to a body whose function is exclusively legislative. If the settlement to which the preamble refers as the principal reason why the courts are rendered powerless, was obtained by fraud, or was without authority, or for any conceivable reason could be set aside or avoided, it should be done by some appropriate proceeding in the court which had the whole matter before it, and which had all the power in that case proper to be intrusted to any body, and not by Congress or by any power to be conferred on a committee of one of the two houses.

The resolution adopted as a sequence of this preamble contains no hint of any intention of final action by Congress on the subject. In all the argument of the case no suggestion has been made of what the House of Representatives or the Congress could have done in the way of remedying the wrong or securing the creditors of Jay Cooke & Co., or even the United States. Was it to be simply a fruitless investigation into the personal affairs of individuals? If so, the House of Representatives had no power or authority in the matter more than any other equal number of gentlemen interested for the government of their country. By fruitless we mean that it could result in no valid legislation on the subject to which the inquiry referred.

What was this committee charged to do? To inquire into the nature and history of the real estate pool.

How indefinite! What was the real estate pool? Is it charged with any crime or offense? If so, the courts alone can punish the members of it. Is it charged with a fraud against the government? Here again the courts, and they alone, can afford a remedy. Was it a corporation whose powers Congress could repeal? There is no suggestion of the kind. The word "pool," in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic, and the gravamen of the whole proceeding is that a debtor of the United States may be found to have an interest in the pool. Can the rights of the pool, or of its members, and the rights of the debtor, and of the creditor of the debtor, be determined by the report of a committee or by an act of Congress? If they cannot, what authority has the house to enter upon this investigation into the private affairs of individuals who hold no office under the government?

The Court of Exchequer of England was originally organized solely to entertain suits of the king against the debtors of the crown. But after a while, when the other courts of Westminster Hall became overcrowded with business, and it became desirable to open the Court of Exchequer to the general administration of justice, a party was allowed to bring any common-law action in that court, on an allegation that the plaintiff was debtor to the king, and the recovery in the action would enable him to respond to the king's debt. After a while the court refused to allow this allegation to be controverted, and so, by this fiction, the court came from a very limited to be one of general jurisdiction. Such an enlargement of jurisdiction would not now be tolerated in England, and it is hoped not in this country of written Constitutions and laws; but it looks very like it when, upon the allegation that the United States is a creditor of a man who has an interest in some other man's business, the affairs of the latter can be subjected to the unlimited scrutiny or investigation of a congressional committee.

We are of opinion, for these reasons, that the resolution of the House of Representatives authorizing the investigation, was in excess of the power conferred on that body by the Constitution; that the committee, therefore, had no lawful authority to require Mr. Kilbourn to testify as a witness beyond what he voluntarily chose to tell; that the orders and resolutions of the house, and the warrant of the speaker, under which Mr. Kilbourn was imprisoned, are in like manner void for want of jurisdiction in that body, and that his imprisonment was without any lawful authority.

At this point of the inquiry we are met by the case of *Anderson v. Dunn*, decided by this court in 1821, reported in 6 Wheaton, 204, and in many respects analogous to the one now under consideration. In that case Anderson sued Dunn for false imprisonment, and Dunn justified under a warrant of the House of Representatives directed to him as sergeant-at-arms of that body. The warrant recited that Anderson had been found by the house "guilty of a breach of the privileges of the house, and of a high contempt of the dignity and authority of the same." The warrant directed the sergeant-at-arms to bring him before the house, when, by its order, he was reprimanded by the speaker. Neither the warrant nor the plea described or gave any clue to the nature of the act which was held by the house to be a contempt. Nor can it be clearly ascertained from the report of the case what it was, though a slight inference may be derived from something in one of the arguments of counsel, that it was an attempt to bribe a member.

But however that may be, the defense of the sergeant-at-arms rested on the broad ground that the house, having found the plaintiff guilty of a contempt, and the speaker, under the order of the house, having

issued a warrant for his arrest, that alone was sufficient authority for defendant to take him into custody, and this court held the plea good.

It may be said that since the order of the house and the warrant of the speaker, and the plea of the sergeant-at-arms, do not disclose the ground on which the plaintiff was held guilty of a contempt, but state the finding of the house in general terms as a judgment of guilty, and as the court placed its decision on the ground that such a judgment was conclusive in the action against the officer who executed the warrant, it is no precedent for a case where the plea establishes, as we have shown it does in this case by its recital of the facts, that the house has exceeded its authority.

This is in fact a substantial difference. But the court in its reasoning goes beyond this, and though the grounds of the decision are not very clearly stated, we take it to be this: that there is in some cases a power in each house of Congress to punish for contempt; that this power is analogous to that exercised by courts of justice, and that it is the well-established doctrine that when it appears that a prisoner is held under order of a court of general jurisdiction for a contempt of its authority, no other court will discharge the prisoner or make further inquiry into the cause of his commitment. That this is the general rule, though somewhat modified since that case was decided, as regards the relations of one court to another, must be conceded.

But we do not concede that the houses of Congress possess this general power of punishing for contempt. The cases in which they can do this are very limited, as we have already attempted to show. If they are proceeding in a matter beyond their legitimate cognizance, we are of opinion that this can be shown, and we cannot give our assent to the principle that by the mere act of asserting a person to be guilty of a contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases, or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceeding. See *Williamson v. Berry*, 8 How. 540; *Thompson v. Whitman*, 18 Wall. 457; *Knowles v. The Gas Light & Coke Co.*, 19 id. 58; *Pennyroy v. Neff*, 95 U. S. 712.

The case of *Anderson v. Dunn* was decided before the case of *Stockdale v. Hansard*, and the more recent cases in the Privy Council to which we have referred. It was decided as a case of the first impression in this court, and undoubtedly under pressure of the strong rulings of the English courts in favor of the privileges of the two houses of Parliament. Such is not the doctrine, however, of the English courts to-day. In the case of *Stockdale v. Hansard*, 9 Ad. & Ell. 229, Lord Denman says: "The house (of Commons) is not a court of law at all in the sense in which that term can alone be properly applied here. Neither originally nor by appeal can it decide a matter in litigation between two parties; it has no means of doing so; it claims no such power; power of inquiry and accusation it has, but it decides nothing judicially, except when it is itself a party, in cases of contempt. * * *. Considered merely as resolutions or acts, I have yet to learn that this court is to be restrained by the dignity or the power of any body, however exalted, from fearlessly, though respectfully, examining their reasonableness and justice, when the rights of third persons in litigation before us depend upon it." Again, he says: "Let me suppose, by way of illustration, an extreme case: the House of Commons resolves that any one wearing

a dress of a particular manufacture is guilty of a breach of privilege, and orders the arrest of such persons by the constable of the parish. An arrest is made and action brought, to which the order of the house is pleaded as a justification. In such a case the plaintiff's counsel would insist on the distinction between privilege and power, and no lawyer can seriously doubt that it exists; but the argument confounds them and forbids us to inquire into any particular case, whether it ranges under the one or the other. I can find no principle which sustains this."

The case of *Keilly v. Carson and others*, in 4 Moore's P. C. 13, from which we have before quoted so largely, held that the order of the assembly, finding the plaintiff guilty of a contempt, was no defense to the action for imprisonment. And it is to be observed that the case of *Anderson v. Dunn* was cited there in argument.

But we have found no better expression of the true principle on this subject than the language of Mr. Justice Hoar, in the Supreme Court of Massachusetts, reported in 14 Gray, 238, in the case of *Burnham v. Morrissey*. That was a case in which the plaintiff was imprisoned under an order of the House of Representatives of the Massachusetts Legislature for refusing to answer certain questions as a witness and to produce certain books and papers. The opinion, or statement rather, was concurred in by all the court, including the venerable Chief Justice Shaw.

"The House of Representatives (says the court) is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That house is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void. The House of Representatives has the power under the Constitution to imprison for contempt, and the power is limited to the cases expressly provided for by the Constitution, or to cases where the power is necessarily implied from these constitutional functions and to the proper performance of which it is essential."

In this statement of the law, and in the principles there laid down, we fully concur.

We must therefore hold, notwithstanding what is said in the case of *Anderson v. Dunn*, that the resolution of the House of Representatives finding Mr. Kilbourn guilty of contempt, and the warrant of its speaker for his commitment to prison, are not conclusive in this case, and in fact are no justification, because, as the whole plea shows, the house was without authority in the matter.

It remains to consider the matter special to the other defendants set out in their plea, which claims the protection due to their character as members of the House of Representatives. In support of this defense they allege that they did not in any manner assist in the arrest of Kilbourn or his imprisonment, nor did they order or direct the same, except by their votes and by their participation as members in the introduction of, and assent to, the official acts and proceedings of the house, which they did and performed as members of the house in the due discharge of their duties, and not otherwise.

As these defendants did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him, they can only be held liable on the charge made against them as persons who had ordered or directed in the matter, so as to become responsible for the acts which they directed.

The general doctrine that the person who procures the arrest of another by judicial process, by instituting and conducting the proceedings, is liable to an action for false imprisonment, where he acts without probable cause, is not to be controverted. Nor can it be denied that he who assumes the authority to order the imprisonment of another is responsible for the acts of the person to whom such order is given, when the arrest is without justification. The plea of these defendants shows that it was they who initiated the proceedings under which plaintiff was arrested. It was they who reported to the house his refusal to answer the questions which they had put to him, and to produce the books and papers which they had demanded of him. They expressed the opinion in that report that plaintiff was guilty of a contempt of the authority of the house in so acting. It is a fair inference from this plea, that they were the active parties in setting on foot the proceeding by which he was adjudged guilty of a contempt, and in procuring the passage of that resolution.

If they had done this in any ordinary tribunal, without probable cause, they would have been liable for the action which they had thus promoted.

The House of Representatives is not an ordinary tribunal. The defendants set up the protection of the Constitution, under which they do business as part of the Congress of the United States. That Constitution declares that the Senators and Representatives "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

Is what the defendants did in the matter in hand covered by this provision? Is a resolution offered by a member speech or debate, within the meaning of the clause? Does its protection extend to the report which they made to the house of Kilbourn's delinquency? To the expression of opinion that he was in contempt of the authority of the house? To their vote in favor of the resolution under which he was imprisoned? If these questions be answered in the affirmative, they cannot be brought in question for their action in a court of justice or in any other place. And yet, if a report, or a resolution, or a vote is not speech or debate, of what value is the constitutional protection?

We may perhaps find some aid in ascertaining the meaning of this provision if we can find out its source, and fortunately in this there is no difficulty. For while the framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they did incorporate such parts of it, and with it such privileges of Parliament, as they thought proper to be applied to the two houses of Congress. Some of these we have already referred to, as the right to make rules of procedure, to determine the election and qualification of its members, to preserve order, etc. In the sentence we have just cited another part of the privileges of Parliament are made privileges of Congress. The freedom from arrest and freedom of speech in the two houses of Parliament were long subjects of contest between the Tudor and Stuart kings and the House of Commons. When, however, the revolution of 1688 expelled the last of the Stuarts and introduced a new dynasty, many of these questions were settled by a bill of rights, formally declared by the Parliament and assented to by the crown. 1 William and Mary, 2 Statute, chap. 2. One of these dec-

larations is "that the freedom of speech, and debates, and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament."

In the case of *Stockdale v. Hansard*, 9 Ad. & El. 113, Lord Denman, speaking on this subject, says:

"The privilege of having their debates unquestioned, though denied when the members began to speak their minds freely in the time of Queen Elizabeth and punished in its exercise both by that princess and her two successors, was soon clearly perceived to be indispensable and universally acknowledged. By consequence, whatever is done within the walls of either assembly must pass without question in any other place. For speeches made in Parliament by a member to the prejudice of any other person, or hazardous to the public peace, that member enjoys complete impunity. For every paper signed by the speaker by order of the house, though to the last degree calumnious, or even if it brought personal suffering upon individuals, the speaker cannot be arraigned in a court of justice. But if the calumnious or inflammatory speeches should be reported and published, the law will attach responsibilities on the publisher. So if the speaker by authority of the house order an illegal act, though that authority shall exempt him from question, his order shall no more justify the person who executed it than King Charles' warrant for levying ship-money could justify his revenue officer."

Taking this to be a sound statement of the legal effect of the bill of rights and of the parliamentary law of England, it may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source.

Many of the colonies, which afterward became States in our Union, had similar provisions in their charters or in bills of rights, which were part of their fundamental laws, and the general idea in all of them, however expressed, must have been the same and must have been in the minds of the members of the constitutional convention. In the Constitution of the State of Massachusetts of 1780, adopted during the war of the Revolution, the twenty-first article of the bill of rights embodies the principle in the following language:

"The freedom of deliberation, speech and debate in either house of the Legislature is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever."

This article received a construction as early as 1808 in the Supreme Court of that State in the case of *Coffin v. Coffin*, 4 Mass. 1, in which Chief Justice Parsons delivered the opinion. The case was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts Legislature. The words were not delivered in the course of a regular address or speech, though on the floor of the house while in session, but were used in a conversation between three of the members when neither of them were addressing the chair. It had relation however to a matter which had a few moments before been under discussion. The court, speaking of this article of the bill of rights, the protection of which had been invoked in the plea, said: "These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the right of the people by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think (said the chief justice) that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to

every other act resulting from the nature and the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the house, or irregular and against those rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber."

The report states that the other judges, namely, Sedgwick, Sewall, Thacher and Parker, concurred in the opinion.

This is, perhaps, the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight. We have been unable to find any decision of a Federal court on this clause of the section 6 of article 1, though the previous clause of the same section concerning exemption from arrest has been often construed.

Mr. Justice Story (§ 866 of his Commentaries on the Constitution) says: "The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual. This privilege also (he says) is derived from the practice of the British Parliament, and was in full exercise in our colonial legislation, and now belongs to the legislation of every State in the Union as matter of constitutional right."

It seems to us that the views expressed in the authorities we have cited are sound and applicable to this case. It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committee, to resolutions offered, which though in writing must be reproduced in speech, and to the act of voting whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the house by one of its members in relation to the business before it.

It is not necessary to decide here that there may not be things done, in the one house or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible. If we could suppose the members of these bodies so far to forget their high functions and the noble instrument under which they act as to imitate the Long Parliament in the execution of the Chief Magistrate of the nation, or to follow the example of the French Assembly in assuming the function of a court for capital punishment, we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate. In this, as in other matters which have been pressed on our attention, we prefer to decide only what is necessary to the case in hand, and we think the plea set up by those of the defendants who were members of the house is a good defense, and the judgment of the court overruling the demurrer to it and giving judgment for those defendants is affirmed. As to Thompson, the judgment is reversed and the case remanded for further proceedings.

NEW YORK COURT OF APPEALS ABSTRACT.

BANK — LIEN ON MONEYS OF DEPOSITOR — DOES NOT APPLY TO TRUST MONEYS. — The rule that a bank has a general lien upon all moneys in its possession belonging to a depositor is a part of the law merchant and well established. It rests upon the principle that as the depositor is a debtor to the bank the moneys may

be justly applied to pay such debt, and it also arises from the contract implied to exist from the relation of the parties and the operation of law. More possession is not enough, and the debt must have matured. Each of the parties must be a debtor to the other. *Jordan v. Shoe & Leather Bk.*, 74 N. Y. 472. The rule does not interfere with the rights of third parties where moneys may have become mingled with those belonging to the depositor, to assert and maintain a claim to the same while in possession of the bank. *Van Allen v. American Exch. Bk.*, 52 N. Y. 1. It must be made clear that the moneys deposited actually belong to the person from whom the account is due, to entitle the bank to apply them in payment of its demand. In this case the firm of R. & C., in the course of their business, received various sums of money on account of captains of vessels, and on account of various freights of vessels, consigned to them, and deposited such moneys in their bank account. They became embarrassed in business and in consequence thereof, and in order to keep the funds received by them from being attached by creditors, they caused an account to be opened by A. in the defendant bank, and the moneys and checks received were deposited to the credit of A. These moneys, etc., were not actually the property of the firm, and they had no right or title to the same, and they were deposited solely for the benefit of the persons whose property they were. *Held*, that the defendant bank had no lien upon this deposit to satisfy a debt due it from the firm, and that A. was entitled to claim the same against the bank. The rule that when moneys held in trust have been mingled with other moneys of the trustees, so as to be indistinguishable, that the *cestui que trust* cannot claim a specific lien upon the property or funds (*Ferris v. Van Vechte*, 73 N. Y. 113) has no application where the money is held in trust to pay certain creditors, and cannot be invoked to uphold defendant's claim to the fund in this case. That none of the creditors of the firm made any claim for the same would not aid defendant. Nor would it be an answer that A. acted as agent of the persons entitled to the funds, in making the deposit, or that defendant had no notice of the facts. Judgment reversed and new trial ordered. *Falkland v. St. Nicholas National Bank*. Opinion by Miller, J. [Decided Feb. 11, 1881.]

LIBEL—JUSTIFICATION—SERIAL PUBLICATION EXCEEDING STIPULATED NUMBER CHARGED AS SWINDLE.—In an action for libel the substance of the alleged libel was that plaintiffs procured subscriptions to a serial work called "Our Country," to be published in numbers at the subscription price of twenty-five cents each, being a history of the United States to July, 1876, upon the representation made in the prospectus or conditions of publication, that "the work will be fully completed in forty-eight numbers," and that the forty-eighth number, which had been published, broke off abruptly in the middle of a sentence, and that subscribers were informed that in order to have the completed work or a complete work they must take twelve numbers more. This was characterized in the article as a "contemptible swindle." There was evidence that the original prospectus issued by plaintiffs represented that the work would be fully completed in forty-eight parts, and subscriptions were procured on this basis. The forty-eighth number was sent to subscribers without any index and closing with an incomplete sentence. The original prospectus, which had been published on the back of preceding numbers, was changed in that one so as to read: "The work will be fully completed in sixty parts." The same price per number was asked. *Held*, that there was sufficient to justify a jury in finding that the alleged libel was substantially true, and that a circular issued and delivered with the forty-

eighth number, announcing to subscribers that that number fully completed the history and subscribers could have the work in that form if desired, did not rebut the justification. If the plaintiffs meant by the circular that the forty-eighth number delivered to subscribers completed their original contract, their conduct might properly have been characterized as fraudulent and dishonest. The subscribers, when they agreed to subscribe for a complete work in forty-eight parts, did not understand that they were to be furnished with a work without an index and breaking off in the middle of a sentence. Judgment affirmed. *Johnson v. Grove & Bailey*. Opinion by Andrews, J. [Decided Jan. 18, 1881.]

MARRIED WOMAN—LANDS CONVEYED FOR SEPARATE USE BEFORE 1848—EFFECT OF ENABLING STATUTES—MAY SUE TO RECOVER POSSESSION FROM HUSBAND WRONGFULLY OUSTING HER—IMPROVEMENTS BY ONE WRONGFULLY IN POSSESSION.—Real estate was in 1844 conveyed to the plaintiff, then and ever since a married woman, for her natural life, "only as and for her own separate estate free from the control of her husband." In addition her husband, the defendant, covenanted with the grantor *pari passu* with the execution of the conveyance, and for a consideration expressed, that the plaintiff should hold the premises to her own separate and sole use free from any claim or interference from the defendant. *Held*, that although at law at that time the husband acquired in the wife's freehold interest in lands for life a freehold interest in himself during their joint lives (*Polyblank v. Hawkins*, Doug. 329) even of lands conveyed during coverture (*Junction R. Co. v. Harris*, 9 Ind. 184), which the Legislature could not take away (*Westervelt v. Gregg*, 12 N. Y. 202), in equity there was a recognition of a capacity in a married woman to enjoy property separate from her husband, and that, too, when she came by it during coverture. *Stedman v. Pools*, 6 Harv. 193. The deed in this case created such an estate. See *Stanton v. Hall*, 2 Russ. & Myl. 180. Nor need there have been a trustee named in the instrument. *Bennett v. Davis*, 2 P. Wms. 316; *Douglas v. Congreve*, 1 Beav. 72; *Davidson v. Atkinson*, 5 Johns. 434. The law would create the husband a trustee for the wife in such a case. *Parker v. Brooks*, 9 Ves. 563; *Rice v. Cockell*, id. 300. The statutes (Laws 1848, chap. 200; 1860, chap. 90; 1862, chap. 172) gave the married woman control of her separate property, and where there was no trustee named as in this deed, she need not resort (under Laws 1849, chap. 375, § 2) to the Supreme Court for a resignation and surrender of the trustee. The statutes by their own operation changed her capacity to hold a separate estate as a matter of equity into a legal estate, and she could bring an action to recover the possession of the estate if she had been unlawfully ousted (*Darby v. Callaghan*, 16 N. Y. 71), even against her husband. *Wright v. Wright*, 54 id. 437. The husband in this case would not get possession of this estate by occupying it with his wife as the head of the family. And the fact that by reason of his conduct toward her she left the premises, would not give him an interest in the premises as tenant entitling him to a notice, because he never had an interest or any possession growing out of an interest. See *Knowles v. Hull*, 99 Mass. 562. *Held*, also, that he was not entitled to any thing for improvements put upon the premises. See *Woodhull v. Rosenthal*, 61 N. Y. 382. Judgment affirmed. *Wood v. Wood*. Opinion by Folger, C. J. [Decided Jan. 25, 1881.]

MECHANICS' LIEN LAW—KINGS COUNTY—CONSTRUCTION OF—PAYMENTS BY OWNER BEFORE DUE UNDER CONTRACT.—The provision in the lien law applicable to Kings and Queens counties (Laws 1862, chap. 478, § 1) disallowing as against lienors any payment made "by collusion for the purpose of avoiding

the provisions of this act, or in advance of the terms of any contract," held to exclude from allowance payments made either by collusion or in advance of the terms of the contract. The various lien laws differ in their provisions, but where provision is made against payment in advance, there are none which require that such payment be made by collusion or fraudulently. See *Cheney v. Troy Hospital Association*, 65 N. Y. 282. But the lienor cannot avail himself of the right to have payments disallowed to the owner on the ground that they were in advance of the terms of the contract, when such payments were made to the lienor himself on account of the work and materials for which he claims a lien. Order affirmed and judgment absolute upon stipulation. *Post v. Campbell*. Opinion by Rapallo, J.

[Decided January 18, 1881.]

WILL—PROBATE OF—PREPONDERANCE OF PROOF—LACK OF REMEMBRANCE OF SUBSCRIBING WITNESS—EXECUTOR COMPETENT TO PROVE CIRCUMSTANCES OF EXECUTION.—The testimony of the subscribing witnesses to a will was not positive as to whether the testator signed before or after them, one witness on cross-examination, after stating that testator signed after he did, testifying that he might be mistaken, and the other witness stating that he did not remember that testator signed last, and afterward stating that he himself signed last. But the executor, who had considerable experience in such matters, testified distinctly to all which took place, the order in which the several acts were done, and that the testator signed before the subscribing witness. Held, that the preponderance of proof was in favor of the due execution of the will. Where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution. *Matter of Kellum*, 52 N. Y. 517. In fact, wills may be established in opposition to the evidence of the subscribing witnesses. Trustees of Auburn Theol. Sem. v. Calhoun, 25 N. Y. 425. Held, also, that there was no objection to questions put to the subscribing witnesses in regard to their being mistaken. Held, further, that the executor was a competent witness. *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387. Order affirmed. *Rugg v. Rugg*. Opinion by Miller, J. [Decided Jan. 25, 1881.]

CALIFORNIA SUPREME COURT ABSTRACT.

ATTORNEY—NEGLECT OF, IN ALLOWING DEFAULT, NOT GROUND FOR VACATING JUDGMENT.—A case was in regular course brought to trial. The attorneys for the plaintiff were negligently absent and judgment was rendered for defendant. Held, that the fact that the judgment was entered by reason of the negligence of attorneys was not ground for vacating it. Parties in this State have in such cases as this been held not entitled to relief on account of the negligence of their attorneys. *Haight v. Green*, 10 Cal. 118; *Mulholland v. Heyneman*, 1d. 605; *Ekel v. Swift*, 47 id. 620. *Smith v. Townsend*. Opinion by Thornton, J. [Decided Oct. 2, 1880.]

DAMAGES—IN ACTION BY PARENT FOR INJURY TO CHILD, COMPENSATORY ONLY.—A statute giving an action to the father of a minor child injured or killed by the negligence of another provided that in such action "such damages may be given as under all the circumstances of the case may be just." Held, that the father in such action for injury would be entitled only to compensatory damages for the loss of service of the child and the expense incurred in consequence of the injury for medical services, nursing, etc., and not for the pain and suffering of the child or for his disfigure-

ment. In *Long v. Morrison*, 14 Ind. 600, the court says: "On the question of damages in this class of cases the common-law rule must prevail. When the action is by the husband or master or parent, for their individual losses respectively, occasioned by the tortious acts toward the wife, infant child or servant, the individual suffering of the immediate subject of a wrongful act cannot be taken into account in the assignment of damages." See *Ohio & M. R. Co. v. Tendall*, 13 Ind. 396; *Quin v. Moore*, 35 N. Y. 432; *Oldfield v. New York & Harlem R. Co.*, 14 id. 318. In such case there may be two actions for the same injury, that of the father and that of the child. When the action is brought by the parent, loss of service, medical attendance, expense of nursing, and the like, are matters to be considered by the jury; and in such cases compensation is the rule. The child recovers, not for the loss of time or service or medical attendance or expense of curing, but for the injury personal to himself, such as pain and suffering, both physical and mental, disfigurement, etc. See *Pennsylvania R. Co. v. Zebe*, 33 Penn. St. 328; *Pennsylvania R. Co. v. Kelly*, 7 Casey, 372; *Sherm. & R. on Neg.*, § 608. *Durkee v. Central Pacific Railroad Co.* Opinion by Morrison, C. J., and McKinstry, J.

[Decided Dec. 11, 1880.]

ESTOPPEL—PARTY OBTAINING DIVORCE CANNOT DENY ITS VALIDITY.—While a divorce, granted to a husband in another State not having jurisdiction of his wife, the defendant, may be avoided for fraud, the plaintiff who procured it cannot himself claim as against defendant that it is invalid, nor can one who derives a claim to property rights from plaintiff, the existence of which are dependent upon the invalidity of such divorce, set up that it is invalid against one claiming the same rights by title from the wife. The court say "We know of no principle upon which the plaintiff in that action of divorce could be permitted to impeach the judgment rendered in it, for the purpose of recovering property from the defendant in that action which he could recover on no other ground than that he had obtained that judgment by fraud. There is a maxim of law that 'no man should take advantage of his own wrong.' Fraud renders any transaction voidable at the election of the party defrauded. But we have yet to learn that the party by whom the fraud is perpetrated has that election. If he overreached himself the law would leave him to extricate himself as well as he might without its aid. In this case, however, the defendant is an entire stranger to that judgment. If the plaintiff in that divorce suit were the plaintiff in this action, and the defendant in that action were the defendant in this, would a court permit the plaintiff to attack that judgment on the ground that he obtained it by fraud, of which the defendant was not only innocent but ignorant? We think not. Well, the grantees of these respective parties occupy in this respect no better or worse positions than their several grantors would if this action were between them." *Elliot v. Wohlfrom*. Opinion by Sharpsstein, J. [Decided Aug. 2, 1880.]

NEGLECTANCE—BY DITCH OWNER IN NOT REMOVING SAND IN DITCH—ACT OF GOD—INJURY DONE BY PERIODICAL FRESHET NOT.—Defendant was the owner of a ditch through which a large quantity of water was carried. An accumulation of sand took place in the ditch and the ditch banks overflowed and caused a deposit of sand, etc., upon plaintiff's lands contiguous to the ditch, injuring the crops. The injury took place during a season of high water caused by the melting of snow. This high water is periodical and is anticipated by all inhabitants of that region. Held, that the defendant was bound to keep its canal banks in repair and to use ordinary diligence for that purpose. If the accumulation of sand in the ditch was such as to render

it probable that the periodical overflow would by its action wash out the sand and thus damage the land of plaintiff, it was then the duty of the defendant to use all the means which an ordinarily prudent business man would employ under the circumstances to prevent it. The sand might have been removed from the ditch and deposited where the water would not reach it during the period of overflow. Ordinary prudence would have dictated such a course to prevent injury to the property of another. In case this course was not taken it could not be claimed that the injury was from the act of God. No one is responsible for that which is merely the act of God or inevitable accident. But when human agency, if combined with it, and neglect occurs in the employment of such agency, a liability for damage results from such neglect. Such is the rule in *Polack v. Pioche*, 35 Cal. 416. "The expression 'act of God' excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to have been the act of God, but must be regarded as the act of man." P. 423, per Sanderson, J. See Whart. on Neg., §§ 553, 559; Broom's Max. "*Actus Dei nemine facit injuriam*," pp. 227-8. The author referred to states the rule thus: "The act of God signifies, in legal phraseology, any inevitable accident occurring without the intervention of man, and may indeed be considered to mean something in opposition to the act of man, as storms, tempests and lightning. The above maxim may therefore be paraphrased and explained as follows: It would be unreasonable that those things which are inevitable by the act of God, which no industry can avoid nor policy prevent, should be construed to the prejudice of any person in whom there has been no laches." *Chidester v. Consolidated People's Ditch Co.* Opinion by Thornton, J. [Decided Dec. 24, 1880.]

WEST VIRGINIA SUPREME COURT OF APPEALS ABSTRACT.*

ACTION—STRANGER PAYING DEBT WITHOUT AUTHORITY MAY NOT SUE DEBTOR—PAYMENT NOT DISCHARGE—RATIFICATION.—A stranger who pays a debt of another without his request or authority cannot sustain a suit against the debtor unless he has ratified the act of the stranger by promising to repay him or in some other manner. If such payment by a stranger is neither authorized nor ratified by the debtor, it will not be held to be a discharge of the debt. If such payment by the stranger is neither authorized nor ratified by the debtor, the stranger may sue the debtor at law in the name of the creditor for his own use, but the debtor may, by pleading or relying on the payment of the stranger, ratify it, and such ratification being the equivalent of a previous request, the debt will be thereby discharged, and the debtor will be liable to be then sued by the stranger for money paid for him at his request. *Neely v. Jones et al.* Opinion by Green, J. [Decided May 1, 1880.]

NEGLIGENCE—PROXIMATE AND REMOTE CAUSE—HORSE KILLED ON UNINCLOSED RAILROAD TRACK.—(1) The cause of an injury in the contemplation of law is that which immediately produces it as its natural consequence; and therefore if a party be guilty of an act of negligence which would naturally produce an injury to another, but before such injury actually results, a third person does act which is the immediate cause of the injury, such third person is alone responsible therefor, and the original party is in no degree responsible therefor, though the injury could never

have occurred but for his negligence. The casual connection between the first act of negligence and the injury is broken by the intervention of the act of a responsible party, which act is in law regarded as the sole cause of the injury according to the maxim—"In jure non remota causa, sed proxima, spectatur." (2) The owner of horses in this State is not chargeable with an unlawful act or with negligence in allowing them to get on a railroad track if it be uninclosed. But he by so doing takes the risk of their loss or injury by unavoidable accident. But if killed by the negligence of the servants of the railroad company in running the train, it is responsible. *Washington v. Baltimore & Ohio Railroad Co.* Opinion by Green, J. [Decided Nov. 20, 1880.]

PLEDGE—OF CHOSE IN ACTION GIVES RIGHT TO SUE BUT NOT TO SELL.—It is well settled that where a chose in action, such as a bond, note or accepted order on a third person, is transferred and delivered to a creditor as collateral security for a debt, it is the right of the debtor to sue upon such chose in action at law, and if necessary, to use the name of the legal owner of such chose in action. Unless a power to sell is superadded to the agreement, whereby such chose in action is pledged as a collateral security, the creditor has no right to sell such chose in action, and he cannot come into a court of equity to ask the sale thereof. *Whittaker v. Charleston Gas Co.* Opinion by Moore, J. [Decided May 4, 1880.]

MAINE SUPREME JUDICIAL COURT ABSTRACT.*

BANKRUPTCY—VALIDITY OF DISCHARGE IN, CANNOT BE CONTESTED IN STATE COURT.—The validity of a discharge under the United States Bankrupt Act cannot be contested in the State court for the intentional and fraudulent omission of the plaintiffs' names in the list of creditors and the fraudulent omission to give them notice of proceedings in bankruptcy. The validity of a discharge can only be impeached in the District Court of the United States in which it is granted. *Corey v. Ripley*, 57 Me. 69; *Way v. Howe*, 106 Mass. 502; *Ocean Nat. Bk. v. Olcott*, 46 N. Y. 12; *Parker v. Atwood*, 52 N. H. 181; *Black v. Blazo*, 117 Mass. 17. *Bailey v. Corruthers.* Opinion by Appleton, C. J. [Decided May 7, 1880.]

CONTRACT—MEMORANDUM EXPLAINING, WHEN PART OF—WHEN NOT.—When a contract is unilateral, and the body of the contract fails for any reason to express the agreement between the parties, and a memorandum is made upon the same paper and delivered as a part of the contract, it is as much a part of the contract as if written in the body of it. *Tuckerman v. Hartwell*, 3 Me. 147; *Johnson v. Hengan*, 23 id. 329; *Jones v. Fales*, 4 Mass. 245; *Springfield Bank v. Merrick*, 14 id. 322; *Barnard v. Cushing*, 4 Met. 230; *Shaw v. First Methodist Society*, 8 id. 228; *Haywood v. Perrin*, 10 Pick. 228; *Wheelock v. Freeman*, 18 id. 185; *Benedict v. Cowden*, 49 N. Y. 396; *Warrington v. Early*, 2 E. & B. 763; *Gardner v. Walsh*, 5 id. 83. When the memorandum is collateral to and independent of the contract, it does not become a part of the contract and no way changes it. *Byles on Bills*, 95. Thus, where a promissory note signed by G. W. C. and L. T. C. payable "on demand with interest," had the following memorandum upon it, written below the signatures: "interest on the above note to be nine per cent, G. W. C.," held, that it was not a material alteration of the note

* To appear in 16 West Virginia Reports.

* To appear in 71 Maine Reports.

so far as L. T. C. was concerned. *Littlefield v. Coombs*. Opinion by Libbey, J.
[Decided March 21, 1880.]

EXECUTION — IN OFFICER'S HANDS NOT ABATED BY DEATH OF CREDITOR — TRESPASS. — At common law a writ of execution in the hands of an officer for service is not abated by the death of the judgment creditor, and it is the duty of the officer to serve it. The statutes of this State have not changed the common law rule in this respect. It is the duty of an officer to serve an execution in his hands for that purpose, notwithstanding the death of the judgment creditor while the execution is in the officer's hands, and in arresting and committing the judgment debtor he is not a trespasser. When no trespass is committed by an officer in serving an execution, it follows that the person directing the service is not guilty of trespass. *Cleve v. Veer*, Cro. Car. 459; *Thoroughgood's case*, Noy, 73; *Ellis v. Griffith*, 16 M. & W. 106; *Comm. v. Whitney*, 10 Pick. 434; *Murray v. Buchanan*, 7 Blackf. 549; *Freeman on Exec.*, § 37; *Commonwealth v. Whitney*, 10 Pick. 434. *Wing v. Hussey*. Opinion by Libbey, J.
[Decided May 27, 1880.]

LIEN — OF LABORER ASSIGNABLE. — One who has purchased the claim of a laborer in the cutting and hauling of logs may maintain an action thereon in the name of such laborer to enforce the laborer's lien on the logs. The fact that the laborer assigns his claim to a third party who is willing to advance him money therefor does not defeat or discharge his lien. The weight of authority and reasoning is in favor of the assignability of the lien of a mechanic and the right of his assignee to assert his claim in the same manner and to the same extent that the mechanic could. *Kerr v. Moore*, 54 Miss. 286, citing *Laege v. Bossieux*, 15 Gratt. 83; *Tuttle v. Howe*, 14 Minn. 150; *Davis v. Bilsland*, 18 Wall. 659. See, also, *Hull of Ship, Davies*, 190; *The Sarah J. Weed*, 2 Lowell, 556. *Murphy v. Adams et al.* Opinion by Barrows, J.
[Decided March 26, 1880.]

OFFICE — ACTS OF JUDICIAL OFFICER DE FACTO VALID. — Where the office of judge of a municipal court was vacated under a statute by the incumbent taking a seat as a member of the Legislature, *held*, that while his authority as a judge *de jure* would cease, still if he continued peaceably to act under his commission and to exercise the functions of a judge with the usual insignia of his office, he would be an officer *de facto*, and with reference to the public and third persons his acts, including judgments rendered by him in cases within the jurisdiction of the court, would be valid, although he might be removed upon information filed against him in behalf of the State. *State v. Carroll*, 38 Conn. 449; *Knowles v. Luce*, Moore, 109; 2 Kent's Com. 295; *Am. Law Reg.*, March, 1873; *Wilcox v. Smith*, 5 Wend. 282; *Brown v. Lunt*, 37 Me. 423; *Sheehan's case*, 122 Mass. 445. *Woodside v. Wagg*. Opinion by Symonds, J.
[Decided May 28, 1880.]

INSURANCE LAW.

FIRE POLICY — CONDITION LIMITING TIME OF COMMENCEMENT OF ACTION. — In the construction of contracts, all the provisions thereof shall be taken into consideration and reconciled, if possible, so that the true intent of the parties to the contract may be ascertained. Where a condition in a policy of insurance provides for an indefinite period to elapse before suit shall be brought on the policy, and that no suit shall be brought until the thing so provided for is done, to accomplish which may take more than six months without the fault of either of the parties to the contract, and the condition further provides that no suit

on the policy shall be maintained unless commenced within six months next after the loss shall occur, the intent of the parties to the contract was that the six months' limitation should commence to run when the cause of action accrued and not before. *West Virginia Supreme Court of Appeals*, May 1, 1880. *Barbee v. Fire & Marine Insurance Co. of Wheeling*. Opinion by Moore, J.

CONDITION AGAINST OTHER INSURANCE — WAIVER BY AGENT — CONDITIONS AS TO PETROLEUM, ETC., AND EXTRA HAZARDOUS ARTICLES. — A fire policy duly signed and countersigned, was delivered to the agent of the assured by the local agent of an insurance company. It provided by a printed provision that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, this policy shall be void." It also provided that it was a part of the contract "that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The policy also contained this clause in writing: "\$3,000 other concurrent insurance permitted." It was subsequently found by a referee that at the time the policy was delivered the agent of the company knew that the assured had other insurance upon the property to the extent of \$6,000. *Held*, under these circumstances, that a delivery of the policy was a waiver of the implied prohibition contained in the condition in said policy, permitting \$3,000 additional insurance. *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415; *Fish v. Cottenet*, 44 id. 538; *Sherman v. Niagara Fire Ins. Co.*, 46 id. 523; *Pechner v. Phoenix Ins. Co.*, 65 id. 195; *Van Schoick v. Niagara Fire Ins. Co.*, 68 id. 434; *Bidwell v. N. West. Ins. Co.*, 24 id. 302; *Rohrbach v. Germania Fire Ins. Co.*, 62 id. 47; *Alexander v. Germania Fire Ins. Co.*, 66 id. 464; *Sprague v. Holland Purchase Ins. Co.*, 69 id. 128. (2) The policy provided: "If in said premises there be kept petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or there be kept or used therein camphene, spirit gas, or any burning fluid, or any chemical oils, without written permission in this policy, then, and in every such case, this policy shall become void." *Held*, such provision did not forbid the use of naphtha upon the insured premises for the purposes of illumination. It also provided that "if during this insurance the above-mentioned premises shall be used for any trade, business or vocation, or for storing, using or vending therein any of the articles, goods or merchandise denominated hazardous or extra hazardous or specially hazardous, * * * printed on the back of this policy, then and from thenceforth, so long as the same shall be so appropriated, applied or used, this policy shall cease, and be of no force or effect." *Held*, that "burning fluid" did not necessarily mean any fluid that would burn, when "burning fluid" was classed as "specially hazardous" under such provision. *Held*, further, that the policy was only suspended under such clause while the forbidden use of naphtha continued, and that it revived when such use ceased. *United States Cir. Ct.*, N. D. New York, Nov. 4, 1880. *Putnam v. Commonwealth Insurance Co.* Opinion by Blatchford, C. J.

LIFE POLICY — EQUITY WILL NOT RELIEVE AGAINST FORFEITURE BY NON-PAYMENT OF PREMIUM. — In contracts of life insurance, the time for the payment of interest on the premium notes is of the very essence of the contract, and must be strictly complied with; and if by the terms of the policy, it is to become void upon a failure to pay such interest at the time specified, equity will not relieve against the forfeiture. *St. Louis*

Mut. Ins. Co. v. Grigsby, 10 Bush, 310; Patch v. Phoenix Mut. L. Ins. Co., 44 Vt. 488; Anderson v. St. Louis Mut. L. Ins. Co., 5 Bigelow's L. Ins. Rep. 531; Russum v. St. Louis Mut. L. Ins. Co., id. 245; Nettleton v. St. Louis L. Ins. Co., 6 Ins. L. J. 428. Maryland Ct. of Appeals, April term, 1879. *Knickerbocker Life Insurance Co. of New York v. Dietz*. Opinion by Grason, J. (To appear 52 Md. 16.)

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, March 15, 1881:

Judgment affirmed with costs—*Smith v. Trustlow*; *Bean v. Edge*.—Judgment reversed and new trial granted, costs to abide event—*Knupfle v. Knickerbocker Ice Co.*—Order of General Term reversed and judgment on report of referee affirmed with costs—*Caguin v. Town of Hancock*.—Order affirmed and judgment absolute for respondent on stipulation with costs—*McConnell v. Sherwood*.—Judgment affirmed, with one bill of costs to respondent who appeared in this court, to be paid out of the estate—*Palmer v. Horn*.—Judgment of General Term modified, by remitting case to the surrogate to be heard upon the question of fraud and undue influence as affecting the codicil, and as so modified affirmed, costs to abide event and to be determined by the court below—*Dack v. Dack*.—Appeal dismissed with costs—*Dwight v. Brooklyn Life Insurance Co.*; *Dwight v. Homeopathic Life Insurance Co.*; *Dwight v. Metropolitan Life Insurance Co.*; *Dwight v. Manhattan Life Insurance Co.*, two cases; *Dwight v. Washington Life Insurance Co.*; *Dwight v. Germania Life Insurance Co.*—Judgment of General Term affirmed, and a *venire de novo* ordered on the count in the indictment charging a larceny—*The People v. Dowling*.—Order of General Term reversed, and judgment of Special Term modified by striking therefrom the allowance of \$45, and interest thereon, and also by providing that the interest upon the amount found due the plaintiff, upon her mortgages, should be at the rate of six instead of seven per cent, and as thus modified that judgment be affirmed, without costs to either party, upon the appeals to the General Term and to this court—*Taylor v. Wing*.—Motion denied with \$10 costs—*Taylor v. The Mayor, etc., of New York*.

NOTES.

THE tokens of prosperity and the promises with which the beginning of the year opened upon our contemporaries are being well fulfilled. The ALBANY LAW JOURNAL, nearest and most important to New York lawyers, comes packed fuller than ever with weighty matter. The course of this journal from the beginning has been singularly felicitous. Well conceived at the outset, and well made up, it is now just the same as it always has been, "only more so." Its growth has been not change, but advancement; it is at once compact and condensed, yet comprehensive and diversified; and its volumes make an annual conspectus of the whole field of the law.—*N. Y. Daily Register*.

Our excellent contemporary, the *Central Law Journal*, has enlarged its weekly issue four pages. Now if it will add six pages more of its style of typography, it will give about as much as the ALBANY LAW JOURNAL gives and has for years given.—A correspondent sends us the following copy, "*verbatim et literalitque*" (as a lawyer of our acquaintance used to say), of a justice's judgment in 7 Wend. 389: "Samuel Cooper vs. Iretick Brownner. This 25 day of november 1824. *Summons returned personal served in a plea of—of*

fifty dulloos and issue gind, and the parties was rety for triel and witness sworn and gudgmand fur the plaintiff on a former gudgmand fur twenty six dulloos and twenty six cents. Damages \$26,26, corst of suit 72\$26,98. I hereby sartify that the apove copy is a coreckit and true copy of my pook. Guven unter my hand at seal at Danube this 18, day of January 1825."—In a litigation now pending between husband and wife, respecting the custody of their child, the wife testified that on a certain occasion her husband had spoken slightly of her father. The defendant was subsequently called to contradict or explain his wife's testimony and was asked this question among others: Q. "She says that on that occasion you spoke very slightly to her of her father. What do you say about that?" A. "She might have called it slightly, I did not. I said he was the worst hen-pecked man I ever saw; that I thought he was an old milk sop; that he did not dare say his soul was his own in the presence of his wife."

Judge Bowie, of the Maryland Court of Appeals, has died, at the age of seventy-three.—Judge Choate, of the Federal District Court of the Eastern District of New York, has resigned on account of the inadequacy of the salary.—Messrs. Henry C. Murphy and Winchester Britton have presented to the Court of Appeals of this State a portrait of the late Judge Lott, which has been received with appropriate public acknowledgment by the chief judge, and hung upon the wall of the court room.—The formalism with which our profession repeat our technical phrases is amusingly illustrated in a case in 70th Maine Reports, in a case where the question was of recovery for the attendance of the defendant's stallion upon the plaintiff's mare, which had resulted in a colt. The reporter says in his statement that the plaintiff took his mare to the defendant's stallion, and "had her duly served."

The late John W. Dwinelle, a lawyer of San Francisco, formerly of Rochester, in this State, left the following sensible directions to be observed in case of his death: "I desire that there shall be no adjournment of court. I desire that the hour of the funeral shall be fixed at one o'clock P. M., so that the members of the bar who wish may attend it without interfering with the business of the courts. The custom of adjourning the courts when a lawyer dies ought to become obsolete. There is no good reason why the business of twelve courts of record should be interrupted for a day because a lawyer, even the most distinguished, happens to die."—The chief judge of the English Bankrupt Court is evidently a greater admirer of nature than of the fine arts, for he prefers Welsh scenery to a sign-board painted by David Cox. In *Ex parte Sheen, re Thomas*, ante, p. 211, he said: "I must say that the beauty and picturesqueness of the surrounding scenery of Bettws-y-Coed is of far greater attraction to artists and visitors than this picture could possibly be." The decision in question reverses that commented on, 22 Alb. L. J. 322.

The subjects prescribed by the Law Society for the primary examinations furnish food for melancholy reflection to our esteemed contemporary, the ALBANY LAW JOURNAL. We quote its comments, even at the risk that the spirit of some budding Eldon may be 'sicklied o'er with the pale cast of thought' by their perusal. If our National patriotism should rebel at the idea of using Mr. Evarts' speeches in the way suggested by our contemporary, a 'select sentence' of equal length and complexity to any penned by the great American jurist might perhaps be culled from the pages of our Supreme Court Reports.—*Canada Law Journal*.

The Albany Law Journal.

ALBANY, MARCH 26, 1881.

CURRENT TOPICS.

AT a recent meeting the New York City Bar Association declared against codification of the common law, and resolved to send ambassadors to Albany to put the thing down. It seems to us that the New York City Bar Association do not go the right way to work. It does very little good for the driver of a restive horse to say that his horse ought not to and must not run away, but if he sees the signs of bolting he should brace himself and prepare to guide that horse so that the horse shall not smash him and others. (We do not stop here to discuss the question whether the horse may not be so goaded, vexed, and nagged by his driver, that he is justified in running away.) Now general codification is sure to come, sooner or later, to-day, to-morrow, this year or next year, or ten years hence. It is inevitable, whether the lawyers will hear or whether they will forbear. There was an infinitely greater struggle by the profession against the old Code of Procedure, but it was enacted. The part of wisdom, it would seem, is to accept the inevitable with a good grace, and preserve to the bar some influence in procuring a proper codification. If we wash our hands of the matter altogether, and say we will have none of it, our suggestions about scope, plan, construction, and amendments will have very little weight.

We have said that the declaration of the meeting was against codification in general, and this is true although there was an attempt to disguise it under opposition to Mr. Field's pending Codes in particular. But after all, very little if any specific fault was found with the proposed Codes, and Mr. Field's labors and deserts were warmly recognized. Indeed, the extraordinary merits of the proposed Codes were admitted even by its opponents. For ourselves we do not think the proposed Codes by any means faultless. A number of details might be susceptible of amendments. The codifier is not hostile to amendments. The only serious faults which the ingenuity of the acute draftsman of Gov. Robinson's veto message was able to detect, were in the matters of adoption, dower, and fraud, in respect to all of which we have frequently and abundantly expressed our opinion. Therefore we shall now content ourselves with emphasizing our belief that if codification is to take place, we shall never have a better Code to start with, and the chances are three to one, never so good a Code again.

This brings us once more to the serious question of policy. Let it be understood at the outset that these Codes propose no revolution in principle.

Herein the matter is much less serious than at the adoption of the Code of Procedure, for that proposed a tremendous revolution. These Codes simply propose to write down the ascertained but unwritten law; to pick it out of thousands of reports and text-books, and to express it fixedly and clearly, so that it will not be liable to caprices of memory or construction, and so that the layman may himself ascertain its principles. God wrote down His laws, and on stone, at that. Codes have been adopted by men with splendid success. The proper boast of the civil over the common law is its certainty. We ourselves have been compelled to write down some of the common law in statutes. Why not write the rest of it? There is only one answer to this question, and that is, it will certainly give the lawyers some trouble, and may possibly hurt their occupation in picking out the law as it is (or rather in guessing what it will be), from the reports and text-books, and advising their clients. That is the real reason, and the avowed reason when the lawyers are candid. Quite a contrary and inconsistent reason is often assigned, namely, that it will so increase litigation through the necessities of construction. We have no doubt that there will be a period of construction, expensive probably, but that is a minor consideration. The present state of affairs, evil and constantly and rapidly growing worse, must be got rid of at any price. We must be cured of the disease, no matter what the pain and the amount of the doctor's bill. But the profession exaggerate the seriousness both of the real reason and of the pretext. Litigation will not decrease so long as human nature remains as it is, although litigation may be and ought to be cheapened. The expense of construing the general Code will not approach that of construing the old Code of Procedure, for that, as we have said, was revolution and a new creation, while this is mere abstracting and concretion. So we reiterate, we hope these Codes will be enacted and approved, and if they are once made law, we shall wonder how we ever did without them.

Senator Hogan has introduced in our State Senate a bill to protect the right of trial by jury, providing that in no action, civil or criminal, tried with a jury, shall any judge presiding at such trial, in his charge to the jury, review the evidence which has been produced before the jury, except so far as may be necessary for a proper presentation to them of the law involved in the case, and that in no such action shall the judge who presides at the trial, by intimation or expression, submit to the jury his own opinion upon the weight of the evidence which has been produced before them, or as to what should be their verdict upon such evidence, except in cases where by law he is authorized to direct a verdict. There must be considerable doubt of the wisdom of this bill. Such provisions exist in many States, it is true, but we have noticed that they are fruitful of new trials. In spite of such provisions, a judge who wishes the jury to know his opinion of the

facts will find some way of communicating it, and without them he is bound to charge, on request, that his opinion on the facts "is of no consequence." It seems to us that little mischief results from the present practice, and we are confident that an adoption of the proposed measure would lead to a vast number of technical and unmeritorious appeals, and of new trials for unsubstantial reasons.

An esteemed professional friend in Kansas calls our attention to the recent *Prohibitory-Amendment Cases*, 24 Kans. 700, and asks our opinion of the justice and policy of such laws. We have no objection to saying that we deem this purely a matter of policy. We see no injustice in preventing intemperance, pauperism, and crime, by any necessary means. Although we are personally not a "total-abstainer," yet we would cheerfully give up our "cakes and ale" for the sake of seeing alcohol as a beverage totally suppressed. Society certainly has as good a right totally to prohibit the liquor traffic as it has to hang men for murder. If rum drives men to murder, it is perhaps as well to suppress rum as to wait for the murder and then suppress the man. Whether "prohibition" is the best means to effect this desirable end we have no knowledge or experience that qualify us to speak. If, as we are given to understand, the Kansas law, literally construed, would prevent one's selling cologne water, or administering communion in the churches, it is evident that prohibition is overdone.

Senator Madden proposes to require life insurance companies to furnish policy-holders, on demand, copies of their applications. This does not amount to much, in comparison with what is needed to keep these corporations in proper behavior. — Senator Robertson proposes an employers' liability bill. It seems to us to be a substantial copy of the English law. Our readers already know how little we think of that. — Assemblyman Congdon proposes a bill for the continuance of suits in case of the death of the plaintiff, by the entry of an order of course.

Massachusetts, too, is waking up on the subject of separate courts for law and for equity. The Supreme Court is greatly overworked. The *Boston Advertiser* calls attention to *Davis v. Coburn*, 128 Mass. 377. It says: "Davis brought his action in the law court in the early part of 1877, tried it, went to the Supreme Court upon exceptions, which were there sustained, came back and tried it again, once more went to the full court upon exceptions, where it was determined in 1880 that an action at law did not lie in the plaintiff's favor, and that his only remedy was by a bill in equity. By our law the Supreme Court has original exclusive jurisdiction in equity. The question is often asked, why not abolish all distinction between law and equity, and give concurrent jurisdiction to the Supreme and Superior Courts over all proceedings in equity. It is

well known that by the Code of Procedure of the great commercial State of New York the fusion of these two systems was made more than thirty years ago, and has continued to the present time. 'This Code has found favor abroad as well as at home. Fully half the States and nearly all the Territories have adopted the general spirit and important characteristics of the new method, while many have re-enacted its details. It has been the guide in moulding the practice now pursued in most of the British colonies, and its principles are well known to have been very influential in framing the procedure recently established in England.' Massachusetts by its Code of Practice has done much to do away with the old technicalities of pleading, and to protect the substantial rights of parties in their trials. The double system of judicature in law and equity, however, still remains, and the uncertainty which it engenders is continually demanding relief." "It is respectfully suggested to the committees of the Legislature having in charge the revision or arrangement of the administration of justice in Massachusetts, that they carefully examine the question of abolishing this separate system of judicature. If the necessity exists of relieving the Supreme Court of the great labors which are imposed upon it, why not unite the courts of law and equity, and thus throw upon the Superior Court the vast amount of work of which the Supreme Court has now exclusive jurisdiction? It is hardly necessary to allude to the convenience of the bar and the public which this fusion would produce."

NOTES OF CASES.

THE vexed question of the measure of damages in an action of trespass or trover for property taken by mistake was passed on by the Missouri Supreme Court, in *Austin v. Huntsville Coal and Mining Co.*, October, 1880. It was held that in an action for taking coal from plaintiff's land, in the absence of any evidence of willful wrong or other circumstances warranting punitive damages, the true rule of the damages is the value of the coal at the mouth of the shaft, less the cost of labor to defendant in severing it from the freehold and raising it to the mouth of the shaft. The court observed: "The court below, at plaintiff's instance, gave this declaration of law. The measure of damages for the coal taken is the value thereof at the mouth of the shaft, less cost of raising it, and without any deduction for the expense of getting or severing it from the freehold. The report of the referee discloses that the coal was worth one-half a cent in the mine, and seven cents a bushel at the mouth of the shaft, or in the proportion of one to fourteen. There is, doubtless, abundant authority which supports the above declaration of law. *Morgan v. Powell*, 43 Eng. Com. Law, 784; *Martin v. Porter*, 5 M. & W. 310; *Barton Coal Co. v. Coe*, 89 Md. 1; S. C., 17 Am. Rep. 525; *Robertson v. Jones*, 71 Ill. 405; *McLean Coal Co. v. Long*, 81 id. 359; *Waterman on*

Trespass, § 1096; *Moody v. Whitney*, 38 Mo. 174; *Dyuri Co. v. Brogden*, L. R., 11 Eq. 188; *Wild v. Holt*, 9 M. & W. 672. But there is no lack of authority sustaining a different view of the matter. *Stockbridge Iron Co. v. Com. Iron Works*, 102 Mass. 80; *Forseythe v. Wells*, 41 Penn. St. 291; *Chamberlain v. Collinson*, 45 Iowa, 429; *Waters v. Stevenson*, 13 Nev. 157; S. C., 29 Am. Rep. 293; *Foot v. Merrill*, 54 N. H. 490; S. C., 20 Am. Rep. 151; *Maye v. Tappan*, 23 Cal. 306; *Goller v. Fett*, 30 id. 481; *Ham v. Sawyer*, 38 Me. 37; *Hilton v. Woods*, L. R., 4 Eq. 432; *Baldwin v. Porter*, 12 Conn. 473; *Curtis v. Ward*, 20 id. 204; 2 Greenl. Ev., §§ 253, 254; *Price v. Benjamin*, 14 Pick. 356; *Wood v. Morewood*, 3 Q. B. 440; *In re United Merthyr Col. Co.*, L. R., 15 Eq. 46." "The authorities from which we have quoted seem to us to announce the true measure of damages, where there is no element of willfulness or wrong, or such gross negligence or disregard of others' rights as leads necessarily to the inference of willfulness or wrong; because a party engaged in mining may readily ascertain by dialing that he is trespassing on his neighbor's property. In England, and in some of our sister States, the result reached in cases of the character under discussion, and which gave origin to the rule which plaintiff invokes, is no doubt owing to technicalities from which we, happily, are freed, since we have but one form of action in this State, and consequently are not hampered by mere matters of form in seeking redress for injury done. This being the case, there would seem to be neither reason, justice nor consistency in paying a party for his labor in raising the coal to the mouth of the pit, and paying him nothing for his labor in severing it from the freehold, *i. e.*, in getting it into such condition that it could be delivered at the mouth of the shaft. If the labor of the trespasser deserves compensation in one instance, why not in another? By the operation of what principle, based upon common sense, can you thus apportion the injury done, pay for its continuation, but deny pay for its inception?" To the above authorities may be added, in opposition to the principal case, *McLean County Coal Co. v. Lennon*, 91 Ill. 561; S. C., 33 Am. Rep. 64, and note, 68; *Franklin Coal Co. v. McMillan*, 49 Md. 549; S. C., 33 Am. Rep. 280, and note, 282; S. C., 22 Alb. L. J. 2; and in harmony with it, *Livingston v. Rawyards Coal Co.*, House of Lords, 42 L. T. (N. S.) 334; S. C., 21 Alb. L. J. 442. See, also, note, 26 Am. Rep. 525.

In *Commonwealth v. Hall*, 128 Mass. 410, it was held that the statute punishing any one who in Massachusetts takes or kills woodcock, etc., between specified days, or buys, sells, offers for sale, or has them in his possession within the same time, does not apply to such birds lawfully taken or killed in another State. The court said: "The object of the statute is to protect these birds during the breeding season, and for such a reasonable portion of the year as may prevent them from being exterminated

or their numbers diminished in this Commonwealth. The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this Commonwealth during the times specified, or the buying, selling, or offering for sale or having in possession in this Commonwealth, during those times, of birds so taken or killed; and by enacting that the possession in this Commonwealth at any times of the birds specified shall be *prima facie* evidence to convict; leaving it for the defendant to prove, if he can, that the birds found in his possession were not taken or killed in this Commonwealth at a prohibited time." The court distinguished *Whitehead v. Smithers*, 2 C. P. Div. 553, and *Phelps v. Racey*, 60 N. Y. 10; S. C., 19 Am. Rep. 140. In *Magner v. People*, Illinois Supreme Court, February, 1881, the contrary doctrine was held where the game had been unlawfully killed in the other State. In answer to the objection that this construction does not tend to protect the game of Illinois, the court urged the explicit language of the statute, and the argument that "the prohibition of all possession and sales of such wild fowl or birds, during the prohibited seasons, would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them beyond the State, and afterward bringing them into the State for sale, or by other subterfuges and evasions." "This is but one of many instances to be found in the law, where acts which in and of themselves alone are harmless enough, but which are condemned because of the facility they otherwise offer for a cover or disguise for the doing of that which is harmful." Citing *Whitehead v. Smithers*. But this looks very much like enforcing the criminal laws of another State in matters which are not criminal in the former.

In *Pillsbury v. Kenyon*, the New Jersey Court of Appeals have recently held that an assignee for the benefit of creditors, or the executor or administrator of an insolvent estate, may set aside conveyances by the assignor, or the decedent, in fraud of creditors, to the extent necessary to pay debts. The authorities cited will be found in an abstract in another column. They seem generally to support the holding. In *Babcock v. Booth*, 2 Hill, 181, cited by the court, our court refused to pass upon this question. In *Davis v. Swanson*, 54 Ala. 277; S. C., 25 Am. Rep. 678, it was held that a voluntary conveyance, prejudicial to creditors, cannot be set aside by the grantor's administrator. To the same effect, *Strange v. Graham*, 56 Ala. 614.

In the same court, in *Conover v. Ruckman*, it was held that moneys in the hands of the sheriff are liable to attachment. A similar conclusion was reached, after a very learned consideration by Folger, J., in *Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 145; S. C., 30 Am. Rep. 283. *Contra: Hardy v. Tilton*, 68 Me. 195; S. C., 28 Am. Rep. 84. See note, 28 Am. Rep. 35.

LEGAL DEFINITIONS OF COMMON WORDS.

XI.

“ADJUDGED” and “deemed” mean about the same. *Blaufus v. People*, 69 N. Y. 107; S. C., 25 Am. Rep. 148. A witness is disqualified, when “upon conviction he is adjudged guilty of perjury.” It was held he was not rendered incompetent by a mere verdict of guilty, without judgment. Folger, J., observed: “The learned counsel for the plaintiff in error contends that there is no difference in meaning between the words ‘deemed’ and ‘adjudged,’ used in the penal enactments of the Revised Statutes, and urges that the word ‘adjudged,’ in the section under consideration, should be read as if written ‘deemed.’ It is, perhaps, enough to say that it in fact reads ‘adjudged,’ and that whatever difference there is between the two terms, is in favor of our interpretation of the statute. Moreover, the phrase ‘deemed’ is not, in its meaning, when used in legislative expression, so much more favorable to the plaintiff in error, as to turn us from our view of the question. To ‘damn’ or ‘condemn,’ is ‘to deem, think or judge any one, to be guilty, to be criminal—to give judgment, or sentence, or doom of guilt; to adjudge, or declare the penalty or punishment’ (Rich. Dict., in *voce*, *damn*); and ‘judge not, that ye be not judged,’ of our New Testament, is ‘*nyle ye deme, that ye be not demed,*’ of Wycliffe.”

In *Holmes v. Oregon & California Ry. Co.*, U. S. District Court, Oregon, Deady, J., gives this definition of “inhabitant”: “In the consideration of this question counsel for the libellant assumes that habitation and domicile are in this case convertible terms, and that therefore a person is always an inhabitant of the place in which he has a domicile, and *vice versa*. But I do not think that the term ‘inhabitant,’ as used in the statute, is the equivalent of the technical term ‘domicile.’ A habitation is a place of abode—a place to dwell in; and an inhabitant of a place is one who has an actual residence there. But a person’s domicile is a place where he may reside in fact, or for many purposes may be deemed to reside. Indeed, a person may have two domiciles at once; ‘as, for example, if a foreigner, coming to this country, should establish two houses, one in New York and the other in New Orleans, and pass one-half the year in each, he would, for most purposes, have two domiciles.’ Bouvier; Domicile. A man’s domicile, as the word implies, is his house, his home; and it may continue to be such for years, without being actually inhabited by him. But an inhabitant of a place is one who ordinarily is personally present there; not merely *in itinere*, but as a resident and dweller therein. Domicile, as a question of fact, is often one of great difficulty to determine. Yet in contemplation of law, every one has a domicile somewhere, because upon it generally depends his personal status, rights, and duties, and the disposition of his property after his death. Furthermore, a person who, in contemplation of law, has a domi-

cile, may nevertheless, as a matter of fact, be a mere wanderer and not an inhabitant of any place.”

A railroad is not a “public highway” within a statute punishing vulgar and abusive language in presence of females on a public highway. *Comer v. State*, 62 Ala. 320. The court said: “Every thoroughfare which is used by the public, and which is, in the language of the English books, ‘common to all the king’s subjects,’ is a highway, whether it be a carriage-way, a horse-way, a foot-way, or a navigable river.” 3 Kent Com. 548. The statute against gaming forbids it at *any public house or highway*, and it has been several times decided that the term *highway* is intended to designate ‘a public road—that is, a road dedicated to and kept up by the public, as contradistinguished from private ways or neighborhood roads, which are not so kept up.’ *Mills v. State*, 20 Ala. 86; *Glass v. State*, 30 id. 529; *Napier v. State*, 50 id. 169. A navigable river, though declared by law—State and Federal—a public highway for certain purposes, is not a public highway within the meaning of the statute against gaming. *Glass v. State*, *supra*; nor is a railroad, ‘the property of a private corporation, kept up and operated by it, though open to the public for travel and the transportation of freight.’” *Napier v. State*, *supra*.

“Medical attendance” includes nursing and watching within a statute for relief of paupers. *Scott v. Winneshiek County*, 52 Iowa, 579. The court said: “While the words *medical attendance* are often used to denote the rendering of professional medical services, we do not think that their use in that respect is such as necessarily to exclude all other meanings. The efforts of the physician, however skillful or assiduous he may be, must usually be supplemented by an attendance which he cannot give. It matters not that the persons who give such attendance are usually denominated nurses. Their office is to assist the physician to obtain certain medical results. We have no reason to suppose that the Legislature used the words *medical attendance* with the design that any narrow or technical meaning should be put upon them. The statute contemplates that there are persons who need county assistance but who should not be sent to the county poor-house. It provides that the township trustees shall determine who such persons are and supply the necessary relief. We think that they should be allowed in all proper cases to furnish attendants other than professional attendants to administer the medicine professionally prescribed, and do whatever else constitutes a part of the medical treatment.”

A “trial of speed” of horses, for which a premium is offered by an agricultural society, is “in plain English a horse-race,” upon a wager. *Comly v. Hillegar*, Pennsylvania Supreme Court, March, 1880.

“Dwelling-house” seems easy enough, but the judges did not find it so in *Thompson v. Ward*, L. R., 6 C. P. 327. A house consisted of nine rooms, let out in six several tenements. The passage, staircases and conveniences, consisting of a privy and

an ash-pit, were in common. There was an outer street door, never closed, without lock or bolt. Each tenant had exclusive possession of his rooms. The owner did not reside on the premises. Two judges held that each tenant was in the occupancy of a "dwelling-house," and two held the contrary. In *Barnes v. Peters*, L. R., 4 C. P. 539, a set of rooms in a college at Cambridge was held a "dwelling-house."

There is difficulty too about "lodger." Webster says a "lodger is one who lives at board, or in a hired room, or who has a bed in another's house for a night." But in the last case, *Barnes v. Peters*, the occupants of the college rooms were held not "lodgers." And in *Thompson v. Ward*, *supra*, Bovill, C. J., says: "Generally speaking, a lodger is a person whose occupation is of part of a house, and subordinate to and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or a dominion over the house generally, or over the outer door, and under such circumstances as that the possession of any particular part of the house held by the lodger does not prevent the house generally being in the possession of the landlord." But in *Phillips v. Henson*, 3 C. P. Div. 26, an under-tenant was held a "lodger," within the Lodger's Goods Protection Act. And in a recent case before a police court, of *Ball v. Priest*, it was held that it was not enough to "lodge" goods; the owner must "lodge" himself—sleep or live on the premises.

Under English statutes there is a difference between "beer-shop" and "beer-house," the former being held ordinarily to mean a place where beer is sold to be drunk off the premises, and the latter a place where beer is sold to be drunk on the premises. *Bishop of St. Albans v. Battersby*, 3 Q. B. Div. 359.

A rather indefinite definition of "pool" is given by Mr. Justice Miller, of the United States Supreme Court, in *Kilbourne v. Thompson*, 23 Alb. L. J. 227. The "pool" in question was a "real estate pool." He said: "The word 'pool,' in the sense here used, is of modern date, and may not be well understood, but in this case it can mean no more than that certain individuals are engaged in dealing in real estate as a commodity of traffic." This modern "pool" differs from that of Siloam in two particulars; it is always "disturbed," and nobody who descends into it ever comes out cured.

"Evident" does not mean absolutely unquestioned. Webster defines it, "clear to the mind; obvious; plain; apparent; manifest; notorious; palpable." In *Ex parte Foster*, 5 Tex. Ct. App. 625; S. C., 83 Am. Rep. 577, the court recognizes these definitions, and hold that under a constitutional provision allowing bail in a capital case except where the "proof is evident," bail will be denied if the evidence adduced on the application would sustain a verdict of murder in the first degree, but not otherwise.

"Arbitrarily" was defined in *Treloar v. Bigge*, L. R., 9 Ex. 151. Here a lessor covenanted not "arbitrarily" to withhold his assent to an assignment of

the lease. The court, *obiter*, said this meant, "without fair, solid, and substantial cause, and without reason given," and that a refusal grounded upon advice was not "arbitrary." Webster defines "arbitrary," as "depending upon will or discretion, not governed by any fixed rules, despotic, absolute in power, bound by no law."

"Good cause" has no meaning in a stipulation for cancelling a contract. *Cumner v. Butts*, 40 Mich. 322; S. C., 29 Am. Rep. 530. But "cause" for removal from office, means "some dereliction or general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself." *People ex rel. Munday v. Fire Commissioners*, 72 N. Y. 445. To the same effect, *Haight v. Love*, 39 N. J. L. 14.

"Perishable" ordinarily means subject to natural and speedy decay, but it may also be applied to property liable to material depreciation in value from lapse of time. *Webster v. Peck*, 31 Conn. 495. Corn, however, is not "perishable" property. *Illinois Cent. R. Co. v. McClellan*, 54 Ill. 58; S. C., 5 Am. Rep. 83. The court said: "All know that with reasonable care corn can be preserved for many years. In one sense, nearly all things are perishable, as grain, vegetables, timber, animals, and even many kinds of metal perish, or cease to retain their usual character. Perishable property, in the commercial sense, is that which from its nature decays in a short space of time, without reference to the care it receives. Of that character are many varieties of fruits, flowers, some kinds of liquors, and numerous vegetable productions. But to say mature merchantable corn was of that character, would be a perversion of language."

EMPLOYER'S LIABILITY FOR EMPLOYEE'S INJURIES.

IN view of the controversy which will probably ensue upon the bill introduced in the Legislature of Massachusetts, seeking to extend the liabilities of employers, it may not be inopportune to take a cursory glance at the law as it generally exists here and in Europe, with some brief reasons in favor of legislation.

The first recorded case, in which the question of the employer's liability for injuries to his servant was raised, was determined in 1837. *Priestly v. Fowler*, 3 M. & W. 1. The plaintiff declared that he was a servant of the defendant, and as such was directed to go, with certain goods of the defendant, in a van belonging to the defendant, and conducted by another servant of the defendant; that the plaintiff did as he was directed, and that while he was being conveyed the van broke down and he thereby had his thigh fractured. He also proved that the van was overloaded, and that the defendant knew that fact when he ordered the plaintiff on it, and that the overloading caused the van to break down. The jury returned a verdict for 100l. The case was thereupon taken to the Court of Exchequer and judgment was delivered by the chief baron, Lord Abinger, who, among other things, said: "It is admitted that there is no precedent for the present action by a servant against a master. We are therefore to decide the question upon general principles, and in doing so we are at liberty to look at the consequences of a de-

cision the one way or the other. If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. * * * If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach maker or his harness maker or his coachman. The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself. * * * The mere relation of a master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his knowledge, information and belief. * * * In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in his duty bound to exercise on behalf of his master—to protect him against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master than any recourse against his master for damages could possibly afford." The judgment was arrested and the verdict made "nil."

This was followed, in 1841, in South Carolina, by *Murray v. R. R. Co.*, 1 McMullen, 385. *Priestley v. Fowler* is not cited, but there can be little doubt, from the language used, that it had been referred to; yet of a court of ten judges, six determined for the defendant, and the remaining judges, with their elaborate opinions, dissented.

It was not until 1842, however, that the direct question whether a master is liable for the injuries suffered by his servant, through the negligence of a fellow-servant, was judicially decided and the case, *Farwell v. Worcester R. R. Corporation*, 4 Metc. 49, is the leading one on the subject in this country, and is reported in full in the *Dartmouth Coal Co. v. McGuire*, 8 McQueen H. L. 300. Farwell was an engine driver of the Worcester Railroad Corporation, and was running an engine on its road, in the discharge of his duty, when the defendant, by a servant, negligently misplaced a switch, in consequence of which his train left the track and his right hand was run over. Chief Justice Shaw rendered the opinion of the court. "This is an action of a new impression in our courts. * * * It is an argument against such an action, though certainly not a decisive one, that no such action has before been maintained. * * * It is laid down in Blackstone that if a servant, by his negligence, does any damage to a stranger, the master shall be answerable for his neglect. But the damage must be done while he is actually employed in the master's service. * * * But this does not apply to the case of a servant bringing his action against his own employer to recover damages for an injury arising in the course of that employment; where all such risks and perils as the employer and the servant respectively intend to assume and bear may be regulated by the express or implied contract between them, and which, in the contemplation of the law, must be presumed to be thus regulated. * * * The general rule, resulting from considerations as well of justice as of policy, is that he who engaged in the employ of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption the compensation is adjusted accordingly. And we are not aware of any principle except the perils arising from

the carelessness and negligence of those who are in the same employment. There are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, and which can be as distinctly foreseen and provided for in the rate of compensation as any others. * * * In considering the rights and obligations arising out of particular relations, it is competent for courts of justice to regard considerations of policy and general convenience, and to draw from them such rules as will best promote the safety and security of all parties concerned. * * * When several persons are employed in the conduct of a common enterprise or undertaking, and the safety of each depends much on the skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, can give notice of any misconduct, incapacity or neglect of duty, and leave the service if the common employer will not take such precautions and employ such agents as the whole party may require. * * * Under the facts in this case, the loss must be deemed to be the result of pure accident, like those to which all men, in all employments, and at all times, are more or less exposed, and like similar losses from accidental causes, it must rest where it first fell, unless the plaintiff has a remedy against the person actually in default, of which we give no opinion."

This case was followed in England by *Hutchison v. The T. & B. Railway Company*, 5 Exch. 343. The plaintiff sought to hold the company for an injury suffered by her intestate, a servant of the defendant, through the negligence of another servant, while the deceased was travelling in one of the company's carriages, in the discharge of his duties to the defendant, and the court, independent of the decision in *Fowler v. Boston & Worcester Railroad Company*, came to the conclusion: "That this was a risk which Hutchison must be taken to have agreed to run when he entered into the defendant's service, and for the consequences of which therefore it is not responsible." On page 354 in the same report (5 Exch.) appears the case of *Wigmore v. Jay*, a builder who employed Wigmore as a bricklayer. Scaffolding was erected under the superintendence of defendant's foreman, who used an unsound pole, in consequence of which the scaffolding broke while Wigmore was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. But the court, Chief Baron Pollock, held that it was not suggested that the foreman "was deficient in skill, or an improper person to be employed for that purpose," and the action was decided not to be maintainable, resting the opinion on the previous cases.

This doctrine, though recognized in New York and approved by Judge Beardsley, as early as 1844, in *Brown v. Maxwell*, 6 Hill, 594, was not passed upon by the Court of Appeals until 1851, when it was fully adopted and affirmed in *Coon v. Syracuse & Utica Ry. Co.*, 5 N. Y. (1 Seld.) 492, and the general rule of the common law is now well established that a master is not liable to his servant for injuries sustained through the negligence of a fellow-servant in the course of their common employment; that no distinction arises because of the different rank of the employees; that a volunteer assistant is as much a fellow-servant in this respect as an employee (*Potter v. Faulkner*, 1 B. & S. 100), and that a servant who had done a negligent act and has been discharged is a fellow-servant with the person who has been engaged in former situation and injured by the discharged servant's negligence. *Felham v. England*, L. R., 2 Q. B. 14. So the expression "common employment," has been determined to mean the risks incident to the occupation, and includes the negligence of a person employed by the same master;

and here it may be added that it has been decided in Massachusetts, and is the only recorded case in the common law upon the point, that a servant who is injured through the negligence and carelessness of a fellow-servant cannot recover damages for his injury from the negligent servant himself for his carelessness in such employment, and that the plaintiff is utterly without remedy in such cases. *Albro v. Jaquith*, 4 Gray, 99.* The master is, however, liable, if it can be proved that the employee was injured through an extraordinary risk, of which he was cognizant and of which the employee was ignorant.

The foregoing is in brief the common law as it generally exists in this country and in Great Britain.

Ohio has given a very liberal construction to the rule and it has been determined that if the negligence is due to a superior or inferior servant to the workman injured, he can recover (*Stevens v. Miami R. R.*, 20 Ohio, 415), and a railway company is held for the negligence of a conductor, through which a brakeman is injured. *C. C. C. R. R. v. Keary*, 3 Ohio St. 201. A master is also liable to his servant for defective machinery, which might have been avoided by the exercise of ordinary care by the master. *McGatrick v. Wason*, 20 Ohio St. 566.

Kentucky follows this broad view of the rule. *Sullivan v. Louisville Bridge Co.*, 9 Bush, 81. +

There are but two States in the Union in which the rule is changed by special enactment; those States are Iowa and Georgia. In the former the statute provides that all railways shall be held liable to their employees for the negligence or mismanagement of their other employees or agents, as well as for their willful wrongs, whether of omission or commission, and that no contract or receipt shall in any way lessen this liability. Code of Iowa (1873), §§ 1307, 1308.

In Georgia, a provision to the same end, limited to railways but not so broad as in Iowa and without the clause prohibitory of contracting against negligence, is in force. Code of Ga., 1873, § 2083. In Scotland the common law was substantially to the effect that the liability of the employer to his servant for the negligence of another servant was the same as that to strangers, and he was accountable. The late Lord Cockburn said in *Dixon v. Rankin*, reported in 14 Dunlop, 416 (Jan. 13, 1852): "I can conceive some reasons for exempting the employer from liability altogether; but not one for exempting him only when those who act for him injure one of themselves. It rather seems to me that these are the very persons who have the strongest claim upon him for reparation, because they incur danger on his account." By the decision of the House of Lords in the *Barton Hill Coal Company v. Reid*, 3 Macqueen, the law in Scotland was in 1852, as well as in Ireland, made uniform with that of England and Wales. In France, by article 1348 of the Civil Code, "Citizens are liable, not only for damages caused by their own acts, but also for that caused by persons for whom they are responsible, or by things in their custody. * * * Masters and their delegates are liable for damages caused by their servants and overseers in performing the duties in which they are employed," and in 1841 the court of cassation of France determined that "the master is liable for the injury which one of his servants or workmen has caused through negligence to another servant or workman in a work which they were charged to carry out in common." *Dalloz Jurisprudence Générale*

du Royaume (1841), 271. In Germany, by an imperial law of June 7, 1871, railway companies are held liable for damages in every instance for injury or death unless the injury is due to the visitation of God (*vis major*) or the fault of the injured person. A similar provision extends to mines, quarries, diggings, manufactories, etc.; where the injury is due to negligence, in all cases the sufferer shall have redress from the owner or employer, and any contract with a servant or employee in derogation of this liability is absolutely void. In Austria and Italy no trace of the rule derived from the case of *Priestly v. Fowler* is to be found. In Great Britain the common law has now been changed, and since the first day of January, 1881, there is enforced an act (43 & 44 Victoria, ch. 42) which provides substantially as is asked for by the bill introduced into the Massachusetts Legislature.

The chief reasons given by the courts for the rule that the employee cannot maintain an action for injuries due to the negligence of a fellow-workman are: That the wages include the risk of injury which the employee runs in his occupation, or that the employee knows the dangers and hazards incident to the employment in which he engages and therefore cannot recover, or that the employee by implied contract excluded himself from holding the employer responsible and that it would be contrary to justice and public policy to allow him to recover. An examination, however, of these reasons in the light of the actual facts and the general principles of the law, discloses that they are not tenable.

The contract of hiring of labor is an agreement to do certain duties or work for a consideration called wages, *i. e.*, a compensation for services — nor does the word wages in any way extend to or include the idea of a premium for the risks which the workman runs. The contract contains not the slightest essence of the law of insurance. The workman about to enter into an employment is offered no opportunity to examine the master, the superintendent, the overseer or the fellow-workman as to their respective qualifications; the machinery, tackle, scaffolding, plants, buildings, shops and factory as to their fitness, safety, strength and security; and indeed the complexity and variety of modern mechanism, the extent and gigantic proportions of some manufactories, the hundreds of miles of line with its many bridges and vast rolling-stock of even a single railway, render it impracticable, not to say impossible, that a new man should be so informed that he might know his danger and calculate his risks. In truth, the workman is left in the dark as to the material facts affecting the risk he is alleged to assume, a state of fact affecting the subject peculiarly within the knowledge of the assured is not warranted; the courts have repeatedly held that the employer warrants neither the competency of the fellow-workmen nor their adequacy to discharge their ordinary duties, nor the fitness or safety of his machinery — in short, the employer warrants nothing to his employee. With these vital elements of the law of insurance ignored, to say that the employee received a premium for the risk he assumes is as erroneous and false as to say that he receives higher pay because of danger he incurs. Wages as a rule are regulated on the law of demand and supply, and it cannot be denied that the test of high or low wages depends not upon the danger incurred but upon the responsibility imposed, and instead of the persons in the most hazardous occupation receiving the highest wages, the contrary is true, *viz.*: the person in the safest situation has as a rule the highest salary. It is a pure fiction to say that the employee's wages include the risk he runs in his occupation, and not less so the statement that the employee knows the dangers incident to the employment in which he engages and therefore cannot recover for the

* But see *contra*, *Hinds v. Overacker*, 66 Ind. 547; S. C., 22 Am. Rep. 114, and note, 115. — ED. ALB. L. J.

+ So does Illinois. See *Chicago & N. W. R. Co. v. Moranda*, 93 Ill. 302; S. C., 34 Am. Rep. 168, where the railroad company was held for injury suffered by a track-repairer at the hands of a fireman. This case gives a very exhaustive and clear review of the adjudications. — ED. ALB. L. J.

injuries. Admitting this untrue proposition for argument, the conclusion by no means follows as a logical sequence, nor can it be sustained upon sound principles of law. A traveller knows the dangers incident to a railway journey, but that fact does not preclude him from recovering as a passenger, even if he rides on a free pass. *Harrison v. G. N. Ry. Co.*, 10 Exch. 376. Nor though an individual is without a ticket and has no intention of paying and rides contrary to the law. *Austin v. G. W. Ry.*, L. R., 2 Q. B. 442; *Wilton v. Middlesex R. R.*, 107 Mass. 108; *Doran v. E. R. Ferry*, 3 Lans. 103. But the law goes further, and many decisions hold directly that the mere knowledge of danger is no answer to a claim for injuries, and so when a passer on a highway saw an obstruction which he knew to be dangerous and nevertheless continued his efforts to pass and was injured, he was indemnified. *Mahoney v. Metro. R. R.*, 104 Mass. 73. The law actually assists to compensation persons injured while doing an act they knew they had no right to do, prohibited by law, and which if they had not done they would not have been injured. When a man tied the forefeet of his donkey and unlawfully left him an obstruction in the highway where the animal was run over and killed, the plaintiff was allowed to recover. *Davies v. Mann*, 10 M. & W. 546. Where A. went into B.'s garden without his permission to cut and take a stick, and was injured by stepping on a spring gun which the owner had a right to place on his premises, A., though a trespasser and perhaps a thief, was given damages. *Bird v. Holthoke*, 4 Bing. 628. A driver kept on the wrong side of the road in contravention to the statute, and would not have been injured if he had held to the right, but was nevertheless entitled to recover upon the defendant's running into him. *Spofford v. Harlow*, 3 Allen, 176. So where two persons are trotting their horses for money, contrary to law, and in the racing the one ran against the other the latter was entitled to recover though he would not have been injured if he had not broken the law. *Welch v. Wesson*, 6 Gray, 505. To this must be added the case where the thief stole wine, and the owner to catch him mixed it with poison, and after a second theft, feeling its ill results, the thief brought suit, and he was entitled to recover for his injury from the wine owner for his own unlawful act.

All contracts, however, create new liabilities and enlarge existing ones. Thus when a person is intrusted to move some barrels and in moving them negligently breaks them, he will be liable although he renders his services without pay and is not a common carrier. *Coggs v. Bernard*, 1 Sm. Ld. Cas. 97. And where an insurance agent gratuitously undertakes to obtain an insurance and omits some formalities rendering the policy inoperative, he is held liable. *Wilkinson v. Coverdale*, 1 Esp. 74. And it is clear that under the ordinary rules of our law the contract of hire should extend to entitle the employee to recover in every case in which he is injured through negligence attributable to defective machinery, ways or building, or the negligence of a servant, for the negligence of the servant is by the principles of that law the negligence of the master, and that a master shall be liable for his servant or workman as established as an organic law of all civilized countries, and was first adopted in England over 200 years ago in the case of *Michaels v. Alestree*, 2 Levinz, 172, and the force of this rule is admitted by the courts and they seek to create an exception to it; when they say that the employee by implied contract agreed not to hold the employer liable, they assume an act to have been done or a condition to have been agreed to, which in fact and in truth did not exist in the minds of the contracting parties at the time of entering into their agreement. The jury in the first case,

without any evidence upon the question of the extent of the liability of the master for injuries, found, under the rule in *Michaels v. Alestree*, directed by justice and reason, for the plaintiff. Yet when the same case was brought before the judges they freely admitted that it was a new question to them, and then instantly reversed the verdict, and said that it must have been implied by contract, that is as a fact, that the servant would take the risk of injury. Now, since these learned judges confess their ignorance on this question of fact, and since twelve reasonable men have found for the employee, is it not a little unjust that those same judges should reverse the verdict and assume an element or condition, viz.: that the employee agreed not to hold the employer. This assumption once granted, this condition once conceded as existing in the covenant, the reasoning of the courts in cases of this nature will almost necessarily follow, otherwise the conclusions will not follow, unless perhaps the real underlying theory in abridging the rights of an employee toward his master is, that formerly most work was done by slaves who had no civil rights toward their master; that later, in the time of the Feudal Ages, the condition of the slave was ameliorated to that of vassal, who, being bound by an oath of fealty, had surrendered "his life and limb and earthly honor" to the lord of the manor, whose relation toward him in respect to civil rights was in a measure like that of a sovereign toward his subject, and even to this day a citizen cannot sue his State. But a rule of law based upon such a theory is contrary to the fundamental principles of our Constitution and government. Indeed, the condition of the employee suing his master because of injuries is an anomaly in our law, and cannot be maintained upon any principle of logic in our jurisprudence without importing some fact or assuming some element to exist contrary alike to justice and public policy.

Justice and public policy demand that the employer should do everything in his power to avert danger and accident to the life and limb of his employee: that he should provide them with safe and secure ways, lines, bridges, machinery, buildings, etc., so that the employee might know that he is secure while he is at work so far as the employer or those that act for him can so make it, and that if he is injured he may recover upon proof of negligence. The employer reaps the profits of the labors of his workman and he should bear a pecuniary loss for an injury to life or limb sacrificed for his sake in the discharge of his duty, due to no fault of the employee, and resulting from a choice which the employer has exercised by purchasing machinery and engaging other employees, over which he had no control and through the exercise of which the employee is injured. The condition of the contracting parties is not equal; it is the part of public policy to protect the weak; the law guards the mariner in contract with the master in many respects; the law should protect the employee so that he would be accountable for negligence due to himself or those acting for him, so that he will do his share in securing the employee from injury and death, and himself and family from suffering, pauperism, charity, the poor-house and the State.

Nor would a just law in this behalf work such a radical change; the humane and good employer would not feel its effect; he already takes every precaution to guard the life and limb of his employee out of principle of right; but it would reach a class of men whose whole end is "to make money and evade the consequences of their own culpable negligence; such men can only be reached by the terrors of the law and the dread of compensation will compel them to exercise care."

E. B. GOODSALL.

TAXATION OF STATE BONDS BY STATE—
FINAL ADJUDICATION.

SUPREME COURT OF THE UNITED STATES, JAN. 24, 1881.

HARTMAN, Plaintiff in Error, v. GREENHOW.

By an act of the Legislature of Virginia, providing for the issue of coupon bonds of the State, it was declared that the interest coupons which were payable to bearer should be receivable after maturity for all taxes, debts, dues and demands due the State, and this should be expressed on their face. Under this act bonds were issued and negotiated. A subsequent act of the Legislature provided for a tax on the bonds of the State, which tax-collectors were directed to deduct from the coupons presented to them in payment of taxes. *Held*, that this provision, as applied to coupons owned by persons who did not own the bonds from which they were taken, was invalid under the Federal Constitution as impairing the obligation of a contract. One claiming a right under the Federal Constitution applied for a mandamus to enforce such right to a State court of last resort. The judges of that court were evenly divided in opinion upon the question presented, so the application was denied and judgment to that effect entered. *Held*, that there was such a final adjudication of the State court as could be reviewed by the Federal Supreme Court. A mandamus in cases of this kind is no longer regarded in this country as a mere prerogative writ.

IN error to the Supreme Court of Appeals of the State of Virginia. Sufficient facts appear in the opinion.

FIELD, J. The plaintiff in error, who is the petitioner in the court below, is a citizen and resident of the city of Richmond, State of Virginia; and on the 5th of April, 1878, was indebted to the State for taxes to the amount of \$26.53. On that day he tendered to the treasurer of Richmond—who is by law charged with the duty of collecting the taxes of the State in that city—certain interest coupons which were overdue, amounting to \$24, cut from bonds of the State issued under the provisions of an act of the General Assembly passed March 30, 1871, commonly known as the Funding Act, and \$2.53 in lawful money of the United States, in payment of the taxes; but the treasurer refused to receive the coupons in discharge of the taxes without first deducting therefrom the taxes upon the bonds to which they were originally attached. The petitioner holding the coupons was not at the time the owner of such bonds. Upon this refusal he applied to the Supreme Court of Appeals of Virginia for a writ of mandamus to the treasurer to compel him to receive the coupons, with the money mentioned, in full discharge of the petitioner's taxes without any deduction from the coupons for the taxes upon the bonds.

The court issued a rule or an alternative writ upon the treasurer, to which he answered that the General Assembly of the State had for many years exercised the right to tax all bonds, choses in action and other evidences of debt, including bonds of the State; that the taxes assessed upon the latter bonds were according to their market value, the amount being fixed at fifty cents on the \$100 of such value; that the law required the taxes to be collected when the interest on the bonds was paid, and made it a high penal offense for any officer to receive coupons in payment of taxes without deducting from their face value the tax levied upon the bonds from which they were taken; and he referred to several acts of the Legislature in support of this statement. He also answered that at the time the coupons were tendered to him he proposed to deduct from them the amount of the taxes on the bonds to which they were originally attached, and demanded of the petitioner a like amount in money in addition to what was tendered; that he would not otherwise have been justified in giving a receipt in full for the

taxes due; and that this additional amount the petitioner refused to pay. The respondent therefore denied that the petitioner was entitled to the writ, and prayed that his petition be dismissed.

The application was fully argued before the Supreme Court of Appeals by counsel for the petitioner, and by the attorney-general of the State for the treasurer. The judges of the court were equally divided in opinion upon it, and as is usual in such cases the application was denied and judgment to that effect, with costs, was entered. To review this judgment the case is brought here on writ of error.

The principal question for determination as thus seen is the validity of the statute of the State requiring the tax levied upon its bonds to be deducted from the coupons for interest, originally attached to them, when the coupons are presented for payment, so far as it applies to coupons separated from the bonds and held by different owners.

To fully understand this question it will be necessary to make a brief reference to the legislation of the State upon her indebtedness. But before doing this there is a question of jurisdiction to be considered. The judgment of the Supreme Court of Appeals being entered upon an equal division of opinion among its judges, it is argued that there is no such final adjudication of the State court as can be reviewed by this court.

The Revised Statutes, which express the statute law of the United States in force December 1, 1873, provide in section 709—embodying substantially the provisions of section 25 of the Judiciary Act of 1789—that a final judgment or decree, in any suit, of the highest court of a State in which a decision could be had may be re-examined by the Supreme Court of the United States in three classes of cases. In all of them there must be a final judgment or decree of the highest court of the State, and the decision expressed by that judgment must have involved a question under the Constitution, laws or treaties of the United States, and have been adverse to some right, privilege or immunity claimed under them. Here the Supreme Court of Appeals certifies that on the hearing of the case there was drawn in question the validity of the statute of the State authorizing the tax upon the bonds and requiring its deduction from the coupons, on the ground of its repugnancy to the provision of the Constitution of the United States, prohibiting any legislation by the States impairing the obligation of contracts; and that the decision was in favor of the validity of the State statute and against the right claimed by the petitioner under the provision of the Constitution of the United States. That this certificate correctly states the question involved will more clearly appear from the legislation of the State, which we shall presently consider. The judgment denying the writ of mandamus was a final determination against the claim of the petitioner to have the coupons held by him received for taxes without a deduction from their face value of the amount of the tax levied on the bonds. A mandamus in cases of this kind is no longer regarded in this country as a mere prerogative writ. It is nothing more than an ordinary proceeding or action in which the performance of a specific duty, by which the rights of the petitioner are affected, is sought to be enforced. Says Mr. Chief Justice Taney: "It undoubtedly came into use by virtue of prerogative power in the English crown and was subject to regulations and rules which have long since been disused; but the right to the writ and the power to issue it have ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall v. United States*, 12 Pet. 615, and *Kendall v. Stokes*, 3 How. 100." *Kentucky v. Dennison*, 24 How. 61. And such we understand to be the law of Virginia. The

judgment, therefore, in the case stands like the judgment in an ordinary action at law, subject to review under similar conditions. It is not the less expressive of the decision of the court upon the merits of the petitioner's claim in the case because it is rendered upon an equal division of opinion among the judges. The fact of division does not impair the conclusive force of the judgment, though it may prevent the decision from being authority in other cases upon the question involved. The judgment is that of the entire court and is as binding in every respect as if rendered upon the concurrence of all the judges. *Lesieur v. Price*, 12 How. 59; *Durant v. Essex County*, 7 Wall. 107; S. C., 101 U. S. 555.

Nor does it matter that the judgment was rendered in an original proceeding in the Supreme Court of Appeals of Virginia, and not in a case pending before that court on appeal. It is enough for our jurisdiction that the judgment is by the highest tribunal of the State in which a decision could be had in the suit. When such a judgment is brought before us for review, involving in its rendition a decision upon a Federal question, we do not look beyond the action of that court. It is enough that we have its final judgment in the case, whether it be one of original jurisdiction or heard by it in the exercise of its own appellate power over the inferior courts of the State.

We proceed, therefore, to consider the legislation of the State upon her indebtedness. A brief sketch of it will perhaps enable us better than in any other way to exhibit the question for our determination, and indicate the solution it should receive.

It appears from the statutes to which we are referred—and we know the fact as a matter of public history—that prior to the late civil war Virginia had become largely indebted for moneys borrowed to construct public works in the State. The moneys were obtained upon her bonds, which were issued to an amount exceeding \$30,000,000. Being the obligations of a State of large wealth, which never allowed its fidelity to its promises to be questioned anywhere, the bonds found a ready sale in the markets of the country. Until the civil war, the interest on them was regularly and promptly paid. Afterward the payments ceased, and until 1871, with the exception of a few small sums remitted in coin during the war to London for foreign bondholders, or paid in Virginia in Confederate money, and a small amount paid in 1866 and 1867, no part of the interest or principal was paid. During the war a portion of her territory was separated from her, and by its people a new State named West Virginia was formed, and by the Congress of the United States was admitted into the Union. Nearly one-third of her territory and people were thus taken from her jurisdiction. But as the whole State had created the indebtedness for which the bonds were issued, and participated in the benefits obtained by the moneys raised, it was but just that a portion of the indebtedness should be assumed by that part which was taken from her and made a new State. Writers on public law speak of the principle as well established, that where a State is divided into two or more States, in the adjustment of liabilities between each other, the debts of the parent State should be ratably apportioned among them. On this subject Kent says: "If a State should be divided in respect to territory, its rights and obligations are not impaired; and if they have not been apportioned by special agreement, their rights are to be enjoyed and their obligations fulfilled by all the parts in common." 1 Kent's Com. 26. And Halleck, speaking of a State divided into two or more distinct and independent sovereignties, says: "In that case the obligations which have accrued to the whole before the division are, unless they have been the subject of a special agreement, ratably binding upon the different parts. This principle is established by the concurrent opinions of text-

writers, the decisions of courts, and the practice of nations." International Law, ch. 3, § 27.

In conformity with the doctrine thus stated by Halleck, both States—Virginia and West Virginia—have recognized in their Constitutions their respective liability for an equitable proportion of the old debt of the State, and have provided that measures should be taken for its settlement. The Constitution of Virginia of 1870, declared that the General Assembly should "provide by law for adjusting with the State of West Virginia the proportion of the public debt of Virginia proper to be borne by the States of Virginia and West Virginia," and should "provide that such sums as shall be received from West Virginia shall be applied to the payment of the public debt of the State." Art. 10, § 19.

The Constitution of West Virginia which went into effect in 1863 declared that "an equitable proportion of the public debt of the Commonwealth of Virginia prior to the first day of January, 1861," should "be assumed" by the State, and that the Legislature should "ascertain the same as soon as practicable, and provide for the liquidation thereof by a sinking fund sufficient to pay the accruing interest and redeem the principal within thirty-four years." Art. 8, § 8.

But notwithstanding these constitutional requirements and various efforts made to adjust the liabilities of West Virginia, nothing was accomplished up to March 30, 1871, and it is stated by counsel that nothing has been accomplished since. As might have been expected, the position of Virginia was not a pleasant one—being charged with the whole indebtedness which accrued before the formation out of her territory of a new State, and entitled to, without being able to obtain, a contribution from the new State of a part of it corresponding proportionately to her extent and population. She therefore undertook to effect a separate adjustment with her creditors, and for that purpose on the 30th of March, 1871, passed an act known as the "Funding Act" of the State. It is entitled "An act to provide for the funding and payment of the public debt." Its preamble recited that in the ordinance authorizing the organization of the State of West Virginia it was provided that she should take upon herself a just proportion of the public debt of the Commonwealth of Virginia prior to January 1, 1861, and that this provision had not been fulfilled, although repeated and earnest efforts in that behalf had been made by Virginia; and then declared that "to enable the State of West Virginia to settle her proportion of said debt with the holders thereof," and to prevent any complications or difficulties which might be interposed to any other manner of settlement, and "for the purpose of promptly restoring the credit of Virginia by providing for the certain and prompt payment of the interest on her proportion of said debt, as the same shall become due," the Legislature enacted: that the owners of the bonds, stocks or interest-certificates of the State (with a few exceptions) might fund two-thirds of the same and two-thirds of the interest due or to become due thereon up to July 1, 1871, in six per cent coupon or registered bonds of the State, to run thirty-four years; the bonds to be made payable to order or bearer, and the coupons to bearer. The act declared that the coupons should be payable semi-annually, and "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and that this should be so expressed on their face. For the remaining one-third of the amount of the bonds thus funded, the act provided that certificates should be issued to the creditors, setting forth the amount of the bonds not funded, with the interest thereon, and that their payment would be provided for in accordance with such settlement as might be subsequently had between the two States; and that Virginia would hold the bonds surrendered, so far as

they were not funded, in trust for the holder or his assignees. The bonds of the State, with the accumulated interest, then amounted to over \$40,000,000.

Under this act a large number of the creditors of the State holding bonds amounting, including interest thereon, to about \$30,000,000, surrendered them and took new bonds for two-thirds of their amount and certificates for the balance. A contract was thus consummated between the State and the holders of the new bonds and all subsequent holders of the coupons, from the obligation of which she could not without their consent release herself by any subsequent legislation. She thus bound herself not only to pay the bonds when they became due, but to receive the interest coupons from the bearer at and after their maturity to their full amount for any taxes or dues by him to the State. This receivability of coupons for such taxes and dues was written on their face and accompanied them into whatever hands they passed. It constituted their chief value, and was the main consideration offered to the holders of the old bonds to surrender them and accept new bonds for two-thirds of their amount.

In *Woodruff v. Trapnall*, reported in 10 Howard, a provision in an act of Arkansas, similar to this one, that the bills and notes of the Bank of the State of Arkansas, the capital of which belonged to the State, should "be received in all payments of debts due to the State of Arkansas," was held to be a contract with the holders of such notes which was binding on the State, and that the subsequent repeal of the provision did not affect the notes previously issued. "The notes," said the court, "are made payable to bearer; consequently every *bona fide* holder has a right, under the 28th section" (the one making the notes receivable for dues to the State) "to pay the State any debt he may owe it in the paper of the bank. It is a continuing guaranty by the State that the notes shall be so received. Such a contract would be binding on an individual, and is not the less so on the State." "And that the Legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument." In *Furnan v. Nicoll*, reported in 8 Wallace, a similar provision in an act of Tennessee, declaring that certain notes of the bank of that State should be "receivable" at the treasury of the State and by tax-collectors and other public officers, "in all payments for taxes and other moneys due the State," was held by this court unanimously to constitute a valid contract between the State and every person receiving a note of the bank. An attempt was made in the case to restrain the operation of the guaranty contained in the provision to the person who received the note in the course of his dealing with the bank, but the court said: "The guaranty is in no sense a personal one. It attaches to the note—is part of it, as much so as if written on the back of it; goes with the note everywhere and invites every one who has taxes to pay to take it."

Yet notwithstanding the language of the act of March 30, 1871, providing that the interest coupons of the new bonds should "be receivable at and after maturity for all taxes, debts, dues and demands due the State," and this was so expressed upon their face, the Legislature of Virginia, less than one year afterward (on the 7th of March, 1872), passed an act declaring that thereafter it should "not be lawful for the officers charged with the collection of taxes or other demands of the State," then due or which should thereafter become due "to receive in payment thereof any thing else than gold or silver coin, United States treasury notes, or notes of the National banks of the United States." This act, as seen on its face, is in direct conflict with the pledge of the State of the previous year, and with the decisions of this court to which we have

referred. Its validity, as might have been expected, was soon attacked in the courts as impairing the obligation of the contract contained in the funding act, and came before the Supreme Court of Appeals of the State for consideration in *Antoni v. Wright*, at its November term of 1872. The subject was there most elaborately and learnedly treated. The cases above were cited by the court; and the provision of the funding act was shown, by reasoning perfectly conclusive, to be a contract founded upon valuable considerations and binding upon the State. It was earnestly pressed upon the court that it was not within the legitimate power of the Legislature to make such a contract: that it would tend to embarrass the action of subsequent Legislatures by depriving them of the proper control of the annual revenue, and might, by absorbing the revenue, substantially annul the taxing power and put a stop to the wheels of government. But the court said, among other answers to this, that no rightful power of the State was surrendered by the legislation, but simply a provision made for the payment of the debts of the State; that the annual accruing interest on the debt of the State was in all well-regulated governments deemed an essential part of their annual expenses, and was always annually provided for. The act only made provision for an annual appropriation of a portion of the revenue, derived from taxation, to the payment of existing debts; and such legislation could not be deemed a great stretch of power, when the organic law of the State not only contemplated the punctual annual payment of the interest of her entire debt, but imperatively required, on the creation of a debt, that a sinking fund should be at once established, to be applied solely to its extinction. The organic law thus not merely authorized, but required the Legislature, which created the debt, to bind all future Legislatures, by the establishment of a fund to be applied solely to the extinction of the debt. And as to the objection that such legislation might, and probably would, result in crippling the power and resources of the State in time of war or other great calamity, the court said, that legislation cannot well be adapted in advance to extraordinary and exceptional cases; that such cases will occur at all times with all nations, and must be provided for by the wisdom and prudence of the government for the time being. "At such a time, however," said the court, in words full of wisdom, "the honored name and high credit secured to a State by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars—incalculably more—than the comparatively insignificant amount of the interest on a portion of the public debt enjoyed by breach of contract." The court thus expressed a great truth, which all just men appreciate, that there is no wealth or power equal to that which ultimately comes to a State when in all her engagements she keeps her faith unbroken.

These decisions of the Federal and State courts dispose substantially of the question presented in the case at bar. The act of March, 1872, being held to be invalid, the coupons were subsequently and until March, 1873, received for all taxes due the State to their full amount. On the 25th of that month the Legislature passed an act providing that from the interest payable out of the treasury on bonds of the State, whether funded or unfunded, there should be retained a tax equal in amount to fifty cents on the one hundred dollars of their market value, on the first day in April of each year, and made it the duty of every officer of the Commonwealth, charged with the collection of taxes, to deduct from the matured coupons which might be tendered to him in payment of taxes, or other dues to the State, such tax as was then or might thereafter be imposed on the bonds. The act, in terms, applied to all bonds of the State, whether held by her own citizens or non-residents and citizens of other States or

countries. In 1874 the Legislature modified this provision so that the tax on the bonds should not be retained from the interest paid on them, when they were the property of non-residents of the Commonwealth. But this exemption was omitted in the act of 1876, providing for the assessment of taxes in the State, in which the provision of the act of 1873 was inserted. It is the validity of this provision requiring the tax levied on the bonds to be deducted from the coupons held by other parties, when tendered in payment of their taxes or other dues to the State, which is presented for our determination.

The power of the State to impose a tax upon her own obligations is a subject upon which there has been a difference of opinion among jurists and statesmen. On the one hand, it has been contended that such a tax is in conflict with and contrary to the obligation assumed; that the obligation to pay a certain sum is inconsistent with a right, at the same time, to retain a portion of it in the shape of a tax, and that to impose such a tax is, therefore, to violate the promise of the government. See Hamilton on the Public Credit, in his works, 3d vol., pp. 514-518.

On the other hand, it is urged that the bonds of every State are property in the hands of its creditors, and as such, that they should bear a due proportion of the public burdens. In the case of *Murray v. Charleston*, 96 U. S. 445, there are many pertinent and just observations on this subject which it is not material to repeat, for the question is not necessarily involved in the disposition of the case before us. Whatever may be the wise rule—looking at the necessity in a commercial country for its prosperity that its public credit should never be impaired—as to the taxability of the public securities, it is settled that any tax levied upon them cannot be withheld from the interest payable thereon. Such was the decision of this court in *Murray v. Charleston*. There the city had issued certificates of stock, whereby it promised to pay to the owners thereof certain sums of money, with six per cent interest, payable quarterly. Subsequently it imposed a tax of two per cent on the value of all property within its limits for the purpose of meeting the expenses of its government; and treating its stock as part of such property, directed that the tax assessed upon it should be retained by the treasurer of the city from the interest due thereon. To recover the amount thus retained, which was one-third of the interest stipulated, suit was brought. The city defended its action on the ground that the tax on the stock was not higher than the tax on all other property of its citizens, and that all property in the city was subject to taxation; but the court answered, that by the legislation of the city, its obligation to its creditors was impaired, and however great its power of taxation, it must be exercised, being a political agency of the State, in subordination to the inhibition of the Federal Constitution against legislation impairing the obligation of contracts. Until the interest was paid, no act of the State or of its political subdivisions, exercising legislative power by its authority, could work an exoneration from what was promised to the creditor. This decision would be decisive here, but the present case is still stronger for the creditor. The funding act made the bonds issued under it payable to order or bearer, and made the coupons payable to bearer. They were, so far, distinct and independent contracts, that they could be separated from each other and transferred to different hands.

In *Clark v. Iowa City*, we had occasion to speak of bonds of municipal bodies, and private corporations, having similar coupons, and the language there used is applicable here. We said that most of such bonds "are issued in order to raise funds for works of large extent and cost, and their payment is therefore made at distant periods, not unfrequently beyond a quarter

of a century. Coupons for different installments of interest are usually attached to such bonds in the expectation that they will be paid as they mature, however distant the period fixed for the payment of the principal. These coupons, when severed from the bonds, are negotiable and pass by delivery. They then cease to be incidents of the bonds, and become in fact independent claims; they do not lose their validity if for any cause the bonds are cancelled or paid before maturity, nor their negotiable character, nor their ability to support separate actions. They then possess the essential attributes of commercial paper, as has been held by this court in repeated instances." 20 Wall. 589.

Here, also, the coupons held by the petitioner were distinct contracts imposing separate obligations upon the State. He was not the owner of the bonds to which they had been originally attached. In his hands they were as free and discharged from all liability on those bonds as though they had never been connected with them. And surely it is not necessary to argue that an act which requires the holder of one contract to pay the taxes levied upon another contract held by a stranger, cannot be sustained. Such an act is not a legitimate exercise of the taxing power; it undertakes to impose upon one the burden which should fall, if at all, upon another.

The funding act stipulated that the coupons should be receivable for all taxes and dues to the State, that is, for taxes and dues owing by the holders of the coupons, and for their full amount; and upon this pledge the holders of the bonds of the State surrendered them and took new bonds for two-thirds of their amount. The act of 1876 declares that the coupons shall not be thus received for taxes and dues owing by the holder to them for their full amount, but only for such portion as may remain after a tax subsequently levied upon the bonds, to which they were originally attached, is deducted, though the bonds be held by other parties. If this act does not impair the contract with the bondholder—who was authorized to transfer to others the coupons with this quality of receivability for taxes annexed—and also the contract with the bearer of the coupon written on its face that it should be received for all taxes to the State—it is difficult to see in what way the contract with either would be impaired, even though the tax on the bond should equal the whole face of its coupons. If, against the express terms of the contract, the State can take a portion of the interest in the shape of a tax on the bond, it may at its pleasure take the whole.

We are clear that this act of Virginia of 1876 (§ 117), requiring the tax on her bonds, issued under the funding act of March 30, 1871, to be deducted from the coupons originally attached to them when tendered in payment of taxes or other dues to the State, cannot be applied to coupons separated from the bonds, and held by different owners, without impairing the contract with such bondholders contained in the funding act, and the contract with the bearer of the coupons. It follows that the petitioner was entitled to a writ of mandamus to compel the treasurer of the city of Richmond to receive the coupons, tendered to him in payment of taxes due the State for their full amount.

The judgment of the Supreme Court of Appeals denying the writ must therefore be reversed, and the case remanded for further proceedings in accordance with this opinion, and it is so ordered.

MILLER, J. I dissent from the judgment of the court. In addition to the general proposition which I have always maintained, that no Legislature of a State has authority to bargain away the State's right of taxation, I am of opinion that in issuing the bonds and coupons which are the subject of this controversy, the Legislature of Virginia neither in terms nor by

any just inference made any contract that the bonds and coupons should not be subject to the same taxes as other property taxed by the State.

MENTAL ANXIETY NOT ELEMENT OF DAMAGE IN ACTION FOR NEGLIGENCE INJURY TO PROPERTY.

SUPREME JUDICIAL COURT OF MAINE, MAY 31, 1890.

WYMAN V. LEAVITT.

In the trial of an action on the case for simple negligence in blasting out a ledge within the located limits of a railroad whereby rocks were thrown upon the plaintiff's land and buildings, the plaintiff's mental anxiety in relation to his own personal safety is not, in the absence of personal injury, an element of damage.

Nor is his anxiety in relation to the personal safety of his child while going to and returning from school.

ON exceptions and motion to set aside the verdict. The facts sufficiently appear in the opinion.

Baker & Baker, for the plaintiffs.

A. P. Gould and J. E. Moore, for defendant.

VIRGIN, J. These are actions on the case against a sub-contractor to recover damages caused by his alleged negligence in blasting out a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiffs' adjoining lands and buildings, and for not removing, within a reasonable time thereafter, rocks thus lodged on their respective premises.

The cases were tried together. At the trial, Mrs. Wyman's counsel asked her, when upon the stand as a witness, to "give the jury some idea of her anxiety in relation to the blasting of the ledge while she was in and about the house—in relation to herself and family." The question was seasonably objected to by the defendant, but the witness was allowed to answer as follows: "At first, I was not much frightened; then after the second Jordan* began the heavy blasting, I used to watch my little boy when he went to school and came." This answer was objected to and admitted. After giving a detailed statement of the warnings of the blastings, she further testified in answer to the above general question: "I felt afraid the rocks would hit him." * * * "I was afraid." (Objected to; admitted.) "I was in fear from the time the second Jordan began to blow those heavy blasts until they got through." This was also objected to.

The jury were required to find specially, among other things, how much damages they assessed in each action, "for negligence in blasting, including as well the mental anxiety, as the other sources of damages." The jury answered these questions; and in the case of Mrs. Wyman, they found the sum of \$264.

There is no evidence in the case of any injury to the persons of either party or to their child; or of any wanton conduct on the part of the defendant or of his servants. Was the testimony objected to and admitted in relation to Mrs. Wyman's fear of her own or of her child's safety, legally admissible?

As a general proposition, damages are recoverable when they are the natural and reasonable result of the defendant's unlawful act—that is when they are such a consequence as in the ordinary course of things would flow from such an act. This is the broad rule, covering all the elements of damages, some of which do not enter into every case. The rule though correct as a general abstract statement has its limitations in particular cases. It may include insult and contumely, but they do not exist in every case of personal injury. Personal injury usually consists in pain inflicted both

bodily and mental. When bodily pain is caused, mental follows as a necessary consequence, especially when the former is so severe as to create apprehension and anxiety. And not only the suffering experienced before the trial, but such as is reasonably certain to continue afterward, as the result of the injury, rightfully enters into the assessment of damages.

In trespass for assault and battery, the jury may consider not only the mental suffering which accompanies and is a part of the bodily pain, but that other mental condition of the injured person which arises from the insult of the defendant's blows. *Prentiss v. Shaw*, 56 Me. 427; *Wadsworth v. Treat*, 43 id. 163. Or for an assault alone, when maliciously done, though no actual personal injury be inflicted. *Goddard v. Grand T. Ry*, 57 Me. 202; *Bruch v. Hancock*, 27 N. H. 223; 2 Greene's Cr. Rep. 269. So in various other torts to property alone when the tort-feasor is actuated by wantonness or malice, or a willful disregard of others' rights therein, injury to the feelings of the plaintiff, resulting from such conduct of the defendant, may properly be considered by the jury in fixing the amount of their verdict.

But we have been unable to find any decided case which holds that mental suffering alone, unattended by any injury to the person, caused by simple actionable negligence, can sustain an action. And the fact that no such case exists, and that no elementary writer asserts such a doctrine, is a strong argument against it. On the contrary it has been held that a verdict, founded upon fright and mental suffering, caused by risk and peril, would, in the absence of personal injury, be contrary to law. *Canning v. Williamstown*, 1 Cush. 451. So it is said (in *Lynch v. Knight*, 9 H. L. 577, 598) that "mental pain and anxiety the law cannot value, and does not pretend to redress when the unlawful act complained of causes that alone." Again, in *Johnson v. Wells*, 6 Nev. 224 (3 Am. Rep. 245), after a very elaborate examination, it was held that pain of mind, aside and distinct from bodily suffering, cannot be considered in estimating damages in an action against a common carrier of passengers. If the law were otherwise, it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision or by the train's leaving the track, could maintain an action against the company. See an elaborate note by Mr. Wood in his edition of *Mayne on Dam. 70 et seq.* We are of the opinion, therefore, that Mrs. Wyman's testimony relating to her fears as to her own personal safety was erroneously admitted. Whether a fright of sufficient severity to cause a physical disease would support an action, we need not now inquire.

We also think that her testimony, relating to her anxiety about her child's safety, was inadmissible.

If the child had suffered an injury in his own person, the redress would have had no necessary connection with the family relation; for the injury which one suffers in the relation of parent is limited, in the absence of any statutory provision, to the deprivation of the child's services, 2 Kent Com. 195; *Fort v. Union Pac. R. R. Co.*, 17 Wall. 553. And when the injury is to the person of the child, and the father thereby loses the services of the child, the father may maintain an action for the latter wrong, and the child for the former. *Cooley on Torts*, 220. But generally a father can recover no damages for injury to his parental feelings. *Flemington v. Smithers*, 2 Car. & P. 202; *Black v. Carrollton*, 10 L. Ann. 33; *Shearm. & Redf. on Neg.* (2d ed.), § 608, n. This rule, like most others, has its exceptions, among which are seduction (2 Greenl. Ev., § 570; *Phillips v. Hoyle*, 4 Gray, 568); forcible abduction of a child (*Stowe v. Liegewood*, 7 Allen, 118), in both of which, though based upon the predicate of a loss of service, parental feelings may be considered by the jury; and trespass quare claustrum

* Perhaps some one will kindly inform us what a "Jordan" is.—ED. ALB. L. J.

for disinterring and removing in a willful disregard of the father's rights, the remains of the deceased child. *Mcagher v. Dracoll*, 90 Mass. 281. But we fail to perceive upon what principle of law the mother or father could recover for parental feelings in an action like the one at bar.

As to the action of Mr. Wyman, the jury found specially, as in his wife's case, a certain sum of mental anxiety, though less in amount, although there was no testimony upon that point coming from him. The two cases were properly tried together, and the wife must necessarily have had more or less influence upon the other, and cannot well be now separated. We therefore think exceptions should be sustained in both cases.

Exceptions sustained.

NEW YORK COURT OF APPEALS ABSTRACT.

CONSTITUTIONAL LAW — EFFECT OF JUDGE SITTING IN REVIEW OF OWN DECISION IS TO GIVE NEW TRIAL.—Plaintiff had a claim against an estate, which, after presentation, was disputed by the executor, the defendant herein. It was heard before a referee, who reported in favor of defendant, wholly disallowing the claim. A motion was made by defendant, before Justice Brady, for the confirmation of the report, and one by plaintiff to set it aside. The first motion was granted and the last denied. After judgment was entered appeal was taken to the General Term, where the judgment and order was affirmed. Justice Brady was a member of the appellate court, and joined in the decision. *Held*, that his action at the General Term was in violation of article 6, section 8 of the Constitution, which provides that "no judge or justice shall sit," etc., "in review of a decision made by him," etc., the court of review was not properly constituted, and was not authorized to hear the appeal, and therefore its judgment must be reversed, irrespective of the question whether its determination was right or wrong. *Pistor v. Hatfield*, 46 N. Y. 250; *Real v. People*, 42 id. 276. Judgment reversed and new trial granted. *Durges v. Traphagen*. Opinion by Finch, J. [Decided March 1, 1881.]

JURISDICTION — INJUNCTION IN FAVOR OF FOREIGN CORPORATION — THE COURT WILL ONLY EXAMINE GROUND OF DECISION OF COURT BELOW.—(1) The Supreme Court of this State has jurisdiction to hear and determine an application for injunction by a foreign corporation, where individual defendants are residents of this State. (2) Where the ground of denying the injunction is that the court has no jurisdiction, this court will not determine whether a case is presented upon which the court below should grant an injunction. That is to be determined by the court below. This court can only look into the order to ascertain the ground on which the court below proceeded. *Hewlett v. Wood*, 67 N. Y. 394. Order reversed and case remitted. *Direct United States Cable Co. v. Dominion Telegraph Co.* Opinion by the Court. [Decided Feb. 11, 1881.]

MASTER AND SERVANT — FELLOW-SERVANT — YARD-MASTER ON RAILROAD AND TRAIN COUPLER.—A yard-master employed by defendant, a railroad company, was charged with the duty of making up the trains and distributing the cars in and about the yard and the repair shops of the defendant, and plaintiff's intestate was employed by him to assist in that service. As a necessary consequence, broken and disabled cars had to be handled and moved to the repair shops. While intestate was engaged in attaching a broken car to one in front, with the aid of a chain, and by direction of the yard-master, the latter negligently and at the wrong moment signalled the engineer to back the train, and as a consequence the intestate was caught

and crushed between the cars. *Held*, that the yard-master was a fellow-servant of the intestate, as to all acts done within range of the common employment, except such as were done in the performance of some duty owed by the master to the servants. The negligence which caused the injury was not that of the master. In moving the train the yard-master was acting not as the agent of defendant in the performance of its duties, for it was not its duty to effect the coupling of the cars and their movement to the repair shop. What he was doing was the work of a servant in the department of labor assigned to him as such. See *Crispen v. Babbitt*, 81 N. Y. . . Judgment reversed and new trial granted. *McCooker v. Long Island Railroad Co.* Opinion by Finch, J. [Decided Feb. 8, 1881.]

MORTGAGE — ASSUMPTION OF BY GRANTEE TAKING DEED AS SECURITY — EVIDENCE — PRIVILEGE — COMMUNICATION TO ATTORNEY WHERE NO LITIGATION.—(1) Where a deed was given as security merely, a covenant by the grantee to assume and pay a mortgage owned by a third party, held to be an agreement between the grantor and grantee that the latter should advance the amount of the prior lien upon the security of the land, and to give no right of action to the owner of the mortgage against the grantee, to hold him for a deficiency upon a foreclosure sale of the land. *Garnsey v. Rogers*, 47 N. Y. 241. (2) F., the owner of land on which plaintiff held a mortgage, C., who held a junior mortgage, and W., a creditor of F., made an arrangement whereby W. agreed to pay the junior mortgage, and solely to secure W. therefor and for his debt, it was agreed that F. should convey the premises to him by absolute deed. The three parties went to the office of an attorney to have the necessary papers drawn, and consulted him professionally for that purpose. Upon his advice the agreement was changed. In an action to foreclose the prior mortgage, in which W. was made a party, *held*, that the attorney could not testify in behalf of plaintiff to the communications made to him or the agreement of the parties at the time the deed was made to W. The rule that an attorney cannot disclose communications is not confined to those made in contemplation of or in the progress of an action or judicial proceeding, but extends to communications in reference to all matters which are the proper subject of professional employment. *Williams v. Fitch*, 18 N. Y. 550; *Yates v. Olmstead*, 56 id. 603. The rule exists notwithstanding a party may be examined as a witness, and the principle excludes such a communication in a controversy between the parties making it and a third person. See *Rice v. Rice*, 1 B. Monr. 417; *Robson v. Kemp*, 4 Esp. 235, and 5 id. 63; *Strode v. Seaton*, 2 Ad. & El. 171; *Britton v. Lorens*, 43 N. Y. 51; *Whiting v. Barney*, 30 id. 343; 8 C., 38 Barb. 307. Judgment reversed and new trial ordered. *Root v. Wright*. Opinion by Andrews, J. [Decided Feb. 8, 1881.]

NEGLIGENCE — CONTRIBUTORY — WANT OF, MUST BE ESTABLISHED AFFIRMATIVELY.—In an action for the death of plaintiff's intestate in falling into a tank of defendant's it appeared that his duties called him to pass over a passage-way from which he fell; that it was easy to pass without harm where he went; that for four years men had passed there, one of them a hundred times of a night without accident; that intestate had been to and fro over the same way more or less for two days before the accident, five times shortly before it; that a fellow-servant went over safely just ahead of him; that the way was well lighted and there was no obstruction or impediment save a gutter which had blocks to aid over it; and that he had been especially charged to be careful and not to fall in the tank. *Held*, that there was no evidence of want of contributory negligence on the part of the intestate. To show

that it was possible for the fall to have happened without negligence is not to give ground that it thus happened. The rule that either by direct proof or from circumstances attending the injury, the jury must be authorized to find affirmatively that the person injured was free from fault helping to the mischance, or the action cannot be maintained, must be applied. *Ricynolds v. New York Cent. R. Co.*, 58 N. Y. 248. Judgment reversed and new trial ordered. *Riceman v. Havemeyer*. Opinion by Folger, C. J. [Decided Feb. 8, 1881.]

PRACTICE—ACTION AT LAW UPON MORTGAGE AFTER FORECLOSURE BEGAN—LEAVE MAY BE GIVEN BY ORDER NUNC PRO TUNC—BAR TO ACTION.—(1) An action upon defendant's guaranty of the payment of a mortgage was brought after judgment of foreclosure and sale had been rendered in an action to foreclose the mortgage. *Held*, that under 2 R. S. 191, §§ 153, 154, it was necessary that such action should be authorized by the court, and that in the absence of such authority the action could not be maintained. *Scofield v. Doscher*, 72 N. Y. 491. But the court by an order *nunc pro tunc* after the action was commenced could remove the impediment to its maintenance. The statute was passed to prevent vexatious and oppressive litigation, and after proceedings to foreclose had been commenced leave might be refused on the discretion of the court. When leave is given the cause of action is the contract or obligation of the party; the leave given by the court simply removes an obstruction. Want of leave may be pleaded by a plea in the nature of abatement. If plaintiff is defeated for that cause he may obtain leave and commence suit anew for the same cause of action. There is no reason why the court may not grant leave by a retrospective order to take effect before the commencement of the suit. Defendant thereby is deprived of no substantial defense. (2) A cause of action upon the guaranty of the payment of a mortgage, *held* not barred by a judgment of foreclosure of the mortgage. Order affirmed. *McfKernan v. Fraser*. Opinion by Andrews, J. [Decided Feb. 8, 1881.]

SAVINGS BANK—ADMINISTRATOR OF TRUSTEE DEPOSITING MONEY MAY CLAIM PAYMENT IN ABSENCE OF NOTICE FROM BENEFICIARY.—S., as trustee for C., deposited money in the defendant savings bank which gave a pass-book to S. The bank did not know the nature of the trust. One of the terms of the deposit agreed upon at the time was that "the pass-book shall be the voucher of the depositor and evidence of his property in the institution, and the presentation of the pass-book shall be sufficient authority to the bank to make any payment to the bearer thereof; that the officers of the bank will endeavor to prevent fraud upon its depositors, but all payments to persons producing the pass-books issued by the bank shall be valid payments to discharge the bank." S. thereafter died, the deposit not being drawn. *Held*, that a payment by the bank to the administrator of S. upon the production of his letters and of the pass-book, and in the absence of any notice from C., the beneficiary, was a good payment and effectual to discharge the bank. If the trustee in his life-time had presented the book and demanded payment, no claim by the beneficiary having been interposed, the bank would have been bound to pay. Upon the death of the trustee his rights devolved upon his administrator. *Banks v. Executors of Wilkes*, 3 Sandf. Ch. 99; *Bucklin v. Bucklin*, 1 Abb. Ct. App. 242; *Bunn v. Vaughn*, id. 253; *Emerson v. Blakely*, 2 id. 22; *Trecothick v. Austin*, 4 Mason, 16, 29. The bank had no right to inquire into the character of the trust, and owed no duty to the beneficiary until the latter by notice forbade payment or demanded it for himself. It is true that payment to one presenting a pass-book is not always a discharge to the bank, and if

paid to one who is not the depositor or his legal representative, the bank, if it has agreed to use its best endeavors to prevent fraud, must exercise diligence, and is put on inquiry by circumstances of suspicion (*Allen v. Williamsburgh Savings Bank*, 69 N. Y. 317), but this rule applies only to prevent payment to the wrong person, to one not entitled to recover the deposit. If the right person applies and payment is made to him the question of diligence or negligence cannot arise. It does not affect the right of the administrator to call the trust an executed one. If the beneficiary has a right to the pass-book and the fund, he must reach it through the trustee. Payment to the trustee is good, what remains is between him and the beneficiary. Judgment reversed. *Boone v. Citizens' Savings Bank of New York*. Opinion by Finch, J. [Decided Feb. 8, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW—STATE STATUTE OF LIMITATION—CONSTRUCTION—TAX DEED.—The statute of Iowa in reference to tax titles provides "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the treasurer's deed is executed and recorded," as provided by the Iowa statute. In an action in an Iowa court for the recovery of real property, brought by a purchaser at a tax sale and the former owner in possession, this statute of limitation was set up. The court held that the defense could be set up here, and that the limitation began to run at the time of the execution and recording of the tax deed, irrespective of the question of adverse possession, so that if at any time during the period of five years, no matter how near its close, the former owner takes actual possession and holds until the expiration of the five years from the date of the execution and recording of the tax deed, the right of the purchaser at the tax sale is completely barred. *Held*, that the first point was settled by the decision of the Iowa courts, and that the construction given to the limitation was not in conflict with the Federal Constitution either as depriving the purchaser at tax sale of his property without due process of law, or as impairing a contract. The Supreme Court of Iowa has by several decisions construed the five years' statute of limitations to apply to an action brought by one claiming under a tax deed as well as to one brought by the original owner of the land. *Brown v. Painter*, 38 Iowa, 450; *Lavery v. Sexton*, 41 id. 435; *Barrett v. Love*, 48 id. 103. By these decisions the Supreme Court of the State has established a rule of property in the State of Iowa which is binding on this and other courts of the United States. *Jackson v. Chew*, 12 Wheat. 162; *Suydam v. Williamson*, 24 How. 427; *Beauregard v. New Orleans*, 18 id. 497; *Nichols v. Levy*, 5 Wall. 433; *Williams v. Kirtland*, 13 id. 306. The purchaser at a tax sale is not deprived of any of the rights conferred on him by his purchase and deed, by reason of the construction put upon the five years' statute of limitation. The right of the Legislature to prescribe what shall be the effect of a tax sale and deed cannot be questioned. It might have declared that the title of the purchaser at the tax sale should be divested without his consent by the repayment to him within a prescribed period by the former owner of the amount of his bid, or the tax and the interest and penalty thereon. The right to redeem the title of lands sold for taxes is one commonly reserved, and the right is favored by the policy of the law. *Dubois v. Hepburn*, 10 Pet. 1; *Corbett v. Nutt*, 10 Wall. 464; *Gault's Appeal*, 33 Penn. St. 94; *Rice v. Nelson*, 27 Iowa, 148; *Schenck v. Peay*, 1 Dill. 287; *Masterson v. Beasley*, 3 Ohio, 201; *Jones v. Collins*, 18

Wis. 594; *Curtis v. Whitney*, 13 Wall. 68. But it would scarcely be contended that such statute deprived the purchaser of his property without due process of law or impaired the obligation of his contract of purchase. Judgment of Supreme Court of Iowa affirmed. *Barrett v. Holmes*. Opinion by Woods, J. [Decided Jan. 31, 1881.]

MUNICIPAL BONDS—ISSUED WITHOUT AUTHORITY OF LAW VOID IN INNOCENT HOLDER'S HANDS.—A charter granted by the Legislature of Missouri to the S. Railroad Company in 1860, provided that upon petition by the company the county court of any county through which the road should pass might authorize a vote to be taken by the inhabitants of a strip of country not more than ten miles each side of the road to take stock in the company and to raise a tax therefor which should be levied and collected by the county court. By the Constitution of Missouri adopted in 1865, the Legislature was forbidden to authorize any county, city or town to become a stockholder in any corporation unless two-thirds of the voters should assent thereto. By a statute passed in 1868, townships were authorized to subscribe through the county court to railroad companies by a two-third vote, and bonds were to be issued by the county to pay such subscriptions chargeable on the voting town. By a statute amending this, passed in 1870, the taxable inhabitants of portions of townships were granted the same rights as towns as to subscribing for stock and issuing of bonds in cases where the charter of any railroad company authorized such portions to subscribe to stock. In 1870, after the passage of the last-named act, upon the petition of the S. Railroad Company, the county court of D. county, through which the railroad passed, authorized the taxable inhabitants of a strip of five miles on each side of the road through the county to vote upon the question of taking stock in such road and the issue of bonds therefor. At the election there were 568 votes for the subscription, etc., and 400 against it. Thereafter the county court issued county bonds which recited that they were issued upon the vote of certain taxable inhabitants of the county and were in aid of the S. railroad, and which were payable to bearer. *Held*, that the issue of the bonds was unauthorized, and that they were void in the hands of an innocent holder for value. Judgment of U. S. Circ. Ct., W. D. Missouri affirmed. *Ogden v. County of Daviess*. Opinion by Waite, C. J. [Decided Jan. 24, 1881.]

STATUTORY CONSTRUCTION—EVIDENCE—DISTRICT OF COLUMBIA—INSURANCE—ASSIGNMENT OF POLICY TO SECURE DEBT—RIGHTS OF CREDITOR.—(1) The act of Congress relating to the admission of parties to testify in the courts of the United States (Act of July 2, 1864, § 3; amended Act March 3, 1865, U. S. R. S., § 558) applies to the courts of the District of Columbia, and the provisions of that act that no party to an action by or against a personal representative can testify against his adversary as to any transaction with or statement by the deceased, unless called to testify thereto by the opposite party or required to testify thereto by the court, governs as to the admission of the testimony of such a party. If not before that time, from and after the passage of the act of February 21, 1871, which declared that "all laws of the United States which are not locally inapplicable shall have the same force in the District of Columbia as elsewhere in the United States," the provision in question became a part of the law of evidence in the District. Bradley, J., dissented from this holding. (2) B. lent to P. a sum of money, to secure which P. assigned to B. an interest in a policy of life insurance. Subsequent assignments were made to the same effect, until in 1873 one was executed which imported an absolute transfer to B. of all the right, title and interest of the assured in the

policy, and to the payments previously made thereon, as well as all benefit and advantage to be derived therefrom. *Held*, that the last assignment would be construed as simply appointing B., upon the death of the assured, to receive from the company such sum as would then be due on the policy, and after reimbursing himself to the extent of his loans to P., to pay the balance to the person entitled thereto. A different construction of that instrument would place B. in the position of being peculiarly interested in the death of P. Unless compelled to do so the court would not suppose that he had any desire or purpose to speculate upon the life of P., or to do more than secure the repayment of the money actually loaned by him to the assured. Decree of Supreme Court of District of Columbia reversed. *Page, appellant, v. Burnstine*. Opinion by Harlan, J. [Decided Jan. 24, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

COMMISSIONER—WRIT OF PROHIBITION—SUBJECT TO CONTROL OF COURT.—A United States commissioner, when acting as an examining magistrate, is a mere officer of the court as to whom the writ of prohibition is never employed. Such commissioner, however, is subject to the control of the court when acting as an examining magistrate, and the court can assume control of the proceedings whenever justice may require that it should be done. U. S. Dist. Ct., Colorado, Nov. 8, 1880. *United States v. Berry et al.* Opinion by Hallett, D. J.

GARNISHMENT—WAGES OF SEAMEN NOT LIABLE TO, IN STATE COURT.—The wages earned by a seaman in the coastwise trade of the United States are not subject to garnishment at the instance of the creditor of the seaman in an action at law brought in a State court. The judgment of a State court in such case directing the garnishee to pay such wages to a creditor is void for want of jurisdiction. A garnishee cannot plead such judgment in bar where it does not appear that execution has been awarded against him, or that he has been called on or compelled to pay the same. *The Elizabeth & Jane*, 1 Ware, 35; *The Sarah Jane*, B. & H. 414; *Hutchinson v. Combs*, 1 Ware, 65; *Taylor v. Carryl*, 2 How. 583; *The Bark Rajah*, 1 Sprague, 190; *The Betsy & Rhody*, 2 Dav. 118; *Harden v. Gordon*, 2 Mason, 559; *The Express*, B. & H. 008; *Jesse v. Roy*, 1 Crompt. M. & R. 316; *Webb v. Duckinsfield*, 13 Johns. 390; *Goodrich v. Peabody*, 2 Dam. Abr. 462; *Skolfield v. Potter*, 2 Dav. 401; *The Brig Spartan*, 1 Ware, 139; *Burnham v. Hopkinson*, 17 N. H. 259. U. S. Dist. Ct., S. D. New York, Nov. 30, 1880. *McCarthy et al. v. Steam Propeller City of New Bedford*. Opinion by Benedict, D. J.

REMOVAL OF CAUSE—PARTIES PLAINTIFF AND DEFENDANT IN SAME STATE—PRESUMPTION AS TO RESIDENCE.—Suit was brought by the Merchants' National Bank of Boston to foreclose the equity of redemption of the defendant, Edward Thompson, of Charlestown, New Hampshire, in five shares of trust property held by the plaintiff as collateral security for the payment of the defendant's bond. The defendant averred in his answer that he had sold one of the shares to Henry M. Clarke of Boston. The plaintiff thereupon amended its bill, and made Clarke a party defendant, who subsequently entered an appearance. *Held*, that such cause could not be removed under the second clause of section 2 of the act of 1875; further, that it would be presumed that Clarke was a citizen of Massachu-

*Appearing in 4 Federal Reporter.

sets to in the absence of any proof to that effect. *Osgood v. Chicago, etc., R. Co.*, 8 B. 330; *Ruckman v. Ruckman*, 1 Fed. Rep. 587. U. S. Cir. Ct., Massachusetts, Dec. 22, 1880. *Merchants' National Bank v. Thompson*. Opinion by Lowell, C. J.

NEW JERSEY COURT OF ERRORS AND APPEALS ABSTRACT.

NOVEMBER, 1880.*

ATTACHMENT—MONEY IN HANDS OF SHERIFF LIABLE TO.—Moneys in the hands of a sheriff, raised by him in pursuance of a decree of the Court of Chancery, are liable to seizure, by virtue of a writ of attachment. *Crane v. Freese*, 1 Harr. 305, and *Davis v. Mahany*, 9 Vr. 104, approved; *Shinn v. Zimmerman*, 3 Zab. 150, and *Hill v. Beach*, 1 Bess. 31, explained. *Conover v. Ruckman*. Opinion by Depue, J.

FRAUDULENT CONVEYANCE—ASSIGNEE FOR CREDITORS OR ADMINISTRATOR MAY HAVE SET ASIDE.—Assignees, under the Assignment Act, and executors and administrators of insolvent estates, are the representatives of creditors, and as such, may, for the benefit of creditors, set aside conveyances by the assignor or the decedent, in fraud of creditors, to the extent that such property is needed for the payment of debts. *Garretson v. Brown*, 2 Dutch. 425, approved; *Van Keuren v. McLaughlin*, 6 C. E. Gr. 163, overruled. See *Hawes v. Lender*, Cro. Jno. 270; 3 Wms. on Exrs., 1679; *Bethel v. Stanhope*, Cro. Eliz. 810; Anonymous, 2 Roll. 173; *Roberts on Fraud. Conv.* 592; *Shears v. Rogers*, 3 B. & Ad. 382; *Holland v. Craft*, 20 Pick. 321; *Stewart v. Kearney*, 8 Watts, 453; *Buehler v. Gloninger*, 2 id. 226; *Bouslough v. Bouslough*, 68 Penn. St. 495; *Everett v. Read*, 3 N. H. 55; *Abbott v. Tenney*, 18 id. 109; *Cross v. Brown*, 51 id. 486; *Fletcher v. Holmes*, 40 Me. 364; *McLean v. Weeks*, 61 id. 277; 65 id. 411; *Andrus v. Doolittle*, 11 Conn. 283; *Babcock v. Booth*, 2 Hill, 181, 186; *Flagler v. Blunt*, 5 Stew. Eq. 518; *Horton v. Castner*, 4 id. 607; *Kingsbury v. Wild*, 3 N. H. 30; *Drinkwater v. Drinkwater*, 4 Mass. 354; *Butcher v. Harrison*, 4 B. & Ad. 129; *Doe v. Ball*, 11 M. & W. 531; *Norcutt v. Dodd*, 1 Cr. & Ph. 100; *Holmes v. Penney*, 3 K. & J. 90; *Swift v. Thompson*, 9 Conn. 63; *Palmer v. Thayer*, 28 id. 237; *Shipman v. Aetna Ins. Co.*, 29 id. 245; *Moncure v. Harrison*, 15 Penn. St. 385; *Bayard v. Hoffman*, 4 Johns. Ch. 450. Also *Bell v. Cureton*, 2 Myl. & H. 503; *Gavard v. Lauderdale*, 3 Sim. 1; *Colyear v. Mulgrave*, 2 Keen. 94; *Scull v. Relvor*, 2 Gr. Cod. 64; *Alpaugh v. Roberson*, 12 id. 96; *Moore v. Bonnell*, 2 Vr. 90. *Pillsbury v. Kenyon*. Opinion by Depue, J.

TITLE—WHEN DELIVERY ESSENTIAL TO COMPLETE.—A bond and mortgage belonging to a husband were assigned by him to one S., and by S. immediately re-assigned to the wife; both assignments were duly acknowledged, and that to S. recorded, by the husband's direction, but the bond and mortgage and both assignments remained in the husband's possession, except once afterward when the mortgage was delivered to the wife for a temporary purpose and then returned by her to her husband. There was no consideration for the transfer. *Held*, that as there was no delivery of the bond and mortgage and assignment to the wife, the title thereto never passed to or vested in her. *Folly v. Vantuyt*, 4 Hal. 153; *Farlee v. Farlee*, 1 Zab. 279, 286; *Crawford v. Bertholf*, Sax. 458; *Cannon v. Cannon*, 11 C. E. Gr. 316; 4 Kent Com. 456; 3 Wash. Real Pr. 581; 2 Kent Com. 438; *Pringle v. Pringle*, 59 Penn. St. 231; 1 Story Eq. Jur. *Ruckman v. Ruckman*. Opinion by Green, J.

* To appear in 6 Stewart's (38 N. J. Eq.) Reports.

WISCONSIN SUPREME COURT ABSTRACT.

ASSIGNMENT FOR CREDITORS—WHEN ASSIGNEE GETS NO TITLE TO PROPERTY IN TRANSIT TO ASSIGNOR.—The assignee in a voluntary assignment for the benefit of creditors gets no title to property in transit at the time of making the assignment, and which is not mentioned nor referred to in the assignment nor the required inventory, and where neither the vendor nor the vendee ever intended that the title should vest in such vendee making the assignment, notwithstanding he may get the property into his actual possession. In *State v. Field*, 5 L. T. Rep. 211, it was held that "the property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors, reverts in the vendor, so as to avoid the attachment, by the vendee having countermanded the purchase by letter to his agent dated before such delivery, though not received till afterward, the vendor assenting to take back the goods." Lord Kenyon, C. J., said: "It was in the power of the buyer and seller to put an end to the contract as if it had never existed." And Buller, J., said: "With regard to the justices of the case it is impossible to entertain any doubt." In *Bartram v. Farebrother*, 4 Bing. 579, it was held that "P., to whom goods were consigned, said on their arrival at the wharfinger's, that he would not have them, and directed an attorney to do what was necessary to stop them. The attorney, on the third day of November, gave the wharfinger an order not to deliver them to the consignee, which order the consignor wrote to confirm on the sixth; on the seventh the goods were claimed under an execution at the suit of A. Held, that the contract between P. and the consignor was rescinded; that the transitus was not ended by the arrival of the goods at the wharf and the order given by P.; and that the consignor had a right to stop in transitu." To the same effect is the still later case of *James v. Griffin*, 1 M. & W. 20, in which Park, B., said: "The question for the jury was whether the act of the son was a taking possession of the bankrupt *eo animo* as owner. If it was, the transitus was at an end; if not, and he merely meant to take possession for a limited purpose, for the benefit of the seller, the transitus was not at an end." See, also, *Bolton v. Ry.*, L. R., 1 C. P. 431; *Grant v. Hill*, 4 Gray, 361; *Purviance v. Bank*, 8 N. B. R. 447; *Sturtevant v. Orser*, 24 N. Y. 538. *Clark v. Bartlett*. Opinion by Cassoday, J. [Decided Dec. 17, 1880.]

BANKRUPTCY—SURETY ON GUARDIAN'S BOND DISCHARGED BY—FIDUCIARY DEBT.—In an action against the surety on a guardian's bond, the defendant set up a discharge in bankruptcy. *Held*, that the liability of the surety was a contingent liability, the present value of which might have been ascertained, liquidated and proved against the estate of the bankrupt within the meaning of section 6068, U. S. R. S.; that the discharge in bankruptcy released the surety from all liability on the guardian's bond within the meaning of section 5119, U. S. R. S.; that the contingent liability of a surety upon a guardian's bond is not a debt created by him while acting in a fiduciary character, so as to prevent a discharge in bankruptcy within the meaning of section 5117, U. S. R. S. *Reitz v. People*, 72 Ill. 435; *Jones v. Knox*, 46 Ala. 53; *Ex parte Taylor*, 16 N. B. R. 40; *A. C. Co. v. Barnes*, 49 N. H. 312; *Bolae v. Pucket*, 7 Humph. 166; *Mace v. Wells*, 7 How. 272; *Tobias v. Rogers*, 13 N. Y. 59; *Bates v. West*, 19 Ill. 134; *Clarke v. Porter*, 25 Penn. St. 141; *Shelton v. Reese*, 10 Mo. 473; *Dean v. Speakman*, 7 Blackf. 817. *Davis v. McCurdy*. Opinion by Cassoday, J. [Decided Dec. 17, 1880.]

EXEMPTION—MONEY FROM PENSION EXEMPT FROM EXECUTION.—Under the provisions of the U. S. R. S.,

§ 4747, that "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remains with the pension officer or any officer or agent thereof, or is in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner." *Heid*, that the money received by a pensioner of the United States in payment of his pension and remaining in his possession cannot be seized on process against him for debt. See *Eckert v. McKee*, 9 Bush, 355; *Kellogg v. Barton*, 12 Allen, 527. *Folschow v. Werner*. Opinion by Lyon, J. [Decided Jan. 11, 1881.]

HIGHWAY—STAIRWAYS EXTENDING INTO STREET, WHEN NOT OBSTRUCTION—DUTY OF MUNICIPALITY TO RENDER STREET SAFE.—Stairways on the street sides of buildings, leading downward to basements or upward to the front entrances of such buildings, and not encroaching upon the sidewalks, are lawful; but the municipality is bound to provide proper safeguards to prevent accidents from the proximity of such stairways to the sidewalks to persons travelling thereon with ordinary care. In this case, where a descending stairway was parallel to the sidewalk, and there was a sufficient barrier on the side thereof, the defendant city was not bound to cause a barrier or gate to be maintained at the entrance; and it was error to submit to the jury the question whether it was negligent in failing to do so. *Fitzgerald v. City of Berlin*. Opinion by Lyon, J. [Decided Jan. 11, 1881.]

NEW BOOKS AND NEW EDITIONS.

TAYLOR'S MEDICAL JURISPRUDENCE.

A Manual of Medical Jurisprudence, by Alfred Swaine Taylor, M. D., F. R. S., Fellow of the Royal College of Physicians; Honorary Member of the Medico-Legal Society of New York, of the Société de Médecine Légale of Paris, and of the Medical Society of Sweden; late lecturer on Medical Jurisprudence and Chemistry in Guy's Hospital, Eighth American edition, from the tenth London edition containing the author's latest notes made expressly for this edition. Edited, with additional notes and references, by John J. Reese M. D., Professor of Medical Jurisprudence and Toxicology in the University of Pennsylvania, Fellow of the College of Physicians of Philadelphia, Physician to St. Joseph's Hospital and to the Girard College for Orphans, Honorary Member of the New York Medico-Legal Society. With illustrations on wood. Philadelphia: Henry C. Lea's Son & Co., 1880. Pp. xx, 908.

THIS celebrated work has been the standard authority in its department for thirty-seven years, both in England and America, in both the professions which it concerns. As the title page indicates, it is nearly as familiar to this country as in England. Although we have most excellent works on the same topic by our own countrymen—Deck, Dean, Ordronaux and Wharton—yet they do not supplant and do not profess to supplant this classic, and it is improbable that it will be superseded in many years. We know of no topic more fascinating to a lawyer than medical jurisprudence, or that more keenly challenges his best powers, and none that does more to broaden and liberalize the legal mind. If there is any book that presents any temptation to the lawyer to renounce his allegiance to the law and give his adhesion to medicine, it is this, but in part perhaps because the medical pill is coated with the legal sugar. On the occasions when we resort to a work on medical jurisprudence for instruction on a particular topic, we generally find the day is lost to law, and that is more than we can say for any other professional book. The present edition is enriched with succinct and excellent notes by the American editor, in which many of the recent cele-

brated American cases are alluded to, although among these we miss the *Hayden* case on blood corpuscles, and the *Billings* case on gunshot wounds. There is a table of the law cases cited. The typography and paper are very good, and the binding in half Russia and cloth is an agreeable variation from our conventional sheep and calf. The inner margin is a little less ample than is convenient. The work is simply indispensable to every physician, and nearly so to every liberally educated lawyer, and we heartily commend the present edition to both professions. For sale in Albany by E. H. Bender's Son.

HAMILTON'S FRACTURES AND DISLOCATIONS.

A Practical Treatise on Fractures and Dislocations. By Frank Hastings Hamilton, A. M., M. D., LL. D., Surgeon to Bellevue Hospital, New York, Consulting Surgeon to Hospital for Rupture and Cripples, to St. Elizabeth Hospital, etc.; Author of a Treatise on Military Surgery and Hygiene, a Treatise on the Principles and Practice of Surgery, etc. Sixth American edition. Revised and improved. Illustrated with three hundred and fifty-two wood-cuts. Philadelphia: Henry C. Lea's Son & Co., 1880. Pp. xxiv, 909.

When Dr. Hamilton's treatise appeared twenty years ago, it was the only complete work on the subject in our language, and we understand that none has in the interim appeared in any language. The importance of the undertaking may be judged from these facts, and the popularity of this work is a sufficient voucher for its excellence. It is practically unrivalled, and while more directly addressed to the medical profession, it must be highly useful to every lawyer who has a case involving fractures or dislocations. It is written in a clear and unpretentious style, and we have found almost as much interest in the work as in our old favorite, Dr. Taylor's. The typography and binding are precisely similar to the work above noticed. For sale in Albany by E. H. Bender's Son.

IV REDFIELD'S REPORTS.

Reports of Cases argued and determined in the Surrogate's Courts of the State of New York. By Amasa A. Redfield. Vol. IV. New York: Banks & Brothers, 1881. Pp. x, 594.

This volume contains cases decided from November, 1878, to January, 1881, by the surrogates of New York, Kings and Westchester counties. The volume contains many interesting cases, among which we note: *Matter of Stover*, p. 82—A "carpet-bagger" originally hailing from Smyrna, N. Y., and describing himself as of that town in his will, but travelling most of the time for twelve years and stopping perhaps a month each year in the city of New York, is not domiciled in that city, but in Smyrna. *Matter of Luckey*, p. 95—An estate being worth \$11,000, a monument costing \$1,455 is excessive in amount, although left to the discretion of the executor, and it must be cut down to \$700. *Brown v. Kerrigan*, p. 146—An administrator having so administered as probably to render his surety liable, the latter cannot restrain the payment of a legacy to his principal's administratrix. *Matter of Blaccon*, p. 151—The appointment of an executor need not be in so many words. *Matter of Prescott*, p. 178—A will is not revoked by the cancellation of a particular provision. *Freeman v. Kellogg*, p. 218—Irresponsible executors may be required to give security, although the testator knew of their impecunious condition. *Matter of Ridgway*, p. 226—Where two persons are lost in the same shipwreck, there is no presumption that the one last seen alive was the survivor. *Shepard v. Salter*, p. 232—The authority to compromise debts does an estate is not limited to cases of insolvent debtors, but embraces cases of doubtful liability. *Valentine v. Valentine*, p. 265—Creditors not intervening, \$351 may be expended for a burial lot where the estate is worth \$12,000. *Nethersell v. Toerge*, p. 285—As between

two attesting witnesses of a will, the testimony of one who was a lawyer and the draftsman as to the mode of execution will have the more weight. *Hartwell v. McMaster*, p. 389—Disbelief in any specific religious doctrines will not impeach testamentary capacity ("the saving efficacy of infant baptism and the doctrine of the Real Presence," as the surrogate puts it). *Weston v. Ward*, p. 415—Where executors are directed to convert the estate into money, they have a discretion as to the time, and are not liable for loss if they exercise an honest judgment. *Marr v. McGlynn*, p. 456—A diary kept by a testator, containing expressions of fondness toward the chief beneficiary of his will, is admissible in evidence to show the state of his mind, in a contest for probate. An appendix contains a paper by Mr. R. S. Guerusey on "Ownership of Corpses before Burial."

CORRESPONDENCE.

SUP. PRO.

Editor of the Albany Law Journal:

There has been some jubilant commotion among the opponents of the new Code of Civil Procedure, during the past week, owing to the position taken by the judges of the Supreme Court in refusing to institute proceedings supplementary to execution.

Under section 2434 of the Code, it is claimed that no judge of the Supreme Court in New York city is authorized to sign an order in these proceedings. But on looking at the section it will be seen that there is no difficulty in interpreting the second clause: "Or, where it was issued (i. e. the execution) to the city and county of New York from a court other than the Marine Court of that city, before a judge of the Court of Common Pleas for that city and county." * * * This clause is purely additional to the first clause of the section, which reads: "Either special proceeding may be issued out of the court out of which * * * the execution was issued," "or," in New York, etc., out of the Court of Common Pleas, as well. In New York county, that is, the Court of Common Pleas may institute these proceedings, on an execution, out of any court but the Marine. The first clause of the section is certainly broad enough to cover the question of jurisdiction as regards the Supreme Court. The disjunctive conjunction "or" may, too, properly be considered as read with the word "either," on line 1st of the section. That is, "either special proceeding is to be instituted before a judge of the court from which the execution issued, or, in New York, before the Common Pleas," etc. That the Supreme Court should take the view that it is not authorized to institute special proceedings supplementary is, to say the least, unfortunate.

NEW YORK, March 12, 1881.

CODEX.

Editor of the Albany Law Journal:

The *New York Tribune* and the *Daily Register*, of this date, call attention to section 2434 of the Code as not allowing the institution of supplementary proceedings upon a Supreme Court judgment, before a justice of that court in this city. It is said that Mr. Justice Donohue has so construed the section, and that his construction is concurred in by his colleagues here. If it were not for this respectable authority such a construction would seem palpably absurd. I have read and re-read the section referred to, and am utterly unable to comprehend how such a construction can be given to its language, and I would be obliged to any one who will, within ordinary and well-settled rules, logically sustain it. To me this section reads with precisely the same effect as if, to limit it to the case under consideration, its words were: "Either special

proceeding, in the city and county of New York, may be instituted before a judge of the court out of which the execution was issued, or before a judge of the Court of Common Pleas, except where the execution issued from the Marine Court." If I am correct, the section does not need amendment.

Mr. Throop, or some other friend of the new Code, should, if the Legislature fails to remedy Judge Donohue's difficulty in finding jurisdiction in this section, by putting it in clearer language (if that is possible), try to obtain a judicial construction which will settle it by applying for a mandamus to compel the issuing of an order in some actual and proper case.

Yours, etc.,

EUSTACE STERLE.

NEW YORK, March 12, 1881.

[Our correspondents are clearly right. — ED. ALB. L. J.]

PUBLICATION OF SUMMONS.

Editor of the Albany Law Journal:

Will some of your readers enlighten the legal fraternity on what theory the statutes of this State are based by which non-resident parties are constructively brought into court by publishing the summons or other process in a newspaper published in the immediate locality of the forum; that is, in a newspaper that the party is least likely to read or see. If the statutes authorized the publication of the process to be made in a newspaper published at or near the party's residence, he might reasonably be deemed to have read or seen the publication, and thus have notice of the pendency of the action. When a firm doing business in the city of New York make a change in its partnership relations, it is not the custom to publish that fact in the *St. Lawrence* county newspapers. To be sure, the statutes further direct that a copy of the process, etc., be mailed to the party's residence; and that perhaps is sufficient notice of the pendency of the action; but why impose on the plaintiff the expense of also publishing the process in a newspaper which the party to be brought into court never reads or sees.

REFORM.

NEW YORK, March, 1881.

STANLEY MATTHEWS.

Editor of the Albany Law Journal:

In your issue of March 10, referring to the re-nomination of Mr. Stanley Matthews for the vacancy on the Supreme Court bench, you say among other things, "And why not put on a man with some judicial bent and experience?" Both of these qualifications Judge Matthews possesses in an eminent degree. Serving as a judge of the Common Pleas Court of this county, and later in life as a judge of the Superior Court of Cincinnati, he gave universal satisfaction both to the bar and the public. I am a democrat and dissent radically from all of Judge Matthews' political conclusions. There may be good political reasons why he should not be confirmed, but certainly the legal objections urged in your editorial are untenable. As a lawyer he stands in the front rank of the profession. As a judge he has both "judicial bent and experience." Learned, able, cultivated and honest, a master of the English language, clear, forcible and concise in his statement of legal propositions and conclusions, if confirmed he will honor the bench and add additional luster to his own professional reputation. Nor can I coincide with your views that geographical considerations should have any weight in the selection of a person to fill the vacancy in question. It is in my judgment immaterial where the judges of the Supreme Court of the United States were either born or reside. If the most insignificant village in the country possessed the nine lawyers best qualified for the position, and were the power conferred on me to reorganize the Supreme Court,

these nine men would certainly constitute that tribunal. Considerations aside from fitness have too long had their sway in the formation of our courts and in the selection of our judges. Let us hope that the baneful system of elevating politicians to the bench merely because of geographical situation and political importance is passing away.

E. M. J.

CINCINNATI, March 21, 1881.

[We publish the above to illustrate the blindness of Mr. Matthews' friends. The idea that geographical considerations should not be consulted is decidedly unique. We had supposed that it is desirable to have judges from different localities, acquainted with the peculiar laws and interests of each. There is no conceivable reason for giving Ohio two judges, including the chief, on this bench. We have several lawyers quite the equal of Mr. Matthews in every respect, in this State, but we do not push them, for we have our representative. But Ohio has grown to believe that she monopolizes the talents, as she bids fair to monopolize the offices. — Ed. ALB. L. J.]

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, March 22, 1881:

Judgment affirmed with costs — *Wellington v. Kelly*; *Hunter v. Wetsell*; *Mitchell v. Reid*; *People v. New York & Manhattan Beach Railway Co.*; *Pratt v. Munson*; *Dolner v. Lintz*; *Smyth v. Knickerbocker Life Ins. Co.*; *Bernheim v. Daggett*; *St. Vincent Female Orphan Asylum v. City of Troy*. — Judgment reversed and new trial granted, costs to abide event — *Newberry v. Wall*. — Order affirmed with costs — *King v. Arnold*; *McCarthy v. McCarthy*; *Noonan v. Smith*. — Order affirmed and judgment absolute for respondent on stipulation with costs — *Green v. Republic Fire Ins. Co.* — Appeal dismissed without costs — *People ex rel. Floyd v. Petty*. — Appeal dismissed with costs — *Loeb v. Willis*. — Ordered that motion stand over until appeal be heard and be heard with appeal — *Peck v. The N. J. & N. Y. Railroad Co.* — Ordered that motion stand over, and that the court below be requested to return remittitur — *Bliss v. Hoggson*.

NOTES.

WE think an author is very unwise to exhibit any public anger at adverse criticisms of his work. It is not given to every author to be a Byron in this regard, and few are so foolish to suffer like Keats. Mr. J. C. Wells, author of a recent work on Jurisdiction and editor of the *Kentucky Law Journal*, seems to think that he has suffered grievous wrong in a notice of his book in a late number of this JOURNAL. We are not accustomed to defend our opinions of books sent us for review, and are quite averse to advertising books of small merit by entering into personal discussions with their authors. Mr. Wells, however, has made a rejoinder in his own *Law Journal*, entitled "Dishonest Criticism in the ALBANY LAW JOURNAL," and has already published the substance of it over his own name in the *Washington Law Reporter*. In the former, Mr. Wells concedes that the editor of this JOURNAL did not write the offensive review, but in the latter he omits the propitiatory concession. We disclaim the concession, for reasons given below. We personally examined the book with some care, and then put it in the hands of one of the most learned

and distinguished lawyers at the bar of this State—a gentleman who has made special practical studies of the subject in question for many years, but who is not himself a legal author nor a writer for compensation. It will amuse the learned reviewer to ascertain from the angry author that the reviewer is "incompetent," "intentionally dishonest," an "ambitious penny-a-liner," and in a state of "blind rage." If it will in any way appease Mr. Wells, we will confess that the reviewer's conclusions substantially coincide with our own, and that we think the author has failed properly to improve an excellent opportunity. It is noteworthy that in the current number of the *New Jersey Law Journal* almost exactly the same opinion is expressed of Mr. Wells' book as our review expressed. Authors should not complain of a condemnation based on a "cursory" examination, when the matter of the criticism is patent. And authors should not accuse persons who do not admire their works so much as they themselves, of "dishonesty" or "blind rage." And authors should reflect that when they ask the profession to pay for a two-volume "treatise" on a single subject, something more is due than is to be found in a law dictionary under the same head.

The subject of the next prize essay of the New York State Bar Association is "*Ultra Vires*." — Harvard Law School has had a gift of \$100,000. The name of the donor is not divulged, but he is supposed to be Sidney Bartlett, the Nestor of the Boston Bar. — Sir Henry Mather Jackson and Mr. James Charles Mathew have been appointed Judges of the Queen's Bench division. The former is fifty years old and very rich; the latter about the same age, and a Roman Catholic—the second since the Catholic emancipation act.

A LEGAL LAY.

(*Cushing v. Blake*, 2 Stew. 399; 3 Id. 689.)

Sir Marmaduke, about to wed,
Some profitable lands conveyed
In trust unto Antonio,
To hold them for his spouse's aid.
To give unto her separate use
Their issues and emoluments,
Their profits, perquisites, proceeds,
And all their revenues and rents.
And for a further trust, convey,
To whomsoever she'd require
By writing in her life, or else
By testament, should she expire.

No disposition being made
By writing or by testament,
To go unto her heirs at law
As per the statutes of descent.
Sir Marmaduke was wed, but lo,
The lady of his love declined
And died possessed of all her lauds
But left a baby boy behind.

Sir Marmaduke now filed a bill,
And the Chancellor held in his decree
The estate of Mrs. Marmaduke
An equitable one in fee.

The trust was executed, not
A trust executory, so
The rule in Shelley's case directs
The manner that the lands shall go.

And on appeal, the court above
Affirmed the Chancellor's decree.
And so Sir Marmaduke obtained
His equitable courtesy.

PATERSON.

—[*New Jersey Law Journal*.]

The Albany Law Journal.

ALBANY, APRIL 2, 1881.

CURRENT TOPICS.

BY the appointment of Senator Robertson to the office of collector of the port of New York the State will lose an experienced, faithful and honored statesman, and the judiciary committee of the Senate will lose a clear-sighted, just, and influential chairman. For his general services in the Senate he deserves well of his State, and his services on the judiciary committee in particular will be remembered with gratitude. We have not always agreed with the senator in his action on this committee, but every citizen must award him the meed of the purest intentions and the most faithful attention to his duties. Generally, we believe, his experience and learning as a lawyer and his long service in State affairs have put him on the right side of the questions coming before this most responsible committee. The succession to this important post will be awaited by our profession with anxious and jealous expectation.

Down in Brooklyn it has just been decided by the "side judges," overruling the principal magistrate, that it costs only \$250 for a pot-house politician and ex-prize fighter to beat an ex-judge almost to death for calling him by his right names in political discussion. These "side judges" have thus demonstrated the only use to which they are generally put, namely, to defeat justice. Really this side-show business ought to be abolished. It is related of one of these gentlemen, who sat for many years on the Vermont bench by the side of a very strong and distinguished judge, that he said the great man asked his opinion but once in his life, and that was at the close of a long and tedious sitting, when the great man said to him, "I ache all over—don't you?" On such questions the opinion of the side-show may be of value, but in serious matters it is a humiliating spectacle to see a learned, honest and experienced magistrate overruled by two persons whose presence on the bench can excite no feeling save one of wonder at the long-suffering of Providence and the short-sightedness of men.

The president has nominated Mr. Woodford, the present incumbent, as United States attorney for the Southern District of New York. We have before called attention to the faithful service which Mr. Woodford has rendered in this most important position. He possesses administrative abilities of an unusually high order, and under his direction his office has done a work of unprecedented magnitude. While we are not of those who believe that a man could be kept in office simply because he is in, to the exclusion of others just as well qualified and serving, yet as Mr. Woodford suits those who put in, and nothing can be said against his fitness

or his administration of the office, we do not see how the "reformers," at least, can urge his removal with any grace.

Lord Justice Bramwell is fertile in theories. His latest theory is that lawyers ought to be paid, not for work done, but in effect according to results. Hereupon "Special Pleader," in the *St. James' Gazette* puts the following *reductio ad absurdum*: "For example: Demand for £1,000. Letter asking payment. Perusing reply inclosing check for £1,000 and interest. Solicitor's charge, £100. Is not that fair? Is not that reasonable remuneration for saving one's client an action at law with all its perils and chances? Surely yes." And then, he imagines an action for personal injury against a railroad company, claim of £1,000, time two years, sixty visits to client, thirty witnesses, three trials, two appeals, final compromise for £750. "What should a solicitor be paid for all this? Clearly not much; for either the plaintiff had a good case or he had not. If he had, his solicitor should have succeeded at a moderate cost; if he had not, then he should not have conducted the action. But he had a good cause—good, that is, to the extent of £750. The solicitor must be paid a percentage on that—say ten per cent, that is £75. So the defendants shall give that sum to the plaintiff's solicitors?" He continued: "What is fair for one is fair for another, and the bench should be rewarded according to the value of the work they do, and not by the year." "Should not a reduction *pro tanto* be made from a judge's stipend whenever he refers a cause—which some do, saying gravely, *qui facit per alium facit per se*—or when he wrongly decides a point of law? Of course to a certain number of blunders each judge would be entitled without charge, just as men engaged on piecework are allowed to make a certain percentage of 'wasters.' The House of Lords, like the king, cannot err, and needs therefore no consideration. To a lord justice I would allow three mistakes per annum gratis; after that I would charge him £500 for each; this being, after all, a moderate computation of the damage he has done. To vice-chancellors and 'ordinary judges,' as they call themselves now, I would freely allow ten mistakes at *nisi prius*, because of the noise there and the necessity of humoring the jury; in banc, five blunders per annum. If this quantity were exceeded, then I would deduct £100 for each error; but if more than twenty blunders were made on the whole, I would impose a fine of £2,000 for this number, with exclusion from the lord mayor's dinner. To county court judges I would be more liberal yet; and to justices of the peace I would concede immunity if they were right one time in five." His lordship had better abandon this theory, and amuse us with a new one. He can easily do it.

William Beach Lawrence has closed his long and useful career. Although he was a man of independent fortune, he worked in the world as if he owed something to his fellow-men and to his Crea-

was. In politics, in statesmanship, and in law, he has done honorable and influential service. Especially in the domain of international law his works will praise him and perpetuate his reputation on both sides of the world. His name has long been a familiar one in these columns. He has not left behind him a superior in the broadest learning of the law, in general culture, nor in a hearty and active interest in the great affairs of his country and of his race.

The rock that the legal profession are in most danger of coming to wreck on is that of excessive charges. There is a continual low growling in the community on this subject. Already we have seen its effect in the establishment of collecting agencies, and the setting-up of real estate agents and the like, drawing away from lawyers a vast amount of their accustomed business. The following, in an English lay newspaper, does not exaggerate this matter: "There are certain well-known firms of solicitors who can never be got to render a statement; they are perpetually applying for checks on account, and generally have the faculty of asking for these at some critical time in the procedure, when they know that the litigant cannot help paying, in order that his case may go on. Other solicitors punish the inquisitiveness of any who may wish for a detailed bill of costs by making it out to an extent vastly in excess of the round sum originally demanded." "It is notorious that the charges are altogether out of proportion to the time given, the work done, or the consideration received, and all kinds of vexatious obstacles are thrown in the way of any who seek to effect a reform in this respect. The fact is, that the ranks of the legal profession are overcrowded, and are being added to year by year to an extent which the public interests by no means require. Yet the exclusiveness that obtains with regard to methods of procedure, and the stringent rules imposed upon all the members of the craft, prevent that wholesome competition which exists in all other trades. The consequence is that the public are robbed, and that a comparative few of the members of the legal profession obtain for themselves the chief portion of the spoil, while the great bulk of them struggle on as best they can." Our legal exchanges are filled with discussions on lawyers' costs. The community are bound to have cheaper justice, if they can. At such a juncture it is very unwise for lawyers to oppose codification, which to the community means cheapening and simplification.

The communication of Mr. Herbert B. Turner, in another column, on Codification, reaches us too late for a particular reply this week. We may perhaps find something to say about it next week. In the meantime Mr. David Dudley Field has published his answer to the report of the New York City Bar Association against the Civil Code, in a pamphlet of twenty-seven pages. We may also take occasion to make some comment on this. Mr. Field remarks the fact that while the report of the Bar Association

purports to be the unanimous report of the committee, yet it is signed by only six of the nine members, and among those not signing is Mr. Austin Abbott. Mr. Herbert B. Turner is not only a member of the Bar Association, but a member of the committee appointed to oppose the Codes before the Legislature. It is evident that the gentlemen of the Bar Association do not quite understand themselves, for while Mr. Turner asserts that "the association was careful not to commit itself against the principle of codification in general," the "unanimous" report of the committee, adopted "at a full meeting, with two dissenting voices," declares that "the majority of your committee are of opinion that any attempt to codify the entire body of the common law would be the reverse of such benefit to the people at large." We suggest that this shows an unmistakable hostility to all codification. We are surprised to see that Mr. Turner considers 120 an "innumerable" quantity of changes.

In the Assembly, Mr. Draper proposes that graduates of law schools of this State, requiring attendance for two years, of not less than eight months in each year, or for nine months in one year with a previous study for one year, shall be admitted to practice on passing a satisfactory examination by the court. We think this is substantially right, and that it properly recognizes the unquestionable superiority of a law-school education. We have some question, however, whether a clerkship in an office for a year ought not to be exacted in every case. — Mr. Patterson proposes that it shall not be necessary in an action to recover real property, commenced on a lease in fee, that the verdict, report, or decision, or judgment, shall specify the amount of rent in arrear, and that this shall apply to pending actions. This is "by request." We should infer that without the statement.

In the Senate, Mr. Bixby proposes as a concurrent resolution for an amendment of the Constitution, to consolidate the Court of Common Pleas, the Superior Court, and the Supreme Court, in the city of New York. — Mr. Rockwell proposes that no father shall appoint a guardian of his child by will or dispose of its custody and tuition by deed, without the written assent of the mother, if living. We believe this is already the law.

NOTES OF CASES.

IN *Brown v. Ward*, 52 Md. 376, it is held that a belief in "spiritualism" does not incapacitate from making a valid will, even where the testatrix acted under supposed instructions from the spirit of her deceased brother, unless a jury finds actual unsoundness of mind. The court said: "The testatrix is shown to have been a spiritualist, and a believer in being able to communicate with the spirits of the departed. She consulted and advised with them in her business transactions and followed the

directions and advice which she received from them in making the will now in contest. Many of these communications from the spirits are segregated in these instructions, and the court is asked to say to the jury as a matter of law, that if they were believed by the testatrix, and her will was the result of them, such will is not valid." "The question of sanity is * * * a fact to be determined and decided by the jury, and not by the court, upon all the circumstances and proof in the case. The court cannot say as a matter of law, that a person is insane, because he holds the belief that he can communicate with spirits, and can be and is advised and directed by them in his business transactions and in the disposal of his property. He may receive this advice, and act as directed, because he is satisfied in his own mind and from his own reason that the thing recommended is wise and expedient. This is by no means impossible or improbable. Such beliefs do not of themselves afford a certain test of insanity or want of testamentary capacity." "The impropriety of a court segregating certain supposed delusions from a large bulk of evidence, and saying to a jury that they alone are sufficient to show insanity, is particularly applicable to this case. Although the proof establishes the fact that the testatrix believed in the most extreme doctrines of spiritualism, of communication and consultation with spirits, there is much evidence adduced by the caveatees, to the effect that she managed her large property with skill and intelligence. Her sanity and testamentary capacity are testified to by some of the most reliable and intelligent gentlemen of the city, where she resided. When about to have her will written, she intelligently informed the distinguished counsel, by whom it was drawn up, how she wished her property disposed of, and furnished him with an accurate and correct list of her numerous relatives. The will itself bears no intrinsic evidence of insanity in its provisions, but on the contrary is such a will as the most sane might have made." "The mere belief of the testatrix in the various phases of spiritualism, which have been testified to, and which are claimed to be extravagant and unfounded delusions, is not of itself sufficient to prove that she did not possess the capacity that the law requires to make a will. These alleged delusions constitute but part of the evidence, which had been submitted upon the issue of sanity." The celebrated *Bonnard* will case held that a belief in metempsychosis did not conclusively argue unsoundness of mind, and a will leaving money to a society for prevention of cruelty to animals was sustained, although the testator believed that human souls come back and inhabited them. In *Robinson v. Adams*, 63 Me. 889; S. C., 16 Am. Rep. 473, the same conclusion was arrived at as in the principal case, upon similar facts, after a learned review. The same law has also just been laid down by a Chicago court.

The decision of the divided Court of Common Pleas, in *Latter v. Braddell*, ante, 123, has been affirmed by the Court of Appeal. Bramwell, L. J.,

said: "I dare say the woman thought that her master and mistress had a right to have her examined. But what she did was to submit under the influence of other considerations. The truth is that it is impossible to say the jury was wrong in finding that she submitted, not in consideration of violence, but for some other reason. It is not like the case put by Mr. Murphy of a boy holding out his hand to be struck, for the boy knows that if he does not submit he will be compelled to submit to something worse. There is no ground here to suppose that to be the case, and I am satisfied that she did not submit under any fear of violence." Baggallay, L. J., said: "I think the verdict was right. It appears to me that the girl voluntarily led the way up stairs. She went into the room, and following out her statement, her objection was not so much to be examined as to strip off her clothes one by one. The doctor was in the performance of his ordinary duty. She might have resisted if she had pleased, but she did not resist." Brent, L. J., said: "It seems to me the doctor could only be liable if he acted without the consent or submission of the plaintiff, and that the other defendants could only be liable if the doctor so acted, being authorized by them to act without such consent or submission. It seems to me there was no evidence to be left to the jury that they authorized him to do it without the consent of the girl. I am of opinion, therefore, that the judge was right in saying there was no case to go to the jury against Mr. and Mrs. Braddell." "I think there was no case to go to the jury against the doctor. I think he did not act in any way so as to make the girl think force would be used to her. If she had so supposed, but without any such reason as would make a reasonable person think so, he would not be liable. It must be shown that he did use actual force, or that she acted under conduct of his which would make her think he was going to use violence. If there was no threat and she submitted, there was no assault." The judges denounced the conduct of the master and mistress.

In *Redmon v. Phenix Fire Ins. Co.*, Wisconsin Supreme Court, February, 1881, 8 N. W. Rep. 226, it is held that a mechanics' lien is an "incumbrance," within the meaning of an insurance policy. The court said: "It is in effect conceded by counsel for the respondents 'that a covenant against incumbrances in a conveyance of land is a guaranty against the existence of any charge upon it, which will compel the grantee to pay money to relieve the land,' and hence includes a mechanic's lien; but it is insisted that in this application 'the word incumbrance is used in its popular and not in its technical sense.' No case has been cited making such distinction in the use of the word 'incumbrance.' Webster defines an 'incumbrance' to be 'a burdensome and troublesome load;' and again, 'a burden or charge upon property; a legal claim or lien upon an estate.' It will hardly be claimed that Webster did not define the word for the use of the populace, or that he only intended such definition to include

mortgages. Certainly, judgments duly rendered and docketed must be regarded as incumbrances, as used in popular speech. Is not the same true with respect to a mechanic's lien? It would seem to be impossible to conceive of any motive which would induce an insurance company, at the time of an application for insurance, to ask whether there were any incumbrances on the property by way of mortgage, which would not be equally controlling as to incumbrances by way of judgment or mechanic's lien. All such incumbrances affect what counsel called the 'moral hazard.' In this respect, such incumbrances are wholly unlike a highway or right of way. It is true, as stated by counsel, that 'the existence of an incumbrance adds nothing to the risk of *accidental or honest loss*,' but it is not so certain that it 'can in no case take any thing from the insurer.' If it be conceded that every loss is 'accidental or honest,' then it might be true. But many of the stipulations and statements required in the applications for insurance are to secure risks in which there shall be no motive for intentional or dishonest loss. Obviously, the inducement to bring about loss by fire would be far greater in one who is insolvent, having an insurance upon property incumbered for more than it is worth, than in one free from debt and perfectly responsible. Such questions, put to the applicant for insurance, are obviously to secure a declaration from him that he at the time is free from any temptation to bring about an intentional loss, in case the company issues the policy. It is not a prayer, but rather a declaration, forced by the company, to the effect that the assured will not be led into temptation by the issuing of the policy. Such being the motive for putting the question, it would seem to be difficult in this case to so construe the language as to hold that the company merely intended to ask, and the assured merely intended to answer, concerning incumbrances by way of mortgage, and no other incumbrances. No reported case has been cited involving the precise question here presented, nor any affirming the distinction in the use of the word incumbrance here claimed, and it seems to us that such a distinction would be extremely technical and over nice, if not forced."

A WISE JUDGE AND A MERRY.

THE current, 63d, volume of Georgia Reports comes down to September, 1879. The reports are thus a year and a half behind. But when we read Judge Bleckley's opinions, and reflect that we are reading the last of them, we fondly wish that these reports were much more in arrear, so that we could continue to be refreshed and delighted by the unfailing fountain of his wisdom and humor. The last volume has a large number of his opinions, from which we have culled the following gems:

In *Harriman v. First Bryan Baptist Church*, p. 186, which involved a breach of contract to furnish a steamboat for an excursion for the society, the judge says, "a committeeman on board was threatened with a most profane form of immersion."

In *Buchanan v. Sterling*, p. 227, a claim for a physician's services, the question was whether a magistrate had exceeded his jurisdiction of \$100. It had been proved that if the medicine man had charged for every visit the bill would have exceeded that sum, but he charged only \$96. The judge observed: "It is a rare complaint against a physician that his bill is too small. The law puts no such pressure upon a doctor as to require him absolutely to charge for every visit. It allows him the gratification of a free and friendly call upon his patient, even when he has a right to put it in his bill. The gratuitous visits of the plaintiff were made, it seems, during the period of convalescence, and when there was no necessity to prescribe. There is no evidence that his account was ever in fact more than one hundred dollars, so as to be beyond a magistrate's jurisdiction. He may have kept it in bounds, partly for the purpose of having the cheap and expeditious remedy afforded by a justice court, but did this motive appear, we do not know that he would be obliged to charge up to the extreme limit of his right."

In *Kupperman v. McGehee*, p. 256, he says: "Trusts are children of equity; and in a court of equity they are at home—under the family roof-tree, and around the hearth of their ancestor."

In *Nussbaum v. Heilbron*, p. 312, a son carried on business in the name of his father, because he felt that his own name was under a mercantile cloud. As Judge Bleckley expresses it: "According to the charges of the bill, the father had no capital, and the son no character. The man without character carried on business in the name, and upon the credit, of the man without capital."

In *Lee v. Porter*, p. 346, we find the following: "It not infrequently happens that a judgment is affirmed upon a theory of the case which did not occur to the court that rendered it, or which did occur and was expressly repudiated. The human mind is so constituted that in many instances it finds the truth when wholly unable to find the way that leads to it."

'The pupil of impulse, it for'd him along,
His conduct still right, with his argument wrong;
Still aiming at honor, yet fearing to roam,
The coachman was tipsy, the chariot drove home.'"

In *Forrester v. State*, p. 349, the defendant undertook to evade the law against retailing intoxicating liquors without a license, by having his cook sell them in his kitchen. "In the defendant's kitchen, by his servant, in his presence, and with his co-operation through the responses, 'Go to Mary,' and 'Give the money to Mary,' the traffic was carried on. There is little doubt that the defendant was the deity of this rude shrine, and that Mary was only the ministering priestess. But if she was the divinity and he her attending spirit to warn thirsty devotees where to drink, and at whose feet to lay their tribute, he is amenable to the State as the promoter of forbidden libations. Whether in these usurped rights he was serving Mary or Mary him, may make a difference with the gods and goddesses, but makes none with men."

In *Lester v. Lester*, p. 356, the question was about attaching a husband for contempt in refusing to pay alimony. This is what the judge thought about it: "If a man, though having health, will not work for the support of his wife and minor children, a court cannot assume direct control of his will and muscle and compel him to labor. To do this would be to reduce him to a sort of juridical slavery, and would contradict the spirit of our institutions. To be idle (taking the consequences) is one of the privileges of a freeman, unless he is convicted penally of some offense and put to work as a punishment. But while a civil court cannot order an able-bodied man to go to work, it can, in a proper case for alimony, order him to contribute so much money at such and such times to the maintenance of his dependent family, and leave him to provide the money by the free and voluntary exercise of his faculties, mental and physical, or by any other means at his command. If it is not reasonably and fairly within his power to comply with the order, he may disobey it, and the court must and will excuse him." "The attachment will bring the actual resources of the respondent to a practical and decisive test. Pressure is a great concentrator and developer of force. Under the stress of an attachment, even the vision of the respondent himself may be cleared and brightened, so that he will discern ways and means which were once hidden from him, or seen obscurely. It is a great help to do a thing to feel that it must be done, and that there is no evading it."

In speaking of the power of amendment on appeal, in *Burrus v. Moore*, p. 409, he says: "Curative measures are not restricted to the early stages of a case; our 'court physicians' now treat chronic disorders as well as acute ones."

In commenting on the small boy, and his criminal responsibility for injuries by throwing stones in fun, he says, in *Hill v. State*, p. 581: "Life itself is not safe where stones are flying about, even though they be thrown by a boy." "It is good for the young to engage in rough and hardy sports, but the State cannot permit her children to beat and batter one another, even at school, with stones or other dangerous missiles. Bad boys should be made to understand that they are accountable to the law, as well as to parents and teachers, for throwing rocks and thereby inflicting personal injuries." If the Georgia boys are athletic enough to throw "rocks," they certainly should be restrained. At all events, on general principles, we are willing to join Judge Bleckley in a subscription for a monument to Herod.

In *Dodd v. Middleton*, p. 639, the judge dissented in the following terms: "If I could be reinforced here by the votes, as I am by the opinions of the Supreme Judicial Court of Massachusetts and the Court of Appeals of New York, I could easily put my brethren in the minority; but as it is, they are two against one, and I have no option but to yield to the force of numbers—in other words to 'the tyranny of majorities.' Though twice beaten, I am

still strong in the true faith, and am ready to suffer for it (moderately) on all proper occasions."

Now the question may suggest itself, is Judge Bleckley's law any the worse for his humor? That may be settled by the opinion of his brother Jackson, in the last-mentioned case, in which he says: "The dissent of my able and learned associate always makes me distrustful of my own ruder judgment, even when fortified by the venerable chief justice who has so long presided in this court, and whose life is indissolubly interwoven with the growth of the jurisprudence of Georgia from its root in first Kelly to the latest leaf upon it now."

We mean to make a pilgrimage to Georgia sometime on purpose to see Judge Bleckley.

ADMISSION TO THE BAR.

IN view of the attempt which has been lately made in this State to elevate the standard of admission to practice at our bar, an examination of the English system will be found to be most interesting and instructive. That system was only recently perfected, and is due mainly to the exertions of the Incorporated Law Society.

It is no doubt generally known to the members of the legal profession that the whole matter of admission to the English bar is vested in that society. Prior to 1825 the solicitors had no regular organization except perhaps a few local societies. In that year the idea of a law institution took shape, and in obedience to a call issued by certain leading solicitors, a meeting was held in London at which it was determined to effect a permanent organization. The project was carried out; a building was obtained in that city and a committee of managers appointed. In 1831 a Royal charter was obtained incorporating the society, which has since been superseded and new charters granted enlarging the powers and privileges of the society.

Under these charters the corporation was organized. By-laws were adopted, prescribing the test of membership and creating a governing body composed of a president, vice-president and other officers called the "council."

The building which was first obtained soon became inadequate to the accommodation of the rapidly increasing numbers of its members, and the society added new buildings from time to time which are located in Chancery lane, in which there is a large and commodious hall for examinations and lectures. The library of the society has grown from about 1,000 volumes in 1832 to upwards of 26,000. The subscribers or members have increased from 223 in 1825 to 3,372.

Prior to the year 1844 a somewhat similar organization existed, which was less metropolitan in its character, being composed largely of country subscribers. In that year both organizations were merged into one and became the Incorporated Law Society.

A few years after its incorporation the society turned its attention to the subject of legal education. Before the year 1833 articled clerks depended for their education upon their own exertions and what assistance they received from those with whom they served, and the tests for admission were one length of service as articled clerk and satisfactory character.

About that time, in order to promote the cause of educating candidates, the society established courses of lectures, and began to agitate the question of the expediency of an examination before applicants were admitted to practice. The judges in whom the power was vested, recognizing the advantage to be derived from such an examination, finally appointed twelve

senior members of the committee of managers of the society and certain officers of the courts as examiners, and the first examination was held in the hall of the society in 1836.

The rules of the examination required that the candidates should pass a satisfactory examination on the principles and practice of common law and equity before the examiners, and also on one of three subjects, namely, Conveyancing, Bankruptcy, Criminal Law and Proceedings before Magistrates, before the magistrates themselves. A failure to pass an examination on other subjects was not fatal.

In 1877 an act was passed by Parliament, called the "Solicitors Act," putting the whole matter under the control of the society. Pursuant to the act, examiners were appointed composed of twelve members of the board of managers, who in their turn appointed paid assistant examiners chosen from members of the profession. Three examinations yearly are required by the act.

Candidates must pass three examinations, called respectively the preliminary, intermediate and final. The preliminary examination is required before the candidates enter into articles of clerkship and is designed to test the general knowledge of the applicant. The subjects of that examination for the year 1881 are

1. Writing from dictation.
2. Writing a short English composition.
3. Arithmetic.
4. Geography of Europe and history of England.
5. Latin — elementary.
6. And any two languages to be selected by the candidate out of the following six, viz.: 1. Latin; 2. Greek — ancient; 3. French; 4. German; 5. Spanish; 6. Italian.

There are certain exemptions from this preliminary examination in favor of graduates of leading universities and others.

Having passed this examination the candidates may immediately enter into articles of clerkship. The period of service of an articulated clerk, generally speaking, is five years, although there are certain exceptions to this rule. The candidate, within six calendar months next succeeding the day he shall have completed half of the term of service, is required to pass the second or intermediate examination. The subject of this examination for this year is Stephens' "Commentaries on the Laws of England," classed under the following heads:

1. Conveyancing.
2. Private rights, and remedies for their breach, being proceedings in civil actions in all decisions in the Supreme Court.
3. Public rights and their breach.

The final examination occurs when the articulated clerk has served this allotted period, or before that time, and extends over three days. The subjects of this examination for this year are as follows:

1. Principles of law and procedure in matters usually determined or administered in the higher courts.
2. Principles of the law of real and personal property and the practice of conveyancing.

An examination on other subjects embracing the law and practice in bankruptcy, criminal law, etc., is also had, but it is not essential that the candidate should pass that examination. There are also held other examinations for prizes offered by the society and others, called "honors examinations," which of course take a wider range and call for higher qualifications and attainments in the applicant than the regular final examinations.

The following are a few specimens of questions for the final examination for 1880:

"What is the effect of non-entry of a demurrer, no order for leave to amend having been obtained and served?"

"State the distinction between an express trustee

and an implied or constructive trustee, both as regards the statute of limitations and remuneration for time and skill?"

"When is leave given to surcharge and falsify accounts?"

"What is the position of a first legal mortgagee who advances a further sum on mortgage, as regards a mesne mortgage of whose charge he had notice at the date of his second advance?"

"State some of the events on the happening of which a partnership is determined by operation of law?"

"What is 'stoppage in transitu,' and how may it be lost?"

"State very shortly the ordinary successive steps in the administration, without suit, by an executor of the effects of a solvent testator?"

"Construct a pedigree table showing Henry Morgan to be the heir at law of his paternal great-uncle John Morgan?"

"How may a will, which has been revoked, be revived?"

There were seventy-five of these questions in all, and it will be observed from the foregoing specimens that the questions are not more difficult to answer than those which are now put by careful examiners of our own courts under the present rules.

A certificate of having passed the final examination enables the clerk to obtain admission as a solicitor, but no person can be admitted until he has attained twenty-one years of age and his term of service has expired.

It is important to note that the thoroughness and efficiency of the English system is due to the lawyers themselves acting through the Incorporated Law Society. Our own rules on the subject recognize to a certain extent the importance of enlisting the interest and services of the bar. Examiners are now selected with care, and as they hold their office for a year they have the time and opportunity for making the examinations as careful and thorough as they should be. Whatever improvement may be suggested in our own system will tend toward leaving the matter more decidedly with the bar, who may be depended upon to see that only well-trained and well-instructed candidates are admitted to membership.

While the Legislature will persist in setting aside the rules year after year in favor of graduates of law schools who in so many instances owe their diplomas wholly to the good nature and excessive zeal of their instructors, it seems idle and useless to talk about improvements. But it cannot be that the Legislature will long continue this work, and perhaps the best service that can be rendered at this time by the bar to the cause of elevating the standard of admission to practice, is to induce the Legislature to stop all special legislation which sets aside the present rules of the courts and the proceedings under them.

VALIDITY AGAINST CREDITORS OF MARRIAGE SETTLEMENT.

SUPREME COURT OF THE UNITED STATES, FEB. 23, 1881.

PREWITT V. WILSON.

R., an insolvent debtor in fraud of his creditors, settled upon J., in consideration of her marriage to him, a large amount of his real estate. J. knew that he was financially embarrassed, but had no knowledge of his insolvency or of his fraudulent intent. Held, that the settlement was valid as to the creditors of R.

APPEAL by defendants below from a decree of the Circuit Court of the United States for the Northern District of Alabama, in favor of complainant in an action brought by Robert H. Wilson, assignee in bankruptcy of Richard Prewitt, against Richard and Jose-

phine Prewit, to set aside a deed of settlement as fraudulent. The opinion states the facts.

FIELD, J. On the 27th of April, 1856, Mrs. Josephine Prewit was a widow only twenty years of age. Her husband was the late John Prewit. Not many months after his death another Mr. Prewit—Richard this time—proposed marriage to her. He was of mature age, being in his fifty-eighth year. His proposal was rejected. He renewed it and accompanied it with a promise to settle upon her if she would consent to the marriage a large amount of property. This promise moved her to consent. The deed of settlement was accordingly executed, and in the May following the marriage took place. Both parties affirm that the marriage was the only consideration for the settlement, and it is so stated in the deed.

A little more than two years and a half afterward—in December, 1858—the husband was adjudged to be a bankrupt in the District Court of the United States for the Northern District of Alabama, in proceedings taken upon his own application, and in the following month the plaintiff was appointed assignee of his effects, and to him an assignment was made. The present suit is brought by him to set aside the deed of settlement on the alleged ground that it was executed by Prewit to defraud his creditors.

At the time of the settlement Prewit was the holder of a large amount of property, consisting chiefly of lands in Alabama, but was indebted in an amount greater than their value. It is stated that his property was not worth more than \$50,000, and that his debts exceeded \$70,000.

It would seem from the evidence, and we assume it to be a fact, that he was insolvent at the time he executed the deed of settlement, in the sense that his debts largely exceeded the value of his property. It may also be taken as true, so far as the present suit is concerned, that he intended by the deed to hinder, delay and defraud his creditors, and that he made the settlement to place his property beyond their reach.

There is no evidence that Mrs. Prewit was aware at the time of the amount of property he held or of the extent of his debts, or that he had any purpose in the execution of the deed except to induce her to consent to the marriage. It is not at all likely, judging from the ordinary motives governing men, that whilst pressing his suit with her and offering to settle property upon her to obtain her consent to the marriage, he informed her that he was insolvent, and would by the deed he proposed to execute defraud his creditors. If he intended to commit the fraud imputed to him, it is unreasonable to suppose that he would, by unfolding his scheme, expose his true character to one whose good opinion he was at that time anxious to secure. If capable of the fraud charged, he was capable of deceiving Mrs. Prewit as to his pecuniary condition. She states in her answer that she knew he was embarrassed and in debt, but to what extent or to whom she did not know, and that it was because of the knowledge that he was embarrassed that she insisted upon his making a settlement upon her. The deed itself shows that he owed a large sum, for of the 6,770 acres of land embraced by it 2,185 acres were charged with the payment of certain designated debts to the amount of \$18,000. A knowledge of these facts justified her in saying that she knew he was embarrassed, but they rather dispelled than created any suspicion that he had a design to defraud his creditors. Her statements do not warrant the inference of knowledge of any such purpose, much less of any assent to its execution. Besides the property charged in the deed with the payment of the large amount of indebtedness mentioned, he owned 4,700 acres of land not included in it, and personal property of the value of several hundred dollars.

When a deed is executed for a valuable and adequate consideration, without knowledge by the grantee of any fraudulent intent of the grantor, it will be upheld however fraudulent his purpose. To vitiate the transfer in such case, the grantee also must be chargeable with knowledge of the intention of the grantor.

Now, marriage is not only a valuable consideration, but as Coke says, there is no other consideration so much respected in the law. Bishop justly observes that "marriage is attended and followed by pecuniary consequences; by happiness or misery to the parties; by life to unborn children; by unquiet or repose to the State; by what money ordinarily buys and by what no money can buy, to an extent which cannot be estimated or expressed, except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter truth, yet only a part of the truth." And also that "marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value." *Law of Married Women*, §§ 775-6. Such is the purport and language running through all the decisions both in England and this country with reference to marriage as a consideration for an ante-nuptial settlement. *Barrow v. Barrow*, 2 Dickens, 504; *Nairn v. Prouse*, 6 Vesey, 752; *Campion v. Cotton*, 17 id. 264; *Sterry v. Arden*, 1 Johns. Ch. 261; *Herring v. Wickham*, 29 Grat. 628.

In *Maginac v. Thompson*, this court said that "nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void, as a fraud upon creditors, it is necessary that both parties should concur in or have cognizance of the intended fraud. If the settler alone intend a fraud and the other party have no notice of it but is innocent of it, she is not and cannot be affected by it. Marriage, in contemplation of the law, is not only a valuable consideration to support such a settlement, but is a consideration of the highest value, and from motives of the soundest policy is upheld with a steady resolution." 7 Pet. 393.

The same doctrine is asserted by the Supreme Court of Alabama, in which State the parties to the deed of settlement reside and in which it was executed. *Andrews v. Jones*, 10 Ala. 401.

According to these authorities there can be no question of the validity of the settlement in this case. There is an entire absence of elements which would vitiate even an ordinary transaction of sale where, if set aside, the parties may be placed in their former positions. And an ante-nuptial settlement, though made with a fraudulent design by the settler, should not be annulled without the clearest proof of the wife's participation in the intended fraud, for upon its annulment there can follow no dissolution of the marriage, which was the consideration of the settlement.

It follows that the decree of the court below must be reversed, and the cause remanded with directions to dismiss the bill of complaint; and it is so ordered.

LIFE INSURANCE—INSANITY NO EXCUSE FOR FORFEITURE—RIGHT TO PAID-UP POLICY.

NEW YORK COURT OF APPEALS, NOV. 16, 1880.

WHEELER V. CONNECTICUT MUTUAL LIFE INSURANCE COMPANY.

While as a general rule, where the performance of a duty, created by law, is prevented by inevitable accident, without the fault of a party, the default will be excused, yet when a person, by express contract, engages absolutely to

do an act not impossible or unlawful at the time, neither inevitable accident nor other unforeseen contingency, not within his control, will excuse him, for the reason that he might have provided against them by his contract.

A life insurance policy provided that "if any premium on this policy be not paid when due then this policy shall cease and determine and this company shall not be liable for the payment of the sum insured herein nor any part thereof." Held, that a failure to pay the premium when due, caused by the insanity of the insured, whose duty it was to pay it, forfeited the policy, and that equity would not relieve against such forfeiture. *Cohen v. New York, etc., Ins. Co.*, 60 N. Y. 610; *Sands v. New York, etc., Ins. Co.*, id. 626, distinguished.

The policy provided that if default was made after the payment of two or more premiums, the company would grant a paid-up policy for such an amount as the then present value of the policy would purchase, if application should be made within one year after default. Held, that the death of the insured would not relieve the company from its contract to issue a paid-up policy to those entitled, if application was made within one year after default.

A PPEAL by plaintiff from judgment in favor of defendant upon demurrer to complaint. The opinion states the case.

Everett P. Wheeler, for appellant.

William A. Beach, for respondent.

MILLER, J. The complaint in this action sets forth causes of action upon two separate policies of insurance, claiming to recover the amount named in each, and also alleges that a dividend was declared out of the surplus earnings and receipts of the company, for a portion of which the insured was entitled to a paid-up policy, which on demand, was refused. The demurrer to the complaint presents the question whether any cause of action is set forth therein.

The policies on which this action was brought, provided for the payment of an annual premium, and contained a condition as follows, that "this policy shall not take effect until the advance premium hereon shall have been actually paid, during the life-time of the insured, and that if any subsequent premium on this policy be not paid when due, then this policy shall cease and determine (except as hereinafter provided), and this company shall not be liable for the payment of the sum insured herein, nor of any part thereof." The annual premium due on the 28th of October, 1873, was not paid, and the complaint alleges, and upon demurrer it must be taken as true, that Vose, the insured, became, and was by the visitation and act of God insane, and consequently unable to, and did not pay the premium, although he had means to pay the same; but he was bereft of his reason, and in consequence thereof did not know nor remember that said premium was then due, nor that he had agreed to pay the same.

Vose having died without a payment of the premium, according to the terms of the contract, the question arises whether his insanity is an excuse for non-payment, and the forfeiture is thereby waived. Courts of equity will relieve against a forfeiture in many cases, but none of the decisions have gone to the extent of holding that insanity will constitute an excuse for failing to comply with the terms of the condition referred to. In *Rose v. Rose*, Amb. 332, Lord Hardwicke laid down the rule thus: "Equity will relieve against all penalties whatsoever; against non-payment of money at a certain day; against forfeitures of copyholds; but they are all cases where the court can do it with safety to the other party; for if the court cannot put him into as good condition as if the agreement had been performed, the court will not relieve." Even if a condition subsequent becomes impossible by the act of God, or of the law, or of the obligee, etc., the estate will not be defeated. Co. Litt. 206, b. The defendant here could not well be placed in as good a condition as it had been by the payment of the premium after a forfeiture, for by such payment it would be compelled

to pay the amount named in the policies, thus adding to its obligation. So also where the contract is for personal services, which none but the person contracting can perform, inevitable accident, or the act of God, will excuse non-performance. But when the thing or work to be performed may be done by another person, then all accidents are at the risk of the promisor. Story on Bailments, § 36 and notes: *Wolfe v. Howe*, 20 N. Y. 197; *Clark v. Gilbert*, 26 id. 279; *Spalding v. Rona*, 71 id. 40. In the present case the condition did not require the insured himself to pay the premiums, and it could have been done quite as well by any one on his behalf. After Vose became insane, he was not really the party in interest. He had assigned the policies to his children, and they were the parties interested therein, and to be affected by a failure to perform the condition of the contract. Although Vose was their guardian, if incapacitated by his insanity, a competent person could have been appointed in his place; and hence his insanity was not necessarily an insuperable obstacle to their performance of the condition of the policy, and they were not relieved thereby. So long as the act could be performed by any other person, its performance did not depend upon Vose's continued capacity, and although rendered incapable by his insanity, the case is not within the rule which relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power. Brown's Legal Maxims (6th Am. ed.), 178, 179; *Howell v. Knickerbocker Life Ins. Co.*, 44 N. Y. 276.

While as a general rule, where the performance of a duty created by law is prevented by inevitable accident without the fault of a party, the default will be excused, yet when a person by express contract engages absolutely to do an act not impossible or unlawful at the time, neither inevitable accident nor other unforeseen contingency not within his control will excuse him, for the reason that he might have provided against them by his contract. *Dexter v. Norton*, 47 N. Y. 62; *Harmony v. Bingham*, 12 id. 99, 107; *Tompkins v. Dudley*, 25 id. 275. The principle thus established has been especially applied in reference to policies of insurance where the payment of the premium is held to be a condition precedent which must be kept or the policy falls. *Roehner v. Knickerbocker Life Ins. Co.*, 63 N. Y. 160; *Evans v. U. S. Life Ins. Co.*, 64 id. 304; *Beebe v. Johnson*, 19 Wend. 500. In the case last cited it was laid down that to excuse non-performance, it must appear that the thing to be done cannot by any means be accomplished.

The learned counsel for the plaintiff seeks to distinguish 63 N. Y. 160, and 64 N. Y. 304, above cited, from the case at bar; but we are unable to perceive any such difference as prevents an application of the principle decided in these cases, and we think that they are directly in point upon the question discussed. Reliance is also placed upon the decisions of this court in *Cohen v. N. Y. Mut. Life Ins. Co.*, 50 N. Y. 610, and *Sands v. N. Y. Life Ins. Co.*, id. 626, to sustain the theory of the plaintiff. Those decisions hold that the occurrence of war between two States forbids and excuses the transmission and payment of premiums on the policies then in question from one State to another, and legally excuses their payment; and as the premiums could not be paid as they fell due, they were suspended, and a tender, after the termination of the war, with interest, renewed the policies. This condition of affairs arises from the belligerent attitude between the hostile States, which rendered it impracticable to comply with the terms of the contract. War necessarily prevents communication between the citizens of such States; and as it existed without the fault of the insured, in the cases cited, and for that reason no intercourse could be maintained for business purposes, the insured were not in any sense in fault for a failure to comply with the conditions contained in the policies in ques-

tion. As it was impossible for either one of the insured to pay the premium required, or to procure any one else to do so on his behalf, there is no satisfactory reason why he should not be excused. This rule, which is well settled by the law of nations, rests upon grounds of public policy by which contracts between belligerent States are suspended during the war, but are not annulled.

This doctrine is founded upon the principle that the State, and not the individual, wages the war. Phill. on Int. Law, 666; Wheat. on Int. Law (8th ed.) 403, § 317. The cases cited are not analogous, for while here the individual can pay or provide for payment through another, in case of war he is entirely helpless to fulfill and carry out the contract, and at the mercy of the government. The authorities of the hostile States have placed it beyond his control, suspended all intercourse, stopped all business relations, and laid a heavy arm upon all communications between their citizens. As there is no ability to fulfill, no means of paying, the justice and propriety of the rule is apparent, while its application in the case at bar cannot be upheld upon any such ground. There is, we think, a wide distinction in principle recognized in the books between inability to fulfill the terms of the contract, where, by the act of two governments, war intervenes and prevents a fulfillment, and where the default arises from a duty or charge which has been assumed by the party, and is capable of fulfillment either by himself or by another on his behalf.

While a court of equity will interpose its power to relieve against forfeitures for a breach of a condition subsequent, caused by unavoidable accident, by fraud, surprise, or ignorance, in many cases, that power has never been extended so as to excuse a breach of a contract of this description arising from the disability of a party caused by sickness or insanity.

The case of *Baldwin v. Nat. Life Ins. Co.*, 3 Bosw. 530, which is cited and relied upon by the appellant, involved no question as to the non-payment of the premium, but related to a provision in the contract whereby the insured was licensed to travel in prohibited localities, returning within a specified period, and was prevented by illness from performing the condition. It was analogous to contracts for personal services, to which reference has been had, and the authority has no application in the case considered. Besides, it is overruled by *Evans v. U. S. Life Ins. Co.*, *supra*.

In the case at bar, it is not claimed that the performance was strictly impossible, and therefore it was excused by law or that equitable relief should be granted upon that ground; and we are unable to discover that a case is made out, within any acknowledged principle, which authorizes the interposition of a court of equity.

Nor is there any ground for claiming, that by the provisions of the contract, the intention of the parties was that the terms of payment should not be obligatory in case of unavoidable sickness or of insanity. The law places a reasonable construction upon all contracts, but in cases of insurance policies, where the prompt payment of premiums is an important element of the business, and forms the basis of its calculation by the compounding of interest thereon, it is scarcely to be supposed that such payment can be waived, except in conformity with some established rule of law or by express agreement. The claim of the plaintiff that the moneys in possession of the company belonging to Vose, being dividends on the policies in question, should be applied in payment of the premiums falling due, is without merit, as such dividends would have been insufficient to pay the premiums due, even if applied. Nor was the company bound to pay such dividends to the insured, and notify him that the policy was forfeited if not applied. The money was

never demanded, nor any request made to apply the same; and hence the defendant was under no obligation to apply or to pay the dividends on account of the premiums. The views expressed lead to the conclusion that no action lies to recover the amount named in the several policies mentioned in the complaint, or the dividends, and the demurrer must be sustained, unless it can be upheld upon some other ground.

The allegations in the complaint in regard to dividends which have been earned, and the refusal of the defendant to issue a paid-up policy, stand, we think, in a different position. The sixth condition of the policy provides, "That if, after the payment of two or more annual premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then, notwithstanding such default, this company will grant a 'paid-up policy' (payable as above) for such amount as the then present value of this policy will purchase as a single premium, provided that this policy shall be transmitted to and received by this company, and application made for such 'paid-up policy' within one year after default in the payment of premium hereon, shall first be made."

The complaint shows that under this clause, a dividend was declared out of the surplus earnings and receipts for the preceding year, on the 1st day of January, 1873, payable to its several policy-holders, and to Vose as one of them; that none of this has been paid, and it was still retained by the defendant, and was in its possession when the premium not paid became due, and at the time of Vose's death. Three annual premiums had been paid upon the policies, and the provision cited entitled the insured or his assignees to the benefit of the dividends actually made. And as the complainant avers that when the proofs of loss were presented to the defendant the policy of twenty thousand dollars was transmitted to and received by it, and that it refused to grant a paid-up policy for such amount as the then present value of the policy on the twenty-eighth day of October, 1873, the day when default was made, would purchase as a single premium or to pay such amount, a cause of action is made out which entitles the plaintiff to relief. The facts stated establish a demand for a paid-up policy, within one year after default in payment of the premium, in the mode prescribed, and a refusal to comply with such demand. A cause of action was thus made out. The fact that Vose was dead does not relieve the defendant from liability, as no such contingency by the terms of the policy is provided for as an excuse for not granting such paid-up policy. The conditions were: first, that two or more annual premiums should be paid; and second, that the application should be made within one year after default. All this has been done, and the company were bound to comply with these conditions. Although the insured was dead, the right to a paid-up policy, or its value, remained to his assignees. If the insured had lived, he was entitled to it; and his assignees succeeded to his right. The same rule applies as when insurance companies, or their agents, have made contracts to issue policies which have neither been made out nor delivered. In such cases the loss is payable the same as if a policy had been actually issued and delivered. Although not very distinctly or precisely set forth, a cause of action was stated in substance, which entitled the assignees of Vose to a paid-up policy or its equivalent. A refusal to perform this condition created a liability for the amount for which the paid-up policy might have been issued, and this was a good cause of action, for which the plaintiff was entitled to recover.

As the complaint contained distinct causes of action, and a demurrer to the whole complaint was interposed, and one of them is good and sufficiently pleaded, the result is that the judgment of the General Term must be reversed, and that of the Special Term affirmed.

with leave to the defendant to answer upon the usual terms.

Rapallo, Earl, Danforth and Finch, JJ., concur. Folger, C. J., and Andrews, J., being interested as policy-holders in the defendant, took no part.

NEGLECT OF LOT-OWNER TO REMOVE SNOW FROM SIDEWALK.

MICHIGAN SUPREME COURT, JANUARY 5, 1881.

TAYLOR v. LAKE SHORE & MICHIGAN SOUTHERN RAILROAD CO.

A municipal corporation, under authority granted in its charter, by ordinance required owners and occupants of premises upon its streets to remove snow, ice, etc., from the sidewalks in front of such premises. The charter provided that the owner or occupant failing to comply with such ordinance should be liable to the city for damages recovered against it for injury occurring by reason of such failure. Held, that one injured by reason of neglect to remove ice or snow from the sidewalk in said city would not have a right of action for his injury against the individual guilty of the neglect.

ACTION for injury caused by slipping upon an icy sidewalk. The opinion states the facts.

Griffin & Dickinson and Henry M. Campbell, for plaintiff.

Ashley Pond, for defendant.

COOLEY, J. The plaintiff sues the railroad company to recover compensation for an injury suffered by her in consequence of slipping and falling upon ice which had formed on a sidewalk in front of the premises occupied by defendant in the city of Monroe, and which the defendant had failed to remove as required by law. It is not claimed that any such action would lie at the common law, and the right of recovery is supposed to arise from certain State and municipal legislation.

The State legislation in question is the general act for the incorporation of cities, passed in 1873, under which the city of Monroe is now organized. Chapter 12 of this act relates to the sidewalks. Section 1 gives the city council control of all sidewalks, with power to construct and maintain the same and charge the expense thereof upon the lots and premises adjacent to and abutting upon such walks. Section 2 empowers the council to require the owners and occupants of adjacent lots to construct and maintain sidewalks, and section 3 is as follows: "The council shall also have power to cause and require the owners and occupants of any lot or premises to remove all snow and ice from the sidewalks in front of or adjacent to such lot or premises and to keep the same free from obstructions, encroachments, filth, and other nuisances."

Section 4 provides that if any owner or occupant shall fail to perform any duty required by the council in respect to sidewalks, the council may cause the same to be performed, and levy a special assessment to meet the expenses on the lot or premises adjacent to and abutting on the sidewalk.

Section 6 is as follows: "If any owner, occupant or person in charge of any lot or premises shall neglect to repair any sidewalk in front of or adjacent to such premises, or to remove any snow or ice therefrom, or to keep the same free from obstructions and incumbrances, in accordance with the requirements of the ordinances and regulations of the council, he shall be liable to the city for the amount of all damages which shall be recovered against the city for any accident or injury occurring by reason of such neglect." Gen. Laws 1873, pp. 244, 325, 326.

Acting under the authority conferred by this act,

the city council adopted an ordinance whereby it was provided that the owner or occupant of any house or building, or person entitled to the possession of any vacant lot, or person in charge of any church or other public building, or any street, alley or public space, shall not permit the sidewalk and gutter adjoining the same to be obstructed by snow, ice, filth, dirt or other incumbrance, and when ice is formed on any sidewalk and gutter, such owners, occupants, or persons having charge, or entitled to possession of property adjoining, as above provided, shall, within twenty-four hours after the same has formed, remove the same, or cause sand, sawdust or ashes to be strewn thereon.

The defendant, it is alleged, failed to remove, within twenty-four hours as required by this ordinance, the ice which had formed on the sidewalk in front of its premises, and the plaintiff sustained a severe injury by slipping and falling thereon.

It is said on behalf of the plaintiff that the obligation to keep the sidewalks free from snow and ice is imposed as a duty on all persons who may have occasion to use the walks in passing and repassing, and that the neglect to do so, in consequence of which any one lawfully using the walk is injured, is a neglect of duty to him, and entitles him on well-recognized principles to maintain an action. *Crouch v. Steele*, 3 Exch. 402; *Aldrich v. Howard*, 7 R. I. 214.

To maintain this proposition it is necessary to make it appear that the duty imposed was a duty to individuals rather than a duty to the whole public of the city; for if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof. A breach of public duty must be punished in some form of public prosecution, and not by way of individual recovery of damages. Nevertheless the burden that individuals are required to bear for the public protection or benefit may in part be imposed for the protection or benefit of some particular individual or class of individuals, also, and then there may be an individual right of action as well as a public prosecution if a breach of the duty causes individual injury. *Atkinson v. Water Works Co.*, 6 Exch. 404.

The nature of the duty and the benefits to be accomplished through its performance must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty imposed wholly or in part for their especial benefit. In this case the duty was to keep the sidewalks free from obstructions. It will not be claimed that this was not a duty to the whole public of the city, and the disputed question is whether it is also a duty to each individual making use of the walks. An obstruction by snow or ice may make the use of a walk dangerous, or may wholly preclude its use for the purpose for which walks are constructed. If the duty to keep the walk free from obstructions is a duty to individual travellers desiring to use it, it is as much broken when the walk is wholly obstructed as when it is capable of use but is dangerous, and an action will as much lie by one who is compelled to go around an obstruction, as by one who slips and falls in a dangerous place. Moreover as the lot-owner is required to keep the walk free from all nuisances, an individual traveller who can maintain the proposition that this is a duty to him, must be entitled to bring suit wherever the existence of a nuisance diminishes either the comfort or the safety of the use of the walk by him. This view of the obligation of the lot-owner would add greatly to his common-law liabilities, and it is not easy to draw the lines which should definitely limit and confine his liabilities.

But if we look a little further into the statute under which the city is incorporated, we shall see that all its provisions respecting sidewalks, so far as they impose duties upon the owners of adjoining or abutting lots, have one common object, namely, to provide suitable

and safe passage-ways for foot passengers by the side of the public streets, and to keep these in condition for safe use. The expense of such ways is imposed on the owners of adjacent lots, and these owners must keep them free from encroachments. Will it be claimed that if the city council shall require a lot-owner to construct a sidewalk in front of his premises, and he should fail to obey the requirement, every person who should come upon the street desiring to pass on foot where the walk should be, and who should be precluded from doing so by the walk not being constructed, might bring suit against the lot-owner for the neglect to build it as a neglect of duty to the traveller himself? He is damaged in that case as clearly as when he falls upon a dangerous walk and is hurt; though the damage may perhaps be insignificant.

But it is clear, we think, that the duty to build the walk is only a public duty, and the duty to keep it in condition for use is also a public duty. Exactly what force is to be given to the provision of statute that the lot-owner shall be liable to the city for all damages which the city may be compelled to pay for his default, we need not consider in this suit. It is enough to say here that an action grounded on that particular provision of the statute could only arise after the city had been rendered liable in a suit against it. If the statute contemplated public duties only, the city ordinance could not go further and give individual rights of action. But neither, we think, has it attempted to do.

The judgment of the Circuit Court must stand affirmed with costs.

AUTHORITY OF WIFE TO PLEDGE HUSBAND'S CREDIT.

HOUSE OF LORDS, NOVEMBER 27, 1880.

DEBENHAM V. MELLON, 43 L. T. Rep. (N. S.) 673.

There is no necessary presumption that a wife living with her husband has authority to pledge his credit; and a husband who is able and willing to supply his wife with necessaries, and has forbidden her to pledge his credit, cannot be held liable for necessaries bought by her; so that a tradesman who, without notice of the husband's prohibition, has supplied goods to the wife, cannot maintain an action against him for the price.

THIS was an appeal from a judgment of the Court of Appeal (Bramwell, Baggallay and Thesiger, L. J.), affirming a judgment of Bowen, J., at the trial. The case is reported in 5 Q. B. Div. 394, and 42 L. T. Rep. (N. S.) 577.

The question raised by the appeal was, whether a husband who has withdrawn his wife's authority to pledge his credit, but has given no notice whatever of such withdrawal, is liable for necessaries ordered and supplied to his wife while living with him. The appellants were a firm of drapers, carrying on business in Wigmore street, London, and the defendant was Mr. Alfred Mellon, living at Bradford, in Yorkshire. Shortly before July, 1877, the appellants supplied the wife of the respondent while living with him with clothes necessary for her and their children to the amount of 43*l.* 9*s.* 6*d.* The appellant having brought an action against the respondent to recover that sum, at the trial the respondent and his wife stated that in 1869 a verbal agreement was made between them whereby the respondent forbade his wife to pledge his credit, and further stated that such prohibition was continued without interruption down to July, 1877. They further stated that throughout such period the respondent had allowed his wife an annual sum for the purpose of obtaining clothes and other goods for the use of herself and her children. No notice of such prohibition, however, was given to the appellants or

to any other person. At the trial before Bowen, J., and a common jury, in December, 1879, at Guildhall, it was admitted that the goods were supplied on the order of the wife of the respondent, that they were necessaries; that the prices were fair and reasonable; that the respondent and his wife were living together, and that at the time the goods were supplied the appellants had no knowledge of the prohibition by the respondent against his wife pledging his credit. The learned judge thereupon directed that judgment should be entered for the respondent, and his decision was affirmed by the Court of Appeal. Against the latter judgment the present appeal was brought.

Benjamin, Q. C., and A. L. Smith, for appellants, cited Manby v. Scott, 2 Sm. L. C. (8th ed.) 445; Montague v. Benedict, 3 B. & C. 673; Ruddock v. Marsh, 1 H. & N. 601; Johnston v. Sumner, 3 id. 261; 27 L. J. 341, Ex.; Dyer v. East, 1 Mod. 9; Etherington v. Parrott, 2 Ld. Raym. 1006; 1 Salk. 118; Holt v. Brien, 4 B. & Ald. 252; Read v. Levard, 6 Ex. 636; Morgan v. Chetwynd, 4 F. & F. 451.

Willis, Q. C., McCall and Newson, for respondent, referred to Reid v. Teakle, 13 C. B. 627; 22 L. J. 116, C. P.; Renaux v. Teakle, 8 Ex. 680; Atkins v. Curwood, 7 C. & P. 756; Lane v. Ironmonger, 13 M. & W. 368; Freestone v. Butcher, 9 C. & P. 643; and the cases in the note; Mizen v. Pick, 3 M. & W. 481; Denny v. Sargeant, 6 C. & P. 419; Bolton v. Prentice, 2 Str. 1214; Eastland v. Burchell, 3 Q. B. Div. 432; 38 L. T. Rep. (N. S.) 563; Atkyns v. Pearce, 2 C. B. (N. S.) 763.

The LORD CHANCELLOR (Selborne). My Lords: This case raises the very important question whether the decision of the Court of Common Pleas, in 1864, in the case of *Jolly v. Rees* (*ubi sup.*), which, so far as I know, has not been seriously called in question since that time, and was never brought to this house for consideration, is right. The point determined was this, as I understand it; that the question whether a wife has authority to pledge her husband's credit is to be treated as a question of fact, to be determined upon the circumstances of each particular case, whatever may be the rules of law as to the *prima facie* presumptions to be drawn from a particular state of circumstances. That principle is now controverted, and the first question is, whether the mere fact of a marriage implies a mandate by law making the wife (who cannot herself contract, unless so far as she may have a separate estate) the agent in law for the husband, to bind him and to pledge his credit, by what otherwise might be her own contract if she were a *feme sole*? It is sufficient to say that all the authorities show that there is no such mandate in law, except in the particular case of necessity, a necessity which perhaps *prima facie* may arise when the husband has deserted the wife, or compelled her to live apart from him, without properly providing for her, but which, when the husband and wife are living together, cannot be said ~~over~~, *prima facie*, to arise, because if in point of fact she is maintained, there is, in that state of circumstances, no *prima facie* evidence that the husband is neglecting to discharge his proper duty, or that there can be any necessity for the wife to run him into debt for the purpose of keeping herself alive or supplying herself with necessary clothing. I therefore lay aside that proposition, and think it clear that there is no mandate in law by the mere fact of marriage applicable to such a state of circumstances as we have at present. Then, the next question is, whether the law implies a mandate from cohabitation? If it does, on what principle does it do so? Cohabitation is not like marriage, a status, or a new contract—it is a general expression for a certain condition of facts; and if the law does imply any such mandate from cohabitation, it must be as an implication of fact, and not as a necessary conclusion of law. There are, no doubt, various authorities

which say that the ordinary state of cohabitation between husband and wife carries with it some presumption, some *prima facie* evidence of an authority to do those things which, in the ordinary circumstances of cohabitation between husband and wife, it is usual for a wife to have authority to do. Mr. Benjamin says that those words are not the best which might be used for the purpose, but that "apparent authority" or "ostensible authority" would be better. I am not at all sure that Mr. Benjamin's words may not be very good words for that ordinary state of circumstances in the case of cohabitation between husband and wife, out of which the presumption arises, because in that ordinary state of circumstances the husband may truly be said to do acts, or to consent evidently to acts, which hold the wife out as his agent for certain purposes. Then the word "apparent," or the word "ostensible," becomes appropriate. But where there is nothing done, nothing consented to by the husband to justify the proposition that he has held out the wife as his agent, then I apprehend that the question whether, as a matter of fact, he has given the wife authority, is one that must be examined upon the whole circumstances of the case. No doubt, though not intending to hold her out as his agent, and though she may not actually have had authority, the husband may so have conducted himself as to entitle a tradesman dealing with him to rely upon some appearance of authority. If he has done so he may be bound, but the question must be examined as one of fact, and all the authorities, as I understand them, practically treat it so, when they speak of this as a presumption *prima facie* not absolute, not in law, but capable of being rebutted; and when Pollock, C. B., in the case of *Johnston v. Sumner* (*ubi sup.*), said that all the usual authorities of a wife under those circumstances might be assumed, notwithstanding any private arrangement, I apprehend that he had in view that state of facts under cohabitation, when a wife is managing her husband's house and establishment, which usually raises the presumption, which, when once raised, by the husband's acts, or by his assent to the acts of his wife, doubtless, as against the person relying upon that appearance of authority, might not be got rid of by a mere private agreement between the husband and wife. Pollock, C. B., in another case which was cited during the argument, viz., the case of *Renaux v. Teakle* (*ubi sup.*), said that the case of the wife, as to principle, at all events, was not different from that of anybody else in an establishment. If there is an establishment, of which there is a domestic manager, although, perhaps, the wife is the most natural domestic manager, and the presumption may be strongest in particular circumstances when she is so, yet the presumption is the same from similar facts, even if she be not a wife, but merely a woman living with a man and passing as his companion, with or without the assumption of the name of wife. It is also the same if the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of servant. Therefore, it is in all these cases really a mere question of fact. Now in this case, that ordinary state of circumstances which usually accompanies cohabitation, when there is a house and an establishment, is entirely wanting. There was here no house, there was here no establishment, and none of these things were done in the way of living upon credit for the ordinary necessary purposes of providing for the daily wants of an establishment which ordinarily raises the presumption. The husband and wife were both servants of a company of hotel keepers at Bradford. They not only were their servants, but they lived in the hotel which belonged to their employers; the whole of their board and lodging (which, I take it upon the evidence, included that of their children) was found for them, and therefore there was no household to be managed;

there was no domestic management at all, in point of fact. The credit, such as it was, was given by a London tradesman to a woman living in Bradford in these circumstances: No single act was done by him which shows that he was dealing upon the faith of any appearance of authority in the wife, for he made out all the bills to the wife in her own name, which, no doubt, would not have prevented him from resorting to the husband, if the husband was otherwise liable, but certainly does not assist his case as tending to show that he was misled by any appearance of authority into supposing that he was giving credit to the husband. That the husband never knew any of these things is made perfectly clear. The necessary conclusion of fact is that the husband never did hold out his wife as having any authority, by any act, or by any consent of his, either to the plaintiff or to the class of persons to whom the plaintiff belongs, and of whose dealings the plaintiff might be presumed to have any knowledge. Then, if the plaintiff can recover at all, it must be either because there was, notwithstanding this state of things, an authority in fact, or because there is an authority in law, from the necessity of the case. I think it would really be doubtful whether the ordinary presumption even shows the authority in the state of facts which I have mentioned; but taking it to be so, seeing that the clothes might be necessary for the wife, and that if there were no means of supplying them otherwise, it would be the husband's duty to supply them, the evidence conclusively shows that there was no authority in fact. It is said that when this married pair lived, four or five years before the beginning of the dealings between the wife and the plaintiff (and a considerably greater distance of time before this particular debt was contracted), at Westward Ho, in Devonshire, there were some other people who did give credit to the husband, the wife acting as his agent. That the plaintiff ever heard of that is not so much as suggested. More than four years before any dealings with the plaintiff began, that state of things, being disapproved by the husband, was put an end to. The husband expressly determined and revoked any authority which he might previously have given to the wife; and he afterward, at the time this debt was contracted, made her an allowance amply sufficient for any necessary purposes of her clothing, according to the state of the circumstances and his condition in life. It is said that of that revocation the plaintiff had no notice; but the plaintiff had no notice of the circumstances that made the revocation necessary; he never had notice of any single fact except that this was a married woman; and more than four years before the beginning of his dealings with the wife, there was an ending of the authority (if ever it had been given to her) to bind her husband as his agent toward other persons. Then the question is, whether, because these articles are found to be in some sense necessities in their nature, the husband can be bound? It would be perfectly clear that when a reasonable allowance is made by the husband to the wife, as in this case was made, sufficient to cover a proper expenditure for her own and her children's clothing, it is totally impossible to imply *ex necessitate* any authority of hers in law to bind him, even if she had purported to do so. These observations seem to me to dispose of the whole case; but I must add, that without going into the authorities, I think if the principles which run through them from first to last are regarded, rather as casual dicta, colored, as they necessarily would be, by the circumstances of particular cases in one judgment or in another, the whole of the judgments, being consistent with reason and justice, are also consistent with the decision which was arrived at by the majority of the Court of Common Pleas in the case of *Jolly v. Rees*, *ubi sup.* Therefore, my lords, I humbly move your lordships that this appeal should be dismissed, and

that the judgment of the court below should be affirmed.

LORD BLACKBURN. My Lords: If it were not that this case is precisely identical with the case of *Jolly v. Rees, ubi sup.*, I should think it desirable to speak more at length than I propose now to do. The opinion upon which I advise your lordships to act is, that the majority of the court in the case of *Jolly v. Rees, ubi sup.*, were right in the judgment which they gave, and it is admitted that that governs the present case. I also think that the judgment which Byles, J., gave upon that occasion (which it is admitted might, if it were good, apply to the present case) was not correct as applied to that case, and is not applicable now. I premise, as did the majority of the court in *Jolly v. Rees, ubi sup.*, by saying that no question arises here as to what would be the case if the wife had been left destitute, and had not been allowed what was proper for her estate and condition. If there had been desertion and cruelty, so that she had not been supplied with what was proper, no question arises here as to whether she would not have had authority to pledge her husband's credit to get such things. But that is not the case here at all. This is simply a case where a husband is living with his wife, though they are not keeping up any household establishment; and he, in fact, makes her an allowance, which both husband and wife seem to think, so far as one can judge from appearances, would be sufficient to enable her to supply herself with all necessary clothes. She did get clothes and there was evidence, which satisfied the jury, that the husband really and truly told her that she was not to pledge his credit, and that she had assented. The question comes to be, first, had she, from her position as wife, authority to pledge her husband's credit, although the husband had revoked that authority? I grant that the fact of a man living with his wife, frequently, and indeed always, does afford evidence that he intrusts her with such authorities as are commonly and ordinarily given by husband to wife. I should say that it might be a matter of doubt whether it is so perfectly certain that the articles supplied by milliners are always to be procured upon the credit of the husband, so as to make that a *prima facie* part of the authority. But I will assume that it would be so. In the ordinary case of the management of a household the wife is the manager of the household, and would necessarily get short and reasonable credit on butchers' and bakers' bills, and such things; and for those she would have authority to pledge the credit of the husband. I think that if the husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But even then, I do not think the authority would arise so long as he supplied her with the means of procuring the articles otherwise. But that is not the present question, which is this: Had the wife a mandate to order the clothes which it would be proper for her in her station in life to have, though the husband had forbidden her to pledge his credit, and had given her money to buy clothes? I think, for the reasons given by the majority of the court in *Jolly v. Rees, ubi sup.*, and also by the judges in the Court of Appeal in this case, that there is no authority and no principle for saying that the wife had authority to pledge her husband's credit. I quite agree that if the husband knew that the wife had got credit, if he had allowed the tradesmen to suppose that he himself had sanctioned the transactions by paying them, or in other ways, it might very well be argued that he would have given such evidence of authority that if he did revoke it, he would be bound to give notice of the revocation to the tradesmen and to all who had acted upon the faith of his authority and sanction. That would be the general rule; but where

an agent is clothed with an authority, and afterward that authority is revoked, unless that revocation has been made known to those who have dealt with him, they would be entitled to say, "The principal is precluded from denying that that authority continued to exist, which he had led us to believe, as reasonable people, did formerly exist." Now, there may be many cases in which the husband has so sanctioned his wife's pledging his credit, but there is not any such case here. Those cases in Ireland which have been referred to, seem, as far as I could see by a slight glance, to be cases where the husband had assented to the contracts in such a way that he could not deny them afterward. With that we have nothing at present to do. But I cannot agree with Byles, J., that there is any authority established by the cases that the fact of a wife living along with a husband alone entitles the tradesmen to presume that the husband has given an authority so as to preclude the husband from denying it. I think that when husband and wife are living together, it is open to the husband to prove, if he can, the fact that the authority does not exist, it being a question for the jury whether a *bona fide* authority did or did not exist. This is not a case of withdrawing authority once given. The question is, whether the plaintiff, who had never dealt with the wife or the husband before, was entitled to assume that there was such an authority implied in the mere fact that the wife was living with her husband, and I think the law is not so.

LORD WARREN. My Lords: In this case I shall content myself with saying, that notwithstanding the able and ingenious argument of the learned counsel for the appellants, I am very clearly of opinion that both upon principle and according to the authorities, the case of *Jolly v. Rees, ubi sup.*, was well decided; and I therefore concur in the judgment which your lordships propose.

Order affirmed.

HOMICIDE BY DANGEROUS ACT OF UNCERTAIN ONE OF SEVERAL PERSONS.

ENGLISH CROWN CASES RESERVED, DEC. 4, 1880.

REGINA V. SALMON ET AL., 43 L. T. Rep. (N. S.) 573.

Three persons went out together for rifle practice. They selected a field near to a house and put up a target in a tree at a distance of about 100 yards. Four or five shots were fired, and by one of them a boy who was in a tree in a garden at a distance of 300 yards was killed. It was not clear which person fired the shot that killed the boy. Held, that all three were guilty of manslaughter.

CASE reserved for the opinion of this court by Lord Coleridge, C. J., at the Summer Assizes at Wells, 1880.

The three prisoners, George Salmon, John Salmon and Hancock, were tried before me on the 27th July, 1880, for the manslaughter of William Wells, a little boy of ten years old, under the following circumstances:

George Salmon is a member of the Frons Selwood Rifle Corps. On the 25th May, 1880, he attended the rifle practice. He took his rifle from the armory, had fourteen ball cartridges served out to him, and fired them all away. After the practice was over he took away with him his rifle, which it was his duty to return to the armory. He did not take it back, and the drill instructor missed six cartridges from the magazine when he went there about half an hour after the practice was over.

About seven o'clock, that is shortly after the practice was over, the three prisoners came together to the house of a witness (Newport) who was called, and whose evidence, so far as it is material to the point to be determined, was as follows:

"The three prisoners came to my father's house somewhere about seven in the evening on the 29th May. George Salmon had a rifle with him and some ball cartridges. All three wanted to fire off one or two shots, and they asked me for something to fire at. I gave them a board from our fowl house. I went with them into a field close by, and the prisoner Hancock climbed into a tree. George Salmon handed up the board to him. Hancock fixed it in the tree about eight feet from the ground. They all went about 100 yards up the field, and all laid down in the grass. I heard two shots. I cannot tell which of them fired the shots, for I was looking at the board. I am not sure whether the first shot struck the target; the second shot did strike it. I do not know which of them fired it. Two more shots were fired afterward, when Wells and Knight came running up and told us what had happened."

"What had happened" was this: The deceased, William Wells, was with his young sister in his father's garden, and her evidence was as follows:

"There is a low apple tree in my father's garden with a rose tree in it. My brother got up into the apple tree to water the rose; while my brother was in the tree I heard a shot; it passed through the tree, for some of the leaves fell down from the tree; I called to my brother, but he answered and said he was safe. Then there was another shot, and my brother fell out of the tree dead on the ground. There were four or five shots fired altogether, I think the second shot killed him."

It was proved that the distance from the spot where the shot was fired to the tree in which the boy was killed was 308 yards; but the rifle was sighted for 900 yards, and would probably be deadly at a mile.

There was evidence of conversations by the prisoners, and of other circumstances showing that the death of the boy was caused by one of the shots fired by the prisoners. The jury found the prisoners guilty of manslaughter. The trial judge allowed them to go out on bail until he could take the opinion of the Court of Criminal Appeal on the case.

COLERIDGE, C. J. I am of opinion that the conviction was right and ought to be affirmed. If a person does a thing which in itself is dangerous, and without taking proper precautions to prevent danger arising, and if he so does it and kills a person, it is a criminal act as against that person. That would make it clearly manslaughter as regards the prisoner whose shot killed the boy. It follows as the result of the culpable negligence of this one that each of the prisoners is answerable for the acts of the others, they all being engaged in one common pursuit.

FIELD, J. I am of the same opinion. At first I thought it was necessary to show some duty on the part of the prisoners as regards the boy, but I am now satisfied that there was a duty on the part of the prisoners toward the public generally not to use an instrument likely to cause death without taking due and proper precautions to prevent injury to the public. Looking at the character of the spot where the firing took place, there was sufficient evidence that all three prisoners were guilty of culpable negligence under the circumstances.

LOPEZ, J., concurred.

STEPHEN, J. I am of opinion that all three prisoners were guilty of manslaughter. The culpable omission of a duty which tends to preserve life is homicide; and it is the duty of every one to take proper precautions in doing an act which may be dangerous to life. In this case the firing of the rifle was a dangerous act, and all three prisoners were jointly responsible for not taking proper precautions to prevent the danger.

WATKIN WILLIAMS, J., concurred.

Conviction affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION—LEGAL AND EQUITABLE STILL EXIST IN FACT—VARIANCE—UNDER COMPLAINT SHOWING LEGAL RIGHT ONLY, EQUITABLE RELIEF NOT ALLOWED.

—The names of actions no longer exist, but we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either, and the complaint may be framed with a double aspect, but in every case the judgment sought must be warranted by the facts stated. See *Wheelock v. Lee*, 74 N. Y. 500; *Hale v. Omaha Nat. Bank*, 49 id. 626; *Brodley v. Aldrich*, 40 id. 512; *Sternberger v. McGovern*, 58 id. 12; *Margraf v. Muir*, 57 id. 159; *Dobson v. Pearce*, 12 id. 156; *Crary v. Goodman*, id. 308. The plaintiff can have no relief that is not consistent with the case made by his complaint and embraced within the issue. He must therefore establish his allegations, and if they warrant legal relief only he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof. *Salter v. Ham*, 31 N. Y. 321; *Heywood v. Buffalo*, 14 id. 540; *Arnold v. Angell*, 62 id. 508; *People's Bank v. Mitchell*, 73 id. 415. In an action against the city of New York, the complaint demanded payment of the sum of \$200,000 as damages for the fraudulent obtaining of a deed of release mentioned therein. It alleged that the defendant fraudulently and with intent to deceive and defraud plaintiff out of certain specified property, kept concealed from plaintiff certain facts and made certain misrepresentations, and that plaintiff, induced by such misrepresentations, executed and delivered, without consideration, to defendant a deed of his interest in property, and that the interest conveyed was worth the sum specified. Upon this complaint defendant took issue. Held, that the case did not present matters of equitable cognizance; that a jury was an appropriate tribunal for the trial of the issues formed; that a decision of a referee appointed by the consent of parties must be treated like a verdict of a jury, and if upon conflicting evidence would be conclusive upon this court, if approved by the General Term. *Quincy v. White*, 63 N. Y. 570; *Leonard v. New York Tel. Co.*, 41 id. 544; *Stillwell v. Mutual Life Ins. Co.*, 72 id. 385; *Andrews v. Raymond*, 58 id. 678. Judgment affirmed. *Stevens v. Mayor of New York*. Opinion by Danforth, J. (Decided March 1, 1881.)

ASSIGNMENT FOR CREDITORS—GIVING ASSIGNEE AUTHORITY TO COMPROMISE WITH CREDITORS, FRAUDULENT AND VOID AS IN DELAY OF CREDITORS.—In an assignment for the benefit of creditors, the assignor declared the conveyance to be in trust, first to sell and dispose of his property and collect the debts due him, "and the taking a part of the whole when the" assignee "shall deem it expedient to so do." A second clause prescribed the distribution and payment of the proceeds to all creditors of the assignor for his liabilities to them, or if insufficient, "in proportion to their respective demands." But it further declared that the assignee "may have the right to compromise with" those creditors if in his opinion "it would be advantageous" to them and to the assignor. Held, that the provisions of the first clause would not necessarily render the assignment invalid. But the provision in the second clause, authorizing the assignee to compromise with the creditors would have such an effect, within the rule in *Wakeman v. Grover*, 4 Pal. 23; 8 C. 11 Wend. 187, adopted in many later cases as the only safe one, which regards every assignment operating to delay creditors for any reason, not distinctly calculated to promote their interests, as contrary to the statute of frauds and therefore void. In this case the assignee has, under the assignment, a discretion to compromise, and in negotiating therefor the interest of the

assignor is to be regarded. It cannot be said that he has devoted his property absolutely and unconditionally to the payment of his debts. While placing his property beyond the reach of process, the assignor retains an interest to be provided for, delays its application to the payment of debts by investing his trustee with a power which requires time for its execution, and then prohibits its exercise unless it is advantageous to himself. And to a compromise it is essential that both the creditor and the assignee assents. An attempt to compromise must precede payment, and hence there is on the face of the arrangement an intent to delay payment of debts and one to create a trust for the use of the assignor, either of which renders the instrument void. The case, *Horn v. Henriquez*, 13 Wend. 240, distinguished on the ground that there the creditor consented to the assignment. It is also an objection to the assignment that under its provisions the assignee could delay the execution of the other trusts until he ascertained whether the creditors would compromise. Whether delay is directed by the instrument or justified by its provisions, or made necessary for their execution, except so far as that delay is incident to the conversion of assets and the payment of debts, can make no difference. *Nicholson v. Leavitt*, 6 N. Y. 510; *Brigham v. Tillinghast*, 13 id. 215. Order affirmed and judgment absolute on stipulation. *McConnell v. Sherwood*. Opinion by Danforth, J. [Decided March 15, 1881.]

COSTS—UPON APPEAL "TO ABIDE EVENT" GO TO FINALLY SUCCESSFUL PARTY.—From a judgment in favor of plaintiff upon a referee's report defendant appealed to the General Term, which affirmed the judgment with costs. Defendant then appealed to the Court of Appeals and a new trial was ordered with "costs to abide the event." Upon the second trial the plaintiff again succeeded. The clerk taxed the costs of the first trial and of the appeals, including that to the Court of Appeals, in favor of the plaintiff. *Held*, that the taxation by the clerk was right. The plaintiff is entitled to tax the costs of the appeal to this court. The event of the new trial was the circumstance which was to determine which party should recover to costs of the appeal. The order did not limit the recovery of costs to the prevailing party on the appeal. The terms on which a new trial is granted as respects costs are within the discretion of the court. This court has often limited the recovery of costs on appeal to one of the parties, but where the order reversing a judgment and granting a new trial is made with costs to abide the event, without other limitation, "we understand that the party finally succeeding in the action is entitled to tax them. This construction was put upon a similar order in *Koon v. Thurman*, 2 Hill, 357. In *Union Trust Co. v. Whiton*, 78 N. Y. 491, we refused to interfere with the construction given by the General Term of the First Department to its own order. The question here is as to the construction of our order." Order reversed. *First National Bank of Meadville v. Fourth National Bank of New York*. Opinion by Andrews, J. [Decided March 8, 1881.]

EXECUTOR—FORBIDDEN TO MAKE INVESTMENTS ON LANDS OUT OF STATE—INVOLUNTARY INVESTMENTS TO SAVE ESTATE EXCUSED—NOT LIABLE FOR NEGLIGENCE OF CO-EXECUTOR—DELAY IN COLLECTING SECURITY, WHEN EXCUSABLE—WHAT CONSTITUTES PRUDENCE.—While the court has discovered no decision or enactment which in terms declares that an executor may not invest funds in mortgages upon real estate outside of the State, the drift of authority and considerations relating to the safety of trust funds seem to require that such should be regarded as the general rule except in peculiar cases. The rule should not be arbitrary and inflexible, for it is merely the outgrowth of

the broader proposition that the duty of a trustee in making investments is to employ such diligence and prudence as in general prudent men of discretion and intelligence in such matters employ in their own like affairs. *King v. Talbot*, 40 N. Y. 78. The rule is recognized that an executor must invest in government or real estate securities. *Ackerman v. Emott*, 4 Barb. 626. This court does not hesitate to recognize and declare as the general rule that the trustee who invests beyond the jurisdiction does so at the peril of being held responsible for the safety of the investment. But this rule relates only to voluntary investments by the trustee having the fund in his hands and full opportunity and freedom of choice. In this case M. and defendant were co-executors of a will. The assets and the management of the trust estate passed into the hands of M., and defendant had no part in either. M. mingled the assets with his own property, partially converted them to his own personal use, and in part lost them by unsafe investments. Thereafter M. died leaving an estate, whether solvent or insolvent did not appear. There were no assets of the trust estate left as such, but merely a personal liability from the estate of M. Defendant, to secure what was due the trust estate, took from the representatives of M. an assignment of a bond and mortgage upon real estate in Toledo, Ohio, which was guaranteed by the sole legatee of M., who was at that time solvent, and also further collaterals for safety. This was done in good faith and under the belief that it was the best that could be done, as the estate of M. could not raise and pay the ready money. *Held*, that it was defendant's duty to take the securities he did; that the omission to do so would have been imprudent; that his action did not come under the rule which forbids a foreign investment, and that he should not be made personally liable for his acts. *Held*, also, that defendant was not liable for the misconduct of M., the rule being that each executor is liable only for his own acts and cannot be made liable for the negligence and waste of another unless he in some manner aided or concurred therein. *Sutherland v. Brush*, 7 Johns. Ch. 22; *Monell v. Monell*, 5 id. 283; *Manahan v. Gibbons*, 19 Johns. 427. The case of *Bates v. Underhill*, 3 Redf. 365, doubted. See *Banks v. Wilkes*, 3 Sandf. Ch. 99; *Kip v. Dennetou*, 4 Johns. 23; *Kirby v. Turner*, 10 Pl. Ch. 830; *DeForest v. Parsons*, 1 Hall, 130. *Held*, also, that a delay by the executor in foreclosing the mortgage, the reason given being that the depressed condition of the real estate market rendered it inadvisable at the present time to do so, there being no proof to throw discredit upon this reason, would not be negligence making him personally liable. Judgment of General Term reversed and that of surrogate affirmed. *Ormsiston v. Olcott*. Opinion by Finch, J. "All concur except Folger, C. J., dissenting, and Rapallo, J., absent. Andrews, J., concurs in result." [Decided March 1, 1881.]

SUMMARY PROCEEDINGS—TO REMOVE ONE HOLDING OVER AFTER EXECUTION SALE AND DEED MAINTAINABLE AGAINST TENANT OF RECEIVER OF DECEASED DEBTOR'S ESTATE—JURISDICTION OF JUSTICE OF MARINE COURT.—A debtor died in 1872, leaving a leasehold interest in premises in New York city not yet at an end. His executors qualified and went into possession of the premises as owners of the leasehold estate. In 1875 one Parker, the creditor, recovered a judgment against the executors and docketed it. In March, 1876, a receiver of the estate was appointed in proceedings by the executors for a construction of the will and in proceedings for a partition of the estate. Subsequently in that year, by order of the surrogate therefor, the creditor issued an execution against the executors and thereafter issued an execution which the Supreme Court ordered to be levied upon any of

the assets of the testator in the hands of the executors. In 1877 the sheriff, under the last-mentioned execution, levied upon the leasehold estate, sold it and at the expiration of fifteen months gave a deed to the purchaser. In 1879, after such deed was given, the receiver leased the premises to H. who took possession. *Held*, that the possession of H. was taken under a title that was subordinate to or extinguished by the judgment, execution, sale and deed, and that summary proceedings under 2 R. S. 512, § 28, subd. 4, for the removal of H. from such premises, were maintainable before a justice of the Marine Court, and that the fact that the execution was not against H. was no defense. See *Birdsall v. Phillips*, 17 Wend. 464; *Hallenbeck v. Garner*, 20 id. 22; *Spraker v. Cook*, 16 N. Y. 567. *Held*, also, that the result would not be affected whether or not the judgment bound estates for years in the hands of executors. Judgment reversed. *People ex rel. Higgins v. McAdam*. Opinion by Folger, C. J. [Decided March 1, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

PARTNERSHIP — BUSINESS CONTINUED UNDER WILL OF DECEASED PARTNER — WHEN ESTATE OF DECEASED AND SHARES IN PROFITS NOT LIABLE FOR DEBTS OF FIRM. — W., who was in business with his son, provided by will that after his death the business should be carried on by the son in the firm name; that annually, after testator's death, on the first day of January, the profits of the business should be ascertained and divided between his son and his wife and other children. The will also provided that the capital invested by testator in the business should remain there but that no other property left by him should be liable for the debts and liabilities of the business. The testator died in 1872, and the business was conducted as directed in the will until February 27, 1877, when the firm, on the petition of its members, was declared bankrupt in the proper court. The dividends which were made from the business were made in good faith, were really earned, did not diminish the capital, and all debts existing when they were made were paid. The insolvency was brought about by accommodation indorsements for others made after the last dividend was paid; the firm but for this would have remained solvent, and in regard to this none of those interested in the dividends were to blame except the son who conducted the business. In an action by the assignee in bankruptcy of the firm to subject the property of the testator which had not been embarked in the partnership enterprise, in the hands of the devisees, to the payment of the partnership debts and to recover from the wife and other children of testator money which they had received as dividends out of the profits of the business after the death of testator, *held*, that plaintiff was not entitled to the relief sought. In *Smith v. Ayres*, 101 U. S. 320, the legal principle lying at the foundation of the first of these grounds of relief was fully discussed and determined. It was there held that a testator might authorize the continuance of a partnership in which he was engaged at the time of his death, without subjecting any more of his property to the vicissitudes of the business than what was then embarked in it, and that unless he had expressly placed the whole or some other part of his estate under the operation of the partnership, it would not be presumed that he had so intended. See, also, *Burwell v. Mandeville's Executors*, 2 How. 560; *Ex parte Garland*, 10 Vesey, Jr., 100. Decree of U. S. Circuit Court, Kentucky, affirmed. *Jones v. Walker*. Opinion by Miller, J. [Decided Feb. 28, 1881.]

PATENT — FOR PROCESS ALLOWABLE — WHAT NECESSARY TO SUSTAIN — NEW MODE BY SUBSEQUENT IN-

VENTOR. — A patent for a process, irrespective of the particular mode or form of apparatus for carrying it into effect, is admissible under the patent laws of the United States. To sustain a patent for a process, the patentee should be the first and original inventor of the process, should claim it in his patent, and if the means of carrying it out are not obvious to an ordinary mechanic skilled in the art, his specification should describe some mode of carrying it out which will produce a useful result. If a subsequent inventor discover a new mode of carrying out a patented process, though he may have a patent for such new mode, he will not be entitled to use the process without the consent of the patentee thereof. *Corning v. Burden*, 15 How. 267. The decision in *Mitchell v. Tilghman*, 19 Wall. 287, reviewed and overruled; and *Tilghman's* patent, relating to the manufacture of fat acids, sustained as a patent for a process. The decisions in *O'Reilly v. Morse*, 15 How. 62, and in the case of *Nellson's* patent for the hot blast (Webster's Reports), commented upon and explained. Decree of U. S. Circuit Court, S. D. Ohio, reversed. *Tilghman v. Proctor*. Opinion by Bradley, J. [Decided Feb. 28, 1881.]

REMOVAL OF CAUSE — RESIDENCE OF PARTIES ACTUALLY CONTESTING DETERMINES RIGHT TO, WITHOUT REFERENCE TO RESIDENCE OF MERELY FORMAL PARTIES. — The L. Association was a corporation of the State of Missouri, doing a life insurance business, its chief office being located at St. Louis. By the laws of that State, upon the rendition of a judgment dissolving such a corporation its assets vest in fee simple in the superintendent of the insurance department for the benefit of creditors and policy-holders. Upon a judgment in favor of the C. Company, a Missouri corporation, against the L. Company, an action was commenced to dissolve the L. Company October 13, 1879, by Relf, the superintendent of insurance, in the courts of Missouri, and pending it Frost, a citizen of Missouri, was appointed temporary receiver to take charge of its assets. On the 5th November, 1874, R., a policy-holder in Louisiana, commenced suit against the L. Company, its agent at New Orleans, Frost, receiver, and the receiver of the C. Company, in a Louisiana court, asking to have the assets of the company in Louisiana declared a trust fund to pay claims of Louisiana creditors and policy-holders in preference to others. The object of this suit, as set forth in the bill, was to keep the Louisiana assets of the L. Company out of the hands of Relf and his successors in office. No relief was asked against the receiver of the C. Company. A receiver was appointed in this suit. On the 10th of November the L. Company was dissolved by the Missouri court and its property vested in Relf as provided by statute. On the 17th of the same month Relf was on his own motion made a party to the Louisiana suit and on the 28th he filed a petition for removal to the Federal court, the petition showing his citizenship in Missouri and that of R. in Louisiana (the citizenship of the rest of the parties being shown in the pleadings), and gave the proper bond. *Held*, that as the entire controversy was between R., representing the Louisiana creditors on one side, and Relf, the statutory representative of the L. corporation and its property, on the other, the remaining parties being only formal ones, there was a proper case of removal under the act of 1875. Order of U. S. Circuit Court, Louisiana reversed. *Life Association of America v. Rundie*. Opinion by Waite, C. J. [Decided Jan. 24, 1881.]

NEBRASKA SUPREME COURT ABSTRACT.

AGENT — WITH AUTHORITY TO ISSUE BILLS OF LADING BINDS PRINCIPAL BY FRAUDULENT BILLS UPON WHICH MONEY IS ADVANCED IN GOOD FAITH. — A sta-

tion agent of a railroad company, who had authority from it and whose duty was to issue bills of lading for the company, for goods shipped by it, issued bills for wheat which was not in fact shipped. *Held*, that the company was liable to one who in good faith advanced money upon the credit of such bills. In *Grant v. Norway*, 2 Eng. L. & Eq. 337, it was held that the master of a ship has no general authority to sign a bill of lading for goods which are not put on board the vessel, and consequently the owners of the ship are not responsible to parties taking a bill of lading which has been signed by the master without receiving the goods on board, the court saying: "There is but little to be found in the books on the subject: it was discussed in *Berkey v. Watling*, 7 Ad. & El. 29; but that case was decided on another point, although *Littledale, J.*, said in his opinion the bill of lading was not conclusive under similar circumstances on the ship-owner." This decision was followed in *Hubbersty v. Ward*, 18 Eng. L. & Eq. 551, in the Court of Exchequer, *Pollock, C. B.*, placing the decision upon a lack of power in the master. See, also, *Coleman v. Riches*, 29 id. 320. These decisions were followed by the Supreme Court of the United States in the case of the Schooner *Freeman v. Buckingham*, 18 How. 182. See, also, *Dean v. King*, 22 Ohio St. 118. In *Dickson v. Seelye*, 12 Barb. 99, the court say: "As between the owner of the vessel and an assignee for a valuable consideration, paid on the strength of the bill of lading, it may not be explained. *Portland Bank v. Stubbs*, 6 Mass. 422. In such case the superior equity is with the *bona fide* assignee, who has parted with his money on the strength of the bill of lading." See, also, *Armour v. Mich. Cent. R. Co.*, 65 N. Y. 111; *Savings Bank v. Atchinson, Tex., etc., R. Co.*, 20 Kans. 519; *Lickbarrow v. Mason*, 2 T. R. 63. *Sioux City & Pacific Railroad Co. v. First National Bank of Fremont*. Opinion by Maxwell, C. J.

[Decided Nov. 11, 1880.]

CHATTEL MORTGAGE—TENDER AFTER DEB. PAST DUE MUST BE UNCONDITIONAL AND KEPT GOOD TO RELEASE.—A chattel mortgagee, after the maturity of the debt secured by the mortgage, showed the mortgagor \$500 and told him he could have it for his claim. There was a dispute as to the amount due. *Held*, that this was a conditional tender and did not operate to discharge the mortgage. *Held*, also, that a tender after maturity, to discharge a chattel mortgage, must be kept good. *Kortright v. Cady*, 21 N. Y. 343, criticised. See *Perre v. Castro*, 14 Cal. 519; *Himmelman v. Fitzpatrick*, 50 id. 650; *Crain v. McGoon*, 86 Ill. 431. In *Adams v. Nebraska City Nat. Bank*, 4 Neb. 370, it was held "that a chattel mortgage transfers to the mortgagor the whole legal title to the things mortgaged, subject only to be defeated by performance of the condition." And in *Tallon v. Ellison*, 3 id. 74, it was said: "The legal title passes to the mortgagee, subject to the mortgagor's right to perform the condition; and after default the legal title is said to become absolute in the mortgagee." But the mortgagor has a right to redeem the mortgaged property, at any time before it is sold, by paying the mortgage debt. Although a party who tenders money has a right to exclude any presumption against himself that the sum tendered is in part payment of the debt, yet, if he add a condition that the party who receives the money shall acknowledge that no more is due, this will invalidate the tender." *Chitty on Cont.* 699. In *Woods v. Hitchcock*, 20 Wend. 47, it was held that a tender of money in payment of a debt, to be available, must be without qualification; that is, there must not be any thing raising the implication that the debtor intended to cut off or bar a claim for any amount beyond the sum tendered; and it was accordingly held that the tender of a sum in full discharge of all demands of the creditor was not good.

Cowen, J., said: "It was clearly a tender to be accepted as the whole balance due, which is holden bad by all the books." *Tompkins v. Batte*. Opinion by Lake, J.

[Decided Jan. 5, 1881.]

TELEGRAPH—SENDER OF UNREPEATED MESSAGE BOUND BY CONDITIONS LIMITING LIABILITY.—A charge to the jury that a rule by a telegraph company that it shall not be liable for mistakes of any unrepeated message, beyond the amount received for sending the same, was not unreasonable, and if brought to the knowledge of persons dealing with the company, and assented to by them, would be binding upon them, coupled with a statement that the sender of a message not directed to be repeated, could not, in case of error in the message, recover more than the price of the message, if the telegraph company used suitable instruments and machinery and employed skillful operators, who in the transmission of the message used ordinary care and were not guilty of actual negligence in the premises, *held*, not erroneous. *Wolf v. W. U. Tel. Co.*, 62 Penn. St. 83; 1 Am. Rep. 387. In *Redpath v. W. U. Tel. Co.*, 112 Mass. 71; 17 Am. Rep. 69, it was laid down that the sender of an unrepeated message, written upon a blank of the company having a printed heading which specified that the company should not be liable for mistakes in the transmission of an unrepeated message beyond the amount received for sending it, could not recover more, unless the mistakes were caused by gross negligence or fraud. And in *Brees v. United States Tel. Co.*, 48 N. Y. 132; 8 Am. Rep. 526, it was ruled that conditions in telegraphic messages as to repeating are reasonable, "and when a person writes a dispatch, and signs his name, upon a blank containing a printed condition that the company will not be responsible for the correct transmission of the message unless it is repeated at an additional expense, he cannot recover for an error in transmission, the condition as to repeating not being complied with, and there being no allegation of gross negligence or willful misconduct on the part of the company." *Earl, C.*, says: "But while they" (telegraph companies) "are bound to transmit all messages delivered to them, they have the right to make reasonable rules and regulations for the conduct of their business. They can thus limit their liability for mistakes not occasioned by gross negligence or willful misconduct, and this they can do by notice brought home to the sender of the message, or by special contract entered into with him;" and *Lott, C. C.*, in speaking of conditions limiting the company's liability printed upon message blanks, said: "The conditions are reasonable, and not against public policy. On the contrary, they subserve to carry out the objects for which telegraphic associations are created, and especially to secure the receipt of a message in the words in which it is written and delivered for transmission. A party using such a blank, and writing his dispatch thereon, assents to the terms and conditions on which it is sent. If he omits to read or to become informed of them, it is his own fault. A contract voluntarily signed and executed by a party, in the absence of misrepresentation or fraud, with full opportunity of information as to its contents, cannot be avoided on the ground of his negligence or omission to read it, or to avail himself of such information." See, also, *West. Union Tel. Co. v. Carew*, 15 Mich. 225; *Grinnell v. West. Union Tel. Co.*, 113 Mass. 299; 18 Am. Rep. 485, where *Gray, C. J.*, says: "According to the weight of authority, a regulation that the liability of the company for any mistake or delay in the transmission or delivery of a message, or for not delivering the same, shall not extend beyond the sum received for sending it, unless the sender orders the message to be repeated by sending it back to the office which first received it, and pays half the regular rate

additional, is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company." *Becker v. Western Union Telegraph Co.* Opinion by Lake, J.
[Decided Jan. 14, 1881.]

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

NOVEMBER, 1880.

MASTER AND SERVANT — LIABILITY OF MASTER FOR INJURY TO SERVANT CAUSED BY DANGEROUS STRUCTURES LEFT STANDING — DERRICK ON LINE OF RAILROAD. — A derrick was erected by the servants of a railroad company on its road for the purpose of doing work on the road, within four or five feet of an overhanging bank. One of the guys of the derrick was stretched across the track on which the company's trains ran, and fastened. It was of sufficient height when the derrick was upright to clear passing trains. The derrick was carelessly and negligently set up, the guys not being taut and it being placed dangerously near the overhanging bank. It was used for some four days, after which it was not used. About fourteen days after it was set up a mass of the overhanging bank fell upon the derrick breaking it down and bringing the guy so low that it struck a passing train of the railroad company upon which the plaintiff was employed as brakeman and swept him from the train, injuring him. The day before the accident it was apparent to any one that a large mass of the bank was liable to fall upon the derrick. During the time the derrick was up the weather had been alternately thawing and freezing. *Held*, that there was evidence that would warrant a jury in finding that the railroad company had not used the care which the circumstances required to keep their track in a safe condition and to guard against impending danger. It has been settled that a master is bound to use reasonable care in selecting his servants and in keeping the engines with which, and the buildings, places and structures in, upon or over which his business is carried on, in a fit and safe condition, and is liable to his servants for any injury suffered by them by reason of his negligence in this respect. *Cayzer v. Taylor*, 10 Gray, 274; *Snow v. Housatonic R. Co.*, 8 Allen, 441; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 527; *Huddleston v. Lowell Machine Shop*, 106 id. 233. The master does not warrant the safety or sufficiency of such places, buildings, structures or engines. *Ladd v. New Bedford R. Co.*, 119 Mass. 412. But he is bound to use reasonable care, having regard to the nature of the business and the circumstances of the case, to secure their safety and sufficiency. It is difficult to lay down a more definite rule applicable to all cases. If a railroad corporation has suffered a structure not actually in use for the purposes of its business to remain for an unreasonable length of time on land within its control in such a position by the side of its track as to be in danger of being thrown down by ordinary natural causes so as to interfere with the safe passage of its trains, the structure is in law a nuisance, and the corporation is liable to servants employed upon its passing trains for injuries resulting from its own neglect in not removing the structure, or in not guarding against the danger of allowing it to remain in such a place, whether it was originally put there by the servants of the corporation or by strangers, and independently of the question of negligence on the part of those who placed it there. *Holden v. Fitchburg Railroad Co.* Opinion by Gray, C. J.

NEGOTIABLE INSTRUMENT — PAYMENT — TITLE — ONE IN POSSESSION MAY SUE. — The F. Bank of Boston held a promissory note upon which defendants were indorsers, payable at the plaintiff bank in Boston. On the day of maturity the F. Bank sent through the clearing house the note to plaintiff bank, charging the note to plaintiff. Plaintiff's teller, supposing the makers were in funds, stamped the note as paid. He discovered his mistake the same day and had the note duly presented and protested, and notice was duly given to the indorsers and the F. Bank but plaintiff did not return the note. A dispute arose between the F. Bank and plaintiff as to whether under the rules of the clearing house the note had not become the property of plaintiff by a failure to return the same. Plaintiff, to terminate this dispute, paid the amount of the note to the F. Bank, reserving all rights. *Held*, that the note was not paid and that the defendants could not set up that the note was not the property of plaintiff. Defendants could not set up any thing in the rules of the clearing house to estop or defeat the right of plaintiff to recover against them as they were not parties to the clearing house regulations. *Overman v. Hoboken City Bank*, 30 N. J. 61. Their rights were in no way prejudiced. *Merchants' Banks v. Eagle Bank*, 101 Mass. 281. The plaintiff had sufficient title to recover on the note. The note was indorsed in blank and passed by delivery. The plaintiff is in possession of it, and even if the F. Bank is regarded as the real party in interest, yet it is settled that an action may be maintained in the name of the holder of such a note who came into possession of it with the assent of the party in interest. *Pemberton Bank v. Porter*, 125 Mass. 335; *Spoford v. Norton*, 126 id. 533. But the evidence shows that the plaintiff has both the legal and beneficial interest as sole owner. No one else claims any interest in it. The transaction shows that it was intended by the F. Bank on receiving the amount paid by the plaintiff to leave the note in the hands of the latter as a valid existing security. *Troy City Bank v. Grant, Hill & Denio*, 119; *Watervliet Bank v. White*, 1 Denio, 608. *Manufacturers' National Bank v. Thompson.* Opinion by Colt, J.

MUNICIPAL CORPORATION — NOT LIABLE FOR NEGLIGENCE IN PERFORMANCE OF PUBLIC DUTY IN ABSENCE OF STATUTE — MANAGEMENT OF DRAWBRIDGE. — Plaintiff's vessel was detained by the neglect and refusal of the superintendent of a drawbridge across the Charles river, maintained by the city of Boston as a highway under a State statute, to open the draw when required by plaintiff to do so. The ground of refusal was that plaintiff's vessel was too wide for the draw. *Held*, that the city was not liable for the damage arising from such detention. The duty imposed upon the city by the statute is a public duty from the performance of which it receives no profit or advantage. It is well settled in this Commonwealth that no private action can be maintained against a city for the neglect to perform such a duty, unless it is expressly authorized by statute. *Hill v. Boston*, 122 Mass. 344, and cases cited. There is no statute which makes the city liable to a private action for a failure to provide a draw of proper width, or for the carelessness of the superintendent of the bridge in delaying vessels which seek to pass through the draw. *French v. City of Boston.* Opinion by Morton, J.

LIABILITY FOR ANIMAL LICENSED TO EXHIBIT — FRIGHTENING HORSES. — In an action against a city for injury caused by an ox frightening a horse, it appeared that the city had for a compensation granted permission to the owners of the ox to occupy the highway and erect a booth for exhibiting him. At the time of the accident both the ox and the horse were travelling upon the highway and were not in the place for the use of which the city received compensation, and the

ox was not in charge of any agent of the city. *Held*, that the city was not liable for the injury. *Barber v. Roxbury*, 11 Allen, 318; *Pierce v. New Bedford*, 23 Alb. L. J. 95. *Cole v. City of Newburyport*. Opinion by the court.

CRIMINAL LAW.

EVIDENCE—MURDER—DECLARATIONS OF DECEASED AS TO HIS INTENT NOT ADMISSIBLE EXCEPT TO REBUT THREATS.—In a trial for murder, declarations of the deceased to a witness previous to the interview with defendant at which the homicide took place, showing that deceased did not intend to assault defendant or to commit a breach of the peace, cannot be shown by the prosecution in the first instance. It is only where threats of the deceased are introduced on the part of the defense that the prosecution may rebut them. *People v. Arnold*, 15 Cal. 476; 1 Whart. Ev., § 206; *People v. Carlsbuff*, 24 Cal. 640; *Commonwealth v. Harwood*, 4 Gray, 41; *People v. Scoggins*, 37 Cal. 676; 1 Greenl. Ev., § 156. *California Supreme Court*, Dec. 27, 1880, *People of California v. Carlton*. Opinion by Ross, J.

LARCENY—POSSESSION OF STOLEN PROPERTY NOT ALONE SUFFICIENT TO CONVICT.—A horse belonging to M was missed in September, having been stolen. Some time in October defendant was in possession of the horse and sold it. *Held*, that this alone was not sufficient to convict defendant of the larceny of the horse. In *People v. Noregia*, 48 Cal. 123, there was evidence that the stolen horse was found in Noregia's possession a few hours after it was taken, but the court held that that was not of itself sufficient to warrant a conviction, and cited *People v. Chambers*, 18 Cal. 382; and *People v. Ah Ki*, 26 Cal. 178. *California Supreme Court*, Dec. 29, 1880, *People of California v. Swinford*. Opinion by Sharpstein, J.

MARRIED WOMAN—PLEADING MARRIAGE—EVIDENCE—DECLARATIONS.—If a married woman be described, in an information filed against her alone, as a single woman, or be not described at all as married or single, she may either move to quash the information or plead in abatement for want of a proper addition; but if she fail to do this, and plead not guilty, that is *prima facie* evidence that she is not a *feme covert*. It is not conclusive, however, and she may, under the general issue, prove the marriage, as well as the other facts essential to show marital coercion. The declarations of a man and woman recognizing each other as man and wife, made at the time of their arrest in company with each other while engaged in the act of making counterfeit coins, the fact that they had been cohabiting together, and were reputed to be married, are competent proof of the marriage; and it was error to exclude it as inadmissible under the general issue, the defendant having failed to plead her coverture in abatement, for which a new trial should be granted. See upon the general subject 1 Whart. Crim. Law, §§ 233, 243, 248; 3 id., § 70; Whart. Pr. 7, note 2; 1 Bish. Crim. Pr., §§ 671, 675, 772, 791; *State v. Thompson*, 2 Chev. 31; *People v. Smith*, 1 Park. Cr. 329; *State v. Hughes*, 1 Swan, 261; *Lewis v. State*, 1 Head, 329; *Rex v. Jones*, Kel. 37; *Quin's case*, 1 Lewin, C. C. 1; *Rex v. Russell*, 2 C. & P. 434; *Rex v. Woodward*, 8 id. 561; *Rex v. Atkinson*, cited 1 Russ. Cr. L. 24; *Rex v. McGinnis*, 11 Cox, 301; *Rex v. Knight*, 1 C. & P. 116. U. S. Circuit Court, W. D. Tennessee, Jan. 3, 1861, *United States v. DeQuilfeldt*. Opinion by Hammond, D. J.

TRIAL—FELONY—PLEA BY ATTORNEY A NULLITY—PRISONER MUST BE PRESENT—EVIDENCE—CROSS-EXAMINATION—WITNESS EMPLOYING COUNSEL TO PROSECUTE.—(1) In a prosecution for felony, a plea of not guilty by an attorney is a nullity. Such plea must be pleaded by the defendant in person, and the record

should show that fact. A person indicted for felony must be personally present during the trial, and such presence must be shown by the record. (2) Upon a trial on an indictment for felony, the defendant may, on cross-examination of a witness for the State, ask such witness if he has employed counsel to aid in the prosecution against the defendant, and if such question is answered in the affirmative by the witness, it may be considered by the jury as tending to show feelings of bias in the witness against the prisoner in giving his testimony, and may be considered by the jury in connection with the credit to be given to the evidence of such witness. *West Virginia Supreme Court of Appeals*, June 30, 1880, *State of West Virginia v. Conkle*. Opinion by Haymond, J.

CORRESPONDENCE.

CODIFICATION.

Editor of the Albany Law Journal:

A few weeks ago the attention of the Bar Association of the city of New York was called to the fact that there was pending in the Legislature a bill for the enactment of a so-called Civil Code; that this bill proposed to abolish in terms the common law on the subjects treated of by it, and was believed to contain fundamental changes in the statutory law as it existed, and that the profession and the general public knew almost nothing about what this bill contained. The association thereupon directed its committee on the amendment of the law to investigate the matter, and adjourned a week for that purpose. At the expiration of that time the report of the committee was presented, which report disclosed such an extraordinary state of facts that a special committee of five was appointed to take measures to prevent the passage of the bill. This action was taken by the association at a full meeting, with but two dissenting votes. The association was careful not to commit itself against the principle of codification in general, and indeed some of the members of the committee on the amendment of the law are understood to favor that principle. Such being the facts it would appear that the association is entitled to something better from the ALBANY LAW JOURNAL than an erroneous statement of the facts, and an insinuation that its action is the result of fear of a loss of business. This latter suggestion has occasionally appeared in the public press, but the JOURNAL should know that the effect of the proposed legislation would be exactly the reverse.

Codification is one thing—to change the existing law in hundreds of particulars by a bill which the legislators passing it have not read, and of which the public in general has not the faintest idea, is another thing. We are not here considering the question as to whether the changes proposed are or are not advisable. It may be well to impose upon a wife the obligation of supporting her husband, and to render it impossible for any person to question the legitimacy of a child except the husband or wife or a descendant of one of them. Probably it would be a wise thing to alter our usury law. The proposed provisions respecting the descent of real and personal property may be much better than those now in force. It may be well practically to abolish the action for specific performance, and the city railroads and ferry-boats may possibly be able to comply with a requirement forcing them to provide a seat for every passenger at all times. Justice to stock operators may require the restoration of the rule as to the measure of damages, laid down in *Markham v. Jordon*, charging the broker with the highest price which the stock may attain before the day of trial, although this rule was subsequently abrogated by the Court of Appeals in *Baker v. Drake*. But certainly it is the height of unfairness to carry such changes

through the Legislature under the name of codification of existing law.

Yet the ALBANY LAW JOURNAL tells us (and this is the astonishing part of it, for we look to the JOURNAL for information in such matters): "The Codes propose no revolution in principle." "These Codes simply propose to write down the ascertained but unwritten law, to pick it out of thousands of reports and text-books, and to express it fixedly and clearly, so that it will not be liable to caprices of memory or construction, and so that the layman may himself ascertain its principles."

But is all this true, Mr. Editor? What do the commissioners themselves say about it? In their report made in 1865 they say of the Code then presented (and the one now before the Legislature is the same with very few changes): "Besides the changes, to which attention was particularly directed in the preceding report, relating to the rights of married women, the adoption of children, and the assimilation of the laws of real and personal property, there are others of less importance which ought not to be overlooked." Then follows the especial enumeration of 120 sections in which these particular changes in the law are to be found!

It would appear then that the ALBANY LAW JOURNAL is in error in supposing that the simple proposition is to write down the existing law; for the commissioners themselves tell us that they have changed the law fundamentally respecting the domestic relations and the laws of property, and also in 120 other particulars. Would it not be well for us to find out of what these innumerable changes consist before the State adopts them by legislative authority?

No, Mr. Editor, let us have codification if it is best. But the State of New York of late years has been peculiarly unfortunate in the determination of the codifiers to force upon us without debate their peculiar views of the law as it should be. The present attempt, which must fail, if the proposed bill is understood, is not codification, but the enactment of fundamental changes in the law affecting the interests of every man, in his house and in his place of business, entering into his contracts, denying him his present legal remedies, and disposing of his property after his death in a manner of which he now knows nothing.

HERBERT B. TURNER.

STANLEY MATHEWS.

Editor of the Albany Law Journal:

In your issue of the 19th inst., referring to Stanley Mathews' nomination by President Garfield, to the Supreme Bench, you assert that the nominee is "unfit for a judicial place," and ask "why not put on a man with some judicial bent and experience?" Your JOURNAL is justly recognized as one of the leading legal publications of the country, and its treatment of a subject, whether it be of law or lawyers, has been characterized by fair statements and judicious temper. But in the assertion and inquiry referred to, you certainly manifest either ignorance of the subject, or a partisan feeling. You would have your readers infer that Judge Mathews has had no judicial experience, whereas the fact is, that he was a judge of the Supreme Court of this city for some years, at a time when the court ranked as high in ability and learning as any in the land. His associates on the bench were Storor and Hoadley, and he only left it because his eminent abilities would earn for him at the bar thrice the remuneration which the office afforded. The bar of this city exceeds 500 in number, and I presume I may assert without egotism that its standing will compare favorably with any in the country, and Judge Mathews has been its *facile princeps* during the last ten years and over. For *varied scholarship*, depth of understanding, comprehension of essentials, perspicacity, and last, but not

least, knowledge of the law, he will to-day be found the equal of any adorning the Supreme Bench at the present moment.

I do not wish to make comparisons, but I submit that if judicial experience be an essential requisite in a nominee for the bench then the appointments of Marshall, Story, Taney, Chase and Waite, and several of their associates, were improper, for not one of them ever graced the Woolsack until elevated to the bench of the Supreme Court. I do not wish to discuss a subject of this nature, but I cannot, without a protest, see attacks upon a man which, to all who know him, are destitute of foundation.

"J. W. J."

CINCINNATI, O., March 25, 1881.

[We have never denied Mr. Mathews' brilliant abilities. We have objected to him because in our opinion he has not the judicial spirit and cast of mind, because he has not had the proper judicial experience, and because he is from Ohio. Commendations from some other State than Ohio would influence us more than the above. — ED. ALB. L. J.]

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Friday, March 25, 1881:

Judgment affirmed with costs — *Agate v. Morrison*; *Puleston v. Wallace*; *Nickerson v. Ruger*; *Bigler v. Pinckney*; *Hennequin v. Clews*; *Sniffen v. Noechling*; *McGraw v. Tatham*; *Hart v. The Village of Port Jervis*. — Judgment reversed and new trial granted, costs to abide event — *Wheeler v. Young*; *Steele v. Benham*. — Order affirmed with costs — *Tiedmann v. Ackerman*; *Ingersoll v. Mangam*; *In re Cruger*; *Blossom v. Estes*; *People ex rel. Sears v. Board of Assessors of Brooklyn*. — Order of General Term reversed and judgment of Special Term affirmed with costs — *Wyeth v. Brantiff*. — Appeal dismissed with costs — *Wilson v. Simpson*; *Wertheim v. Page*. — Order of Special and General Terms affirmed as respects the part of the assessment for work and material (except sewer pipe), for which a price was fixed in notice to bidders; and reversed as to other items, and a rehearing ordered to ascertain the amount of the deduction to be made from the assessment for the items for which a price was thus fixed, without costs to either party on the appeal to this court — *In re Merriam*, to vacate assessment; *In re Vanderveuel*; *In re Morrison*; *In re Livingston*; *In re Robbins*; *In re Gilbert*; *In re Malone*.

Adjourned till April 18, 1881.

NOTES.

THE *Kentucky Law Reporter* for March contains a leading article on Mandatory Statutes. — Mr. Albert Mathews has published a pamphlet entitled *Thoughts on Codification of the Common Law*, the most striking thought in which is, that under the Code of Procedure "technicality is 'king.'" Mr. Mathews, however, presents his objections to general codification with learning and calmness, if with the vagueness and timid vaticination which must always attend that side of the question. — In the current number of the *American Law Register* Mr. Chauncey continues his article on Contempt of Court, and the case of *Sims v. Anglo-American Telegraph Co.*, on forged transfer of stock, is reported in full, with note by Edmund H. Bennett; also *Heyman v. Covell*, on replevin in State court of property seized on Federal process, with note by M. D. Ewell; and *McCleary v. Ellis*, on restriction upon alienation, with note by Henry Wade Rogers.

The Albany Law Journal.

ALBANY, APRIL 9, 1881.

CURRENT TOPICS.

WE have studied the New York City Bar Association's report on the proposed Civil Code, Mr. Field's answer, and Mr. Herbert B. Turner's communication of last week, just as long as the Bar Association committee studied Mr. Field's Code, namely, one week. Mr. Turner begins by saying that "a few weeks ago the attention of the Bar Association of the city of New York was called to the fact that there was pending in the Legislature a bill for the enactment of a so-called Civil Code;" and he then informs us that the association appointed a committee which made a report, disclosing "an extraordinary state of facts." What a confession! Members of the bar, calling themselves a New York Bar Association, first heard of the Civil Code "a few weeks ago;" and the report which they thereupon caused to be made was such a disclosure! *Disclosed* is the word. The association must have been sleeping the sleep of Rip Van Winkle. Having awaked, they find the world has been moving. Now for the first time, apparently, a *state of facts* is *disclosed* to them which has existed fifteen years; in a matter, moreover, which most nearly concerns them, as good citizens and faithful lawyers! But the last paragraph of Mr. Turner's letter is even more amusing. What does he mean by "the determination of the *codifiers* to force upon us *without debate* their peculiar views of the law as it should be?" Without debate! The Civil Code was reported to the Legislature sixteen years ago; the draft had then been for three years largely circulated, inviting criticism; the completed Code has been on sale ever since, at barely the cost of paper and printing; it has been put into use, with signal success in one great State and one great Territory of this Union; it has materially influenced the legislation of India; it has attracted the attention of jurists in every country governed by English law; it was the duty of our Legislature to act upon it when it was first reported, a duty which has recurred with every recurring Legislature; it has been once passed by both houses, and three times by the assembly; and now the Bar Association, after a week's thought, and a week's rubbing of eyes, cry out, "you are forcing it upon us without debate!" So much for the intelligence and vigilance of these self-constituted guardians of the legal interests of the State.

Our conclusion is that Mr. Field is generally right and the committee and Mr. Turner are generally wrong. We said, on a previous occasion, that the Code proposes no revolution in principle. Some changes, no doubt, are proposed. Mr. Turner has just heard of these, and is startled. But on examination of his criticisms, and those of the Bar Association, we find the important changes suggested

are very few, and we think, generally wise. The critics start off unfortunately. Section twenty-two they say is dangerous, because it allows the certificate of a physician to do away with the effect of a judgment of lunacy. But it will be seen that it only establishes a rule of presumption after discharge from the asylum. We think Mr. Field is quite right in proposing to abolish tenancy by curtesy; we only wish he had stuck to abolishing dower. We think him quite right in making condonation of adultery conditional on subsequent kind treatment; this is only an extension of the present rule. We think him quite right in imposing on the rich wife the duty of supporting her husband when he is no longer able to support himself; that is one of woman's rights. We think him quite right in confining disputes concerning the legitimacy of children born in wedlock, to the husband, wife, and descendants, and shutting out the "sisters, cousins, and aunts." We think him quite right in providing for the adoption of illegitimate children by the father; this is what Lord Cockburn did so far as he could, and we see nothing very dreadful in the "elevation of the bar sinister," although we admit that the phrase is very portentous at first sound. We see nothing very shocking in adopting "movables" and "immovables," from the civil law, and in calling fixtures "immovables." We should not shudder if a street railway company could not compel us to pay for a ride unless it furnished us a seat. We do not know why an infant should not make a will of real as well as of personal property at the statutory age. We think the provision that a fixture shall belong to the owner of the land, in the absence of an agreement for its removal, is a wise one, that would dispense with a vast amount of litigation on a vexed subject. The provision prohibiting a landlord from letting a single room to more than one family at a time is eminently humane, but perhaps it is hardly matter of a Code. We think the old word "lessor" is better than "letter," and that Mr. Field is over-pious in declaring that "act of God" is "an irreverent expression," and suggesting "superhuman irresistible cause." We do not know what Mr. Turner means by intimating that Mr. Field proposes to abolish the action for specific performance. We wonder, however, that these critics have not found fault with the proposal to fix the maturity of sight and demand paper, as to interest, and to abolish days of grace, because these provisions are so eminently wise. But we reaffirm, the proposed Code does not propose a revolution.

But it is evident from the report, in spite of Mr. Turner's disclaimer, that the association are opposed to any codification. The committee say so in so many words. Since we last wrote we have read Mr. Matthews' "Thoughts on Codification of the Common Law" quite through, and with the highest respect for Mr. Matthews, both as a lawyer and as an author, we must reiterate that we think his thoughts very vague, timid, and inconclusive.

So we found Mr. Ivins, on the same subject. Both profound and learned gentlemen, but inconclusive. Such thinkers are too much wedded to old ways, and too skeptical of reform. They call our State an old State. It certainly is not old enough to have got a settled and certain jurisprudence. They praise the "elasticity" of the common law. Nobody ever doubted that quality of it. It has been stretched to conform to every caprice of the judicial mind. There is hardly an important question of common law that has not been differently adjudged in these States and in England. Take any volume of the current American Reports, and you can find several important questions differently held at about the same time in these States, and without any reason for differing. Even in questions involving life and death, this is true. For example, the rule of the burden of proof of insanity pleaded as a defense in murder; the States are about equally divided, and New York does not know exactly what she thinks. Any objection to writing down a rule on that subject? Or is "elasticity" better? The same is true of vital civil questions without number. For ourselves, we are nothing if not practical. We do not enjoy or understand metaphysics. And no one can convince us that it is not much more practicable to regulate the legal affairs of society by written rules, than by rules unformulated, traditional, changeable, uncertain, "elastic." Now this state of things will not always be endured. These laws are sure to be written sooner or later. If the conservative gentlemen of the Bar Association, who have thought of the proposed Code a whole week—the same length of time it took the Almighty to make a universe—can improve it, let them offer amendments, now or after its passage, and if the amendments are wise, let them be adopted. But the Legislature will find that if they yield to postponement for a year, on the plea of a desire to examine and criticise, the same plea will be made every year, so long as old gentlemen dislike to read new books, and so long as young gentlemen are vague, profound, and out of their own depth and everyone else's depth. If it takes the Bar Association sixteen years to find out that a Code has been brewing, how long will it take them to amend it to suit themselves? Give us this Code, and let the aroused metaphysicians of the Bar Association have a good time in construing it at their leisure, and in amending it as it demands. We are glad to see that the assembly have passed it by a vote of 83 to 2. They had previously passed the Code of Criminal Procedure by 77 to 20. So much for the interposition of the Bar Association. Perhaps the Bar Association and *The Nation* will now open their eyes to the fact that there is a public demand for a Code, and that the community are not quite satisfied with the present state of things.

Handwriting experts have suffered some bad black eyes of late. The indictment against Philp and the *Truth* people for forging and uttering the Morey letter is to be quashed—the prosecution being sat-

isfied that they were not the authors of the letter, but were imposed upon by the real forger, who is said to be known. Four "experts" testified that Philp wrote the letter. Three of these same men are witnesses in the *Whittaker* case, and they all say the colored cadet wrote the celebrated letter of warning to himself. In the *Whittaker* case two of the experts discovered "underwriting," but they materially disagreed as to what it read. The defense in this case have now introduced a Boston lawyer who swears to several very bad blunders made by Mr. Southworth, one of these discoverers, in cases with which the witness had a professional connection. And that while Mr. Southworth is a man of veracity, yet he has become a monomaniac on the subject of handwriting, who "can see things about it that no one else can see, and can tell things about it that no one else can tell." This is just our opinion of most of these learned gentlemen—much expertness hath made them mad.

The decision in *Congress Spring Co. v. Knowlton*, reported in full in another column is of great intrinsic interest, and of special interest in this State because it is directly contrary to that of the commission of appeals in the same case, 57 N. Y. 518, and sustains the dissenting opinion of Dwight, C.

NOTES OF CASES.

IN *Baccigalupo v. Commonwealth*, 33 Gratt. 817, it was held that "in defense to a criminal prosecution, upon the ground of insanity, it is not sufficient that the evidence should be of such a character only as to produce a doubt on the minds of the jury, but the *onus probandi* is always on the accused to prove such insanity to their satisfaction." The court said: "In *Boswell's* case, 20 Gratt. 860, one of the grounds of error assigned was that the court in that case gave to the jury the following instruction, to wit: 'That every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury.' In commenting upon this instruction, the president of this court said: 'I think this instruction is unexceptionable. * * * * * He (the counsel for the accused) seems to think that all the proof required by law to repel the said presumption was only so much as would raise a rational doubt of his sanity at the time of committing the act charged against him.' Now I think this is not law; and that the law is correctly expounded in the instruction given by the court. There are certainly several American cases which seem to sustain the view of the prisoner's counsel. But I think the decided weight of authority, English and American, is the other way. In 1 Whart. Am. Cr. Law, § 711, the writer says: 'At common law the preponderance of authority is that if the defense be insanity, it must be substantially proved as an independent fact.' And for this proposition a number of cases are cited. And after reference to many of them, he concludes as follows:

'I think the fair result of them all is to show that insanity, when it is relied on as a defense to a charge of crime, must be proved to the satisfaction of the jury, to entitle the accused to be acquitted on that ground. * * * * The law presumes every person sane till the contrary is proved. The Commonwealth having proved the *corpus delicti*, and that the act was done by the accused, has made out her case. If he relies on the defense of insanity, he must prove it to the satisfaction of the jury. If upon the whole evidence they believed he was insane when he committed the act, they will acquit him on that ground; but not upon any fanciful ground that though they believe he was then sane, yet as there may be a rational doubt of such sanity, he is therefore entitled to an acquittal. Insanity is easily feigned, and hard to be disproved, and public safety requires that it should not be established by less than satisfactory evidence.'" This is the doctrine held in Massachusetts, Pennsylvania, California, New Jersey, Missouri, Maine, North Carolina, Arkansas, Alabama. See *Ortrein v. Com.*, 76 Penn. St. 414; *Boswell v. State*, 63 Ala. 307. But in other States it is held that if the evidence raises a reasonable doubt of sanity, the prisoner must be acquitted. Thus in Mississippi, Michigan, Kansas, Indiana, Tennessee, New Hampshire, Illinois. See *Guetig v. State*, 66 Ind. 94; S. C., 32 Am. Rep. 99; *Cunningham v. State*, 56 Miss. 269; S. C., 31 Am. Rep. 360, and cases cited. It is doubtful what the doctrine is in this State.

In *Com. v. Willard*, Erie Sessions, Pennsylvania, February 28, 1881, it was held that it is no defense to an indictment against one who is the editor and publisher of a newspaper that the libellous article complained of was written and inserted by the local editor of the journal, without the knowledge of the defendant, and in violation of a general order forbidding the publication of any article of a libellous nature without first submitting it to the publisher for his approval. The court said: "Aside from the incalculable damage that may and often does result to the innocent from a misuse of the press in the hands of reckless or malicious persons, and the consequent caution proper to be exacted from those managing newspapers as to the selection of the subordinates in whose hands they intrust this dangerous power, there is the peculiarity incident to the profession of a publisher that the publication of a journal, or a magazine, or a book, is not the visible, manual act of the publisher himself, but is made up of the labors of many different persons, in no one portion of which he may have an actual part. He may not be present at or witness any single one of the various processes of work by which the completed book or newspaper is finally produced; he may not even see it when done and issued to the public, and yet the publication is his act. This is in part, no doubt, the reason why the law of libel forms an apparent exception to the usual rule that one can only be liable criminally for his own individual acts. That such is the law, whatever may be the reason for it, there would seem to be no ques-

tion. It was established by a long line of cases in England, decided by such judges as Hale, Mansfield, Raymond, Kenyon, Powell, Foster, Ellenborough, and Tenterden, and which will be found fully stated in a note in Starkie on Slander, 1st Am. ed., vol. 2, pp. 30-34. It is found clearly recognized in all the leading text-books on criminal law, and has also been recognized and affirmed by the courts in many of the States of the Union." This is supported by Roscoe Crim. Ev. (6th Am. ed.) 621; Whart. Cr. Law, § 2564; *King v. Gutch*, 1 M. & M. 433; *Com. v. Morgan*, 107 Mass. 199; *Perrett v. N. O. Times*, 25 La. Ann. 170. *Smith v. Ashley*, 11 Metc. 367, is overruled by the later Massachusetts cases. The court concluded as follows: "The present case, it will be observed, is not that of a libel surreptitiously smuggled into a newspaper by an employee whose position did not authorize him to prepare or select matter for its columns, as was the fact in *Goodrich v. Stone*, 11 Metc. 486, for the article was prepared by the local editor, employed for and intrusted with that branch of the business, and it was done in the usual course of his daily occupation. Nor is it the case of objectionable matter shown to the publisher and by him refused, and afterward printed against orders, nor was it a fraud or imposition practiced upon a publisher, by which he was misled. It is not even the case of a publisher absent from the town, and obliged to trust the management to another during his absence. As shown by the testimony of the defendant himself, it was simply the case of an editor and publisher of a newspaper leaving his press and office to the sole control of a subordinate, and with such apparent indifference to the outcome of this confidence that up to the time of his arrest he had not even seen the publication complained of. It may be considered by judicious, thoughtful men, who are in favor of the freedom of the press, but opposed to its license, that this case furnishes in itself an illustration of and an argument for the wisdom of the rule, but be that as it may, it is my duty to enforce the law as it is, and not to theorize as to what it ought to be."

In *Weld v. Walker*, Massachusetts Supreme Court, January, 1881, we find a novel question decided, Chief Justice Gray delivering the opinion. The plaintiff, in a bill in equity, alleged in substance, that two days after the death of his wife he consented to her burial, in a coffin and grave-clothes procured by himself, in a lot in the cemetery of the defendant corporation, owned by the husbands of two sisters of his wife; that he consented to such burial while in great distress of mind, and worn out by taking care of his wife during her last illness, and yielding to continued importunities of the sisters and the husband of one of them, much against his own wishes and feelings, "fearing that they would make trouble for him if he did not consent," and "which he should not have done had his mind been in condition to realize the situation;" that he has no right or authority to take care of or adorn her grave in that lot, or to bury other of his

or her family or friends there, or to be buried himself by her side; that he owns jointly with his co-heirs a lot in the Mount Hope Cemetery, in which his father and mother are buried, and in which he wishes that his late wife, and himself at his death, may be laid; that he desires to remove to this lot her remains, with the coffin containing them, and the stones and monuments placed by him at her grave; and has obtained a permit in due form from the proper board of health for that purpose; that he has requested of the defendants permission to do so in a careful and proper manner, doing no damage to the lot in which she is now deposited, and leaving that lot in good condition; and that they have refused such permission. *Held*, that upon these allegations, if supported by evidence, it was within the authority of the justice before whom the hearing was had, to decide that the plaintiff never freely consented to the burial of his wife in the lot of the defendants' cemetery, with the intention and understanding that it should be her final resting place; and that a Court of Chancery might order the defendants to permit him to remove her body, coffin and tombstones to his own lot. The doctrine of ownership of a dead human body was learnedly discussed and adjudged in *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; S. C., 14 Am. Rep. 667, and it was held that a widow, having consented to the burial of her late husband in a lot purchased by him, could not afterward, against the wishes of his only child, remove the remains to another cemetery.

CONTRACT OF WIFE, SEPARATED FROM HUSBAND, FOR NECESSARIES.

IN *Hayward v. Barker*, 52 Vt. 429, it was held that a note, given by a wife whose husband has deserted her, while living apart from him, for necessities used by her in her own support, is void, and her promise to pay it, made after divorce, is also void. It does not appear from the case whether the husband was still in the State or abroad when the note was given, but the doctrine as to the note was conceded by the counsel and assumed by the court in pronouncing on the subsequent promise. See, also, *Priest v. Cone*, 51 Vt. 495; S. C., 31 Am. Rep. 695, and note, 697.

In the Common Pleas, in 1798, in *Cox v. Kitchen*, 1 B. & P. 338, Buller, J., thought that a woman living apart from her husband, in adultery, under an assumed name, is liable on her own contracts, although she has no separate maintenance. Buller, J., said: "Here, therefore, the husband is not liable; and if the wife be not, she stands in a most miserable condition. How is she to find the means of supporting herself? How is she to procure a joint of meat for her daily subsistence? She can obtain no credit unless she be liable for her debt; her situation would be melancholy in the extreme." This, however, was *obiter*, for the case was decided on the ground she had contracted as a *feme sole*, living and representing herself to be unmarried. On this latter ground the decision of

De Gaillon v. L'Aigle, id. 359, was put, the husband there residing abroad. In the last case, Buller, J., remarked that "the husband has voluntarily abandoned his wife," but the stress of the decision was on the absence of the husband.

Mr. Schouler says (Dom. Rel. 295): "As to the right of the wife, when abandoned by the husband, to earn, contract, sue, and be sued, to much the same effect as a *feme sole*, while such abandonment lasts, the current of American authority, legislative and judicial alike, decidedly favors so just a doctrine." He avows that he differs from Mr. Bishop on this point, and claims to be supported by some of the following authorities: *Rhea v. Rhennor*, 1 Pet. 105; *Gregory v. Paul*, 15 Mass. 81; *Dean v. Richmond*, 5 Pick. 461; *Abbott v. Bayley*, 6 id. 89; *Cornwall v. Hoyt*, 7 Conn. 427; *Gregory v. Pierce*, 4 Metc. 478; *Arthur v. Broadnax*, 3 Ala. 557; *James v. Stewart*, 9 id. 855; *Roland v. Logan*, 18 id. 307; *Cassock v. White*, 3 Mills, 282; *Rose v. Bates*, 12 Mo. 30; *Starrett v. Wynn*, 17 S. & R. 130; *Benadum v. Pratt*, 1 Ohio St. 403; *Spier's Appeal*, 2 Casey, 233; *Moore v. Stevenson*, 27 Conn. 14; *Smith v. Sibna*, 4 Iowa, 321; *Wilson v. Brown*, 2 Beas. 277. Mr. Schouler also says, founding on *Cox v. Kitchen*, that the wife would probably be liable under the circumstances of that case. We apprehend that Mr. Schouler is wrong and Mr. Bishop right.

In the leading case of *Marshall v. Rutton*, 8 T. R. 545, Lord Kenyon, delivering the judgment of the twelve judges, A. D. 1800, held that a married woman cannot contract and be sued as a *feme sole*, even though she is living apart from her husband, having a separate maintenance secured to her by deed. But in this case the separation was by agreement. His lordship said, she "must apply that property to her support, as her occasions may call for it, and if they, those who know her condition, instead of requiring immediate payment, give credit to her, they have no greater reason to complain of not being able to sue her than others who have nothing to confide in but the honor of those they trust." In regard to a woman living apart from her husband in adultery, he said her husband "is not liable by law to answer for her necessities, and no case has decided that the woman is." This case was followed by Lord Ellenborough at *nisi prius*, in a case of the wife of an alien, who, after living with her in England, left the kingdom. *Kay v. Duchesse de Pienne*, 3 Camp. 123. This holding was sustained by the bench at a subsequent term.

In *Lewis v. Lee*, 3 B. & C. 291, it was held that a woman divorced from bed and board, and living apart from her husband, cannot be sued alone.

In *Meyer v. Haworth*, 8 Ad. & El. (N. S.) 467, it was held that a woman living separate from her husband, in adultery, cannot be rendered liable for goods then sold her, by her promise after his death to pay for them. This was on the ground that the declaration stated the contract originally to have been made by the wife. But Denman, O. J., said, "the debt was never owing from her," and another judge said, "the promise in the declaration was altogether void."

Watkins v. Halstead, 2 Sandf. 311, was like the principal case, except that the only engagement of the wife was after the divorce. The court said: "If when the debt was contracted, when the goods were delivered, any person was liable, it was the husband. We see nothing in the case to exempt him from liability. The appellant was then a *feme covert*, and clearly not liable. Her promise to pay was made after she was divorced, and if that promise is not supported by an adequate consideration, the action must fail."

In *Prescott v. Fisher*, 22 Ill. 390, it was held that a deserted wife may acquire property, and control it and her person, and be sued like a *feme sole*. This was based on *Love v. Moyneham*, 16 id. 277. The court there said: "Where by fault of the husband the wife is deprived of all benefits accruing to her from the marriage, of any substantial importance, it is but reasonable that she should be restored to her civil rights, at least so far as is indispensable to that actual separate existence he has forced upon her." "We hold the law to be, that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her by whatever reasons to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition." But here the husband was in a foreign State.

In *Rhea v. Rhenner*, *supra*, the Court said: "It is for the benefit of the *feme covert* that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood." The court refer to *Cox v. Kitchen*, *supra*, with approval. But in this case the husband had not been heard of in years, and had at one time been beyond seas. In *Gregory v. Paul*, *supra*, stress was laid on the fact that the husband was a foreigner and had never been in this country, and so was beyond the reach of process. Such wives, say the court, "would be left the wretched dependents upon charity, or driven to the commission of crimes to obtain a precarious support." In *Dean v. Richmond* the doctrine was applied where the wife was divorced from bed and board. The doctrine of *Gregory v. Paul* was applied in *Abbott v. Bayley*, *supra*, where the husband was in another of the United States. In *Cornwall v. Hoyt*, *supra*, the husband left this country and joined an alien enemy. In *Gregory v. Pierce* it was held that the husband must have abandoned the wife and left the Commonwealth. In *Arthur v. Broadnax* the husband had abjured the State, and this was a feature of *Jones v. Stewart*, *Roland v. Logan*, *Rose v. Bates*, *Starrett v. Wynn*, *Moore v. Stevenson*, *Smith v. Silance*, and *Wilson v. Brown*, *supra*.

But in *Benadum v. Pratt*, *supra*, a case where the parties both lived in the same State, and a separate

allowance had been decreed to the wife, although there was no divorce, the wife was allowed to sue alone in respect to that property.

Mr. Bishop says (1 Marr. & Div., § 610) "that there has been a disposition in the United States to break in upon the old English common-law rule;" but we do not find it in any of the above cases, cited by Mr. Schuyler, and some added by ourselves, nor do we see that Mr. Schuyler is correct in his conclusion, for in no case that we have seen has the wife been recognized as a *feme sole*, at common law, except where abandonment by the husband was coupled with his absence from the State of the wife's residence, and many of the cases expressly declare this as the basis of their decision. Therefore we think the common law in this country is, as was declared by Lord Kenyon, in *Marshall v. Rutton*, that no "woman may be sued as a *feme sole* while the relation of marriage subsists, and she and her husband are living in this kingdom." Mr. Schuyler's statement would be correct if he defined "abandonment" to be "desertion, and absence in another State or a foreign country."

Lumpkin, J., in *Waters v. Bean*, 15 Ga. 361, says: "The first suit by a married woman without joining her husband is that of Lady Belknap, in the Year Book of 2 Henry IV, whose husband, the lord high treasurer, had been banished to Gascony. And notwithstanding his transportation, the lawyers of those days were struck with so much surprise, that they commemorated it by a Latin distich, which Lord Coke has thought worthy to preserve in the 1st Institute:

*'Ecce modum mirum quo femina fert breve regis,
Non monitanda virum, conjunctum robore legis.'*"

A learned review of this subject, and of the reasons of the common holding, may be found in *Ayer v. Warren*, 47 Me. 217, where the court say the test of the wife's right to sue or be sued alone is whether the husband may be deemed to have "renounced his marital rights and relations."

The foregoing review of course is confined to the aspect of the subject at common law, and does not apply to the power of the wife to charge her estate for necessities under our modern statutes, an instance of which, arising where the wife was living apart from her husband, is found in *Conlin v. Cantrell*, 64 N. Y. 217.

OBSERVATIONS ON THE PARTICULAR JURISPRUDENCE OF NEW YORK.

VIII.

(1777—1821.)

THE Constitution of 1777 remained for many years without any express alteration by the authority from which it had emanated — the electors of the State represented in a constitutional convention chosen for the purpose; but by the adoption of the Federal Constitution in 1788 the prerogatives and functions of the State government were materially circumscribed and re-distributed. As originally established, the State government had little or no reference to the Federal relations which it subsequently assumed, the first sec-

tion of the State Constitution of 1777 having declared "that no authority should on any pretense whatever be exercised over the people or members of this State" but such as should be derived from and granted by "them." This declaration was as clear an assertion of an inherent status independent of external authority as any that could have been framed, and that it was so intended is apparent from the subsequent "Articles of Confederation" which were ratified only on the condition that the State should reserve every power, jurisdiction and right not ceded in terms.

The Articles of Confederation, always ineffectual even for the proper conduct of the war of the Revolution, proved utterly insufficient for the purposes of a national authority, which last was soon found to be essential not only to preserve peace at home but to maintain the dignity of the confederated States in their intercourse with foreign nations. Consequently the national convention, designed to remedy the defects in the confederation, rejected the proposition to amend the Articles of Confederation and recommended a new frame of government, partly federal and partly national. That the majority of the delegates from New York retired from the convention, conceiving that any course but amendment was beyond their powers, is a matter of general information. It is not proposed to recount the various plans of government suggested or to consider the very familiar nature of the national government, contained in the Constitution reported by this convention, but simply to allude to the effect which the new Federal government had upon the jurisprudence of the State.

The Federal Constitution of Government was ratified at Poughkeepsie on the 26th of July, 1788, by a bare majority of the convention of delegates empowered by the electors to decide the action of this State. That the scope and effect of the Federal Constitution was not understood by the delegates, cannot be pretended by any one who will read the poorly preserved record of their proceedings and debates on this momentous question, not second in importance to the Revolution itself. The party opposed to ratification was led by Governor Clinton, Melancthon Smith and Judge John Lansing, Jr., the latter soon to be Chancellor of this State; the party in favor of the new Constitution by Hamilton, Jay and Chancellor Livingston. The debates were most able and comprehensive and clearly indicated the tenets of the Federal party and the fears of their opponents. It is a noteworthy fact that James Kent, then but at the threshold of his professional career, was in attendance on the convention as a spectator, and that his future political convictions and opinions — opinions and convictions of great consequence, in so far as they affected his subsequent commentaries on constitutional law — were much influenced by the brilliant debates of Hamilton.

That the ratification of the Federal Constitution entirely changed the former external relations of the State of New York and determined some of its sovereign prerogatives is undoubted; that it subordinated the State judiciary in all matters relating to Federal or National laws, was soon decided; that it established a circumscribed but paramount jurisprudence within the realm of which the State jurisprudence might not conflict, must be admitted. But in all other respects the State Constitution remained the supreme arbiter of the State jurisprudence. It is not intended to pursue the extraneous limitations of our subject, which is confined to a mere historical outline of the major changes emanating from within the State itself.

The first proposal to amend the State Constitution was occasioned by the embarrassing ratio in which the Senate and Assembly were increasing with the population; and also by a notorious conflict which had arisen between the Governor and the other members of the Council of Appointment concerning the Gover-

nor's exclusive right to nominate those State officers whose mode of appointment was regulated by the 23d section of the Constitution. The original Constitution did not provide for amendments; the Legislature therefore took the matter into consideration and recommended the election of delegates empowered to consider the difficulties in question, and to determine the true construction of the section relating to the Council of Appointment. The delegates elected accordingly met in convention at Albany on the 13th of October, 1801, and chose Aaron Burr president. They altered the sections relating to representation in the Senate and the Assembly, and declared the appointing power to be vested concurrently in the Governor and each of the members of the Council of Appointment. (Journ. Const. Conv. 1801.) This latter construction was tantamount to a repeal of the 23d section, and by some was thought to exceed the powers of the convention which in this respect were judicial only. (1 Hammond's Polit. Hist. N. Y. p. 166.) But as it was the voice of an overwhelming majority of the convention, this construction was generally acquiesced in. The construction itself was the beginning of that sentiment which finally ended in the application of the elective system to even the judiciary — a system often unwisely condemned, yet susceptible of vast improvement while retained.

These were the only amendments of the first Constitution during the four and forty years it remained in force. Yet there were other features not amended which were also unsatisfactory to the people at large: the formation of the Council of Revision, consisting of the executive and the judges of the two great courts, violated that principle which demands the separation of the executive, judicial and legislative departments of government.

We may next glance at the judicature during the first period of the State government; it was substantially the judicial establishment of the province continued with minor modifications. The original Constitution evidently contemplated that the Court of Chancery would continue, for it mentioned the Chancellor *eo nomine* (§§ 3, 32), and provided for the appointment of the register and clerks in chancery (§ 27). The convention which framed the Constitution appointed Robert R. Livingston Chancellor until such time as a permanent judiciary should be designated in the manner provided by the Constitution. (1 Journ. Prov. Conv. 917.) When the Council of Appointment was perfected, Chancellor Livingston received the permanent commission which he held until 1801, when Chief-Justice John Lansing succeeded to the chancery bench, retaining office until February 1814, the date of Chancellor Kent's accession.

It would seem that although the Constitution of 1777 designed that the Chancellorship should be distinct from the office of Governor, that the incumbent of the latter office, in analogy to the provincial precedent, retained for some time the custody of the Chancery seals, and that a statute was passed in 1790 placing them under the direction of the Chancellor. At least this is the statement of Mr. Attorney-General Van Vechten in the case of *Yates v. People* (6 Johns. 347). If this statement is accurate as to the fact, it is an additional evidence of the tendency, which at first existed, to perpetuate provincial customs in the absence of plain statutory enactments to the contrary. This tendency is further illustrated by a bill, reported at the first session of the Legislature, to constitute a Council of State to assist the Governor to administer the government during the recess of the Legislature.

The jurisdiction of the State Court of Chancery was somewhat vague and never wholly defined until the Revised Statutes of 1829. The English Court of Chancery was divided into two distinct tribunals — the one ordinary, being a court of com-

mon law, the other extraordinary, being a court of equity. The law division of the latter court was said to be more ancient than the equity division. The Court of Chancery of this State did not at first possess the common law judicial powers of the English court, with the exception of those of the *officina justitie*, from which all original writs issued under the seal of the court *ex debito justitie*; it did possess the judicial powers which the English Chancellor exercised in that branch of the court called the Court of Equity in Chancery. This distinction, not adverted to in the works on the Chancery Practice in this State, was fully discussed in the interesting case of *Yates v. People* (6 Johns. 337), in which Chancellor Lansing undertook to supersede a writ of error to the Supreme Court. The Court of Errors denied that the Chancellor had the power to supersede a writ of error to the Supreme Court which issued from the *officina justitie* as a matter of right. They affirmed that the common-law powers of the Court of Chancery in England existed here only in the *officina justitie*. At various times, while the first Constitution remained in force, the Legislature conferred, by acts to that end, special jurisdiction on the Chancellor. (Blake's Ch. Pr. 8.)

In order to determine the true basis of the jurisdiction of the State Court of Chancery, various theories have been resorted to by writers. The late Judge Murray Hoffman attributed it to the act of the provincial assembly passed in 1683 (Hoffman's Ch. Pr., § 1, ch. 1). The difficulty is that this act, "the act to settle courts of justice," was repealed by the "act for establishing courts of judicature," passed in 1691, and the Provincial Court of Chancery was, on the expiration of the latter act, regarded by its contemporaries as held by virtue of the ordinances issued by the royal governors under the authority of their several commissions (2 R. L. 1813, appendix VII). Yet Judge Hoffman's view that the act of 1683 revived had been advanced by Chief Justice Morris as early as 1732. (See opinion of Morris, *Cosby v. Van Dam*, N. Y. Hist. So. Col.) Others have regarded the chancery jurisdiction as a part of the common law re-established by the Constitution of 1777 (§ 35). Precisely what the extent of the jurisdiction of the State court was seems to have been undetermined until *Yates*' case, and then very imperfectly. Chancellor Kent evidently regarded it as co-extensive with that of the English Court of Equity in Chancery (1 Johns. Ch. 117, 517, 607, 100).

It has been said, in substance, that Chancellor Kent rescued the Court of Chancery of this State from a condition of utter inefficiency (Duer's Discourse on the Life of James Kent). Certainly Chancellor Kent did much for the equity jurisprudence of this State, but there is reason to presume that the administrations of Chancellors Livingston and Lansing were also of a high order, and amply adequate to the lesser exigencies of the times. Without a much more comprehensive investigation of the judicial labors of Chancellors Livingston and Lansing than any yet made, nothing of any value may be predicated of their contributions toward the establishment of the equity jurisprudence of this State. So, it is equally true that isolated comments on the Colonial Court of Chancery are rarely to be trusted; that its administration was inefficient there is no doubt, but that its very early existence in New York was of consequence to the particular jurisprudence of the State is susceptible of very exact demonstration. The value of a Court of Equity as a possible engine of reform is great, even though its jurisdiction may not for a time be invoked; its very existence restrains many wrongs which would otherwise be committed.

Without some little recollection and comparison of the value of the *Prætorian edicts* to Roman law, and the value of the chancery decrees to English jurispru-

dence, few will comprehend the extraordinary influence which the Court of Chancery of New York has had on American jurisprudence in general. It is probably not an exaggeration to state that the decisions of the Court of Chancery of New York have been of more value to the domestic jurisprudence of this country than those of any other tribunal, excepting the Federal Supreme Court.

Without in the slightest degree detracting from the fame of Chancellor Kent's labors in the Court of Chancery, it is but common justice to his predecessors—and this his panegyrists seem to forget—to acknowledge the value of what we now know of their work; and in this connection it must be noticed that Kent found the Court of Chancery of New York exercising a vast jurisdiction fully established on very ancient foundations (4 Johns. Ch. 439). It is a very curious historical fact that we find traces of an equity jurisdiction in New York even before Lord Nottingham, the "father of English equity," ascended the "throne of equity." (Record of the N. Y. Court of Assizes; Duke's Laws of 1664.) And a Court of Chancery was actually established here in 1683. It would be a matter of no little utility to examine the equity decrees in New York from 1683 until Chancellor Kent's accession—remembering that this period embraces the chancellorships of the great masters and founders of English equity jurisprudence, Nottingham, Somers, Cowper, Macclesfield, Hardwicke, and Eldon. That in New York there was any thing like a continuity of growth of equity jurisprudence at all parallel to that in England, it would be absurd to suggest, for many of the governors, who at times acted as chancellors here, were not lawyers by profession. But the governors, when sitting in chancery, were always assisted by the masters, examiners, and registers of the court, some of whom were educated lawyers. The very existence of a Court of Equity here during this long period is somewhat remarkable, and it unquestionably led to the constitutional recognition of the Court of Chancery by the founders of the State government, and thus indirectly contributed to the speedy prominence of New York in the domain of jurisprudence. During the colonial epoch, the Court of Chancery abated the rigor of penalties on bonds, and considered the matters of equity addressed to its peculiar discretion. While many of the colonists questioned the propriety of the governor's sitting in a court of equity, they on several occasions recognized the benefits of the court in other hands, by passing acts of assembly fixing its jurisdiction.

The equity decisions of Chancellor Livingston have never been published, and in consequence there are no data, other than the records of the court, and perhaps his private papers, to determine the precise character of his administration of the Court of Chancery. It has however been said on the high authority of Chancellor Jones, "that this august tribunal, though since "covered with a halo of glory, never boasted a more "prompt, more able or more faithful officer than Chancellor Livingston." (Francis' address to the Philo-xenian Society of Columbia College, 1831, p. 29.) Those decisions of Chancellor Livingston bearing on jurisprudence, and preserved in the records of the council of revision, indicate the same qualities which so distinguished his career as a statesman and diplomat (see Debates on Ratification of Fed. Const., 1788, and Livingston's Diplomatic Correspondence), and surely confirm to the ordinary mind the laudatory of Chancellor Jones. Chancellor Livingston's rules in chancery were not published. (See, however, a reference to them, 1 Johns. Ch. 328.)

The chancellorship of Lansing also labors under the disadvantage of having had no reporter to perpetuate the equity opinions, but the reports of the Court of

Errors, embracing part of the period of this chanceryship, fortunately contain some of Lansing's decisions as a judge of that court, and several of the reasons which he assigned for his decisions in the Court of Chancery. Of his judgments in the Supreme Court, we have those from 1798 to 1800, in 1 Johnson's Cases. His judicial decisions are terse and cogent, but they are too few to give a correct conception of his career as chancellor. The best estimate of Chancellor Lansing's administration of the court is to be formed from the chancery rules which he established; they were the first seventy-four rules which are contained in those subsequently revised and digested by Chancellor Kent. (Rules in Chancery, ed. 1815.)* Rules in chancery, like the edicts of the Pretors, were a species of direct legislation, oftentimes of the most ameliorating character. Some of Chancellor Lansing's rules, such as that enabling bills to be taken *pro confesso* for want of answer, though innovative, were very great reforms of the contemporary English practice; and, as they conduced to simplicity, indicate a philosophic conception of administrative jurisprudence.

That the Court of Chancery of New York, even before Kent's time, was thought to possess that exalted jurisdiction which later on was only more firmly established, is fully shown by Chancellor Lansing's course in Yates' case, and by the arguments which were advanced in that celebrated controversy involving the chancery jurisdiction.

Chancellor Kent's administration of the Court of Equity forms an epoch in the judicial history of New York. This remarkable man entered on his renowned career as chancellor the 25th of February, 1814; and in the same year Johnson, the Supreme Court reporter, was directed by the Legislature to report the adjudications of the chancellor. All Kent's chancery decisions of interest are contained in the seven volumes of Johnson's Chancery Reports, the first regular equity reports in New York, or, indeed, in America. Notwithstanding Kent had for sixteen years prior to his accession to the Court of Chancery been a common-law judge, he was nevertheless, at the outset, profoundly versed in the science of equity. Nor was he without practical experience in the chancery administration. As a master in chancery, he had perceived the great benefits to be derived from the application of the principles of equity to the every-day necessities of society, the complicated commercial accountings, the administration of estates, and the various auxiliary duties of the master's office. As a Supreme Court justice, sitting in the Court of Errors, he had for many years exhibited great interest in the chancery appeals. In *LeGuen v. Kemble*, 1 Johns. Cas. 507, Justice Kent had held that the Court of Errors, in analogy to the practice prevailing in the House of Lords appeals, might both reverse the adjudications in chancery and determine the proper decree to be made below. On this principle, all his investigations of the chancery appeals were original and profound. In addition to these qualifications for the chancery bench, Kent possessed others far more extensive. From the time he had been called to the bar he had assiduously devoted himself not only to legal literature in its anglo-American phase, but to the study of French and classical literature, with both of which, according to Justice Duer,* he had even then but a slender acquaintance. In these excursions to a wider domain of knowledge he perfected himself in the systems of public and Roman law in their varied phases, ancient and modern. With the utmost patience he made himself the peer of the jurisconsults and the masters of English equity. In the

Court of Chancery he had scope for all his varied attainments; and although he had for years been a distinguished common-law judge, he there first reached that height of distinction which few jurists have equalled, and still fewer surpassed. The most casual reader of Johnson's Chancery Reports has doubtless observed that Chancellor Kent received his inspiration from the juridical writings of almost every nation in Europe, ancient and modern; the compilations of the Justinian era, the French jurists, Domat, D'Aguesseau, Fournel, Emerigon, Pothier, and Valin; the Swiss publicists, Burlamaqui and Vattel; the Dutch juridical writers, Grotius, Vinnius, Voet, and Bynkershoek; the German writers, Puffendorf, Heineccius, and Stryk. From these, and many like sources in addition to the English jurists, Chancellor Kent illustrated the true scope and province of equity tribunals. The effect of this was at once perceptible on the legal publications of that day; the law booksellers issued many translations of the writings of the French jurists, and they readily found places in those working libraries previously devoted to the English common-law reporters and the equity reports of Vernon, Vesey, and Cox. By some, Chancellor Kent's decisions have been thought to be too expository and elementary in character, and by others to follow too closely in the footsteps of Nottingham, Hardwicke, and Eldon. Were these criticisms true they would be directed at no common fault, but they are not even half-truths. Chancellor Kent found the ancient jurisprudence of the common law greatly modified by statutes of the New York Legislature, and by the new Constitutions of government. Hence it was his peculiar province to apply the principles of equity jurisprudence to these changes, and necessarily his opinions were somewhat detailed and written rather in the style of the commentator than in that of the judge. It is apparent that he intended to place the first series of American Equity Reports on foundations deeply and strongly laid; but that he was a servile imitator of the English jurists is erroneous. He freely admitted that he felt himself bound by the precedents in the English chancery (*Manning v. Manning*, 1 Johns. Ch. 527), but he never failed to verify the original sources from which Lord Somers or Lord Hardwicke had drawn the principles of English equity. At least, he did not attribute to Bacon or Somers that which was due to Ulpian or Paulus. His was a most discriminating repetition, and he no more followed in the footsteps of the English chancellors than they followed in the footsteps of Vinnius or of Voet, or of the classical jurists. Yet that Chancellor Kent's was a great creative mind like that of Hugo Grotius, or supremely endowed like that of Somers, can never be maintained. Still, by common consent, he is placed, even by laymen, in the front rank of juridical writers. (1 Buckle's Hist. of Civ., p. 174.) Under Chancellor Kent the Court of Chancery of New York, founded in 1683, reached its height of usefulness and distinction.

The continuance of the former Supreme Court of judicature, or a court of the same jurisdiction and like name, was evidently intended by the founders of the original State government (Const. 1777, §§ 3, 25), though its jurisdiction was not defined or regulated by constitutional enactment. Until the Constitution of 1846 took effect, this court exercised substantially the same jurisdiction which it possessed in the provincial epoch. (Graham's Juris. 141; 1 Paine & Duer's Pr. 141; N. Y. Civil List, ed. 1867, p. 91.) The Supreme Court of New York was founded originally by an act of the Provincial assembly, passed in 1691 (Bradford's Laws, ed. 1694), and was subsequently continued by virtue of several ordinances promulgated by Lord Bellomont and Viscount Cornbury. (Note, 1 R. L., 1813, p. 318.) Samuel Jones, in his observations on the

* In the absence of an established local practice upon a particular point, the English chancery rules were controlling. (See Hoffman's Int'd to Ch. Pr., p. XIV.)

* There is no systematic biography of Chancellor Kent.

New Revised Laws of 1813, mentions other ordinances affecting this court, particularly one of the reign of King George the First (N. Y. Hist. So. Col., III), and the late Dr. O'Callaghan possessed an unpublished list of like ordinances, not easily to be found by persons unfamiliar with the archives of this State. This court, subsequent to the Revolution, never exercised the jurisdiction of the Court of Equity in the exchequer chamber, which it was held to possess in the celebrated case of *Cosby v. Van Dam*, 19 Alb. L. J. 350; 20 id. 170, but took cognizance of those causes only which, in England, were cognizable in the King's Bench, Common Pleas, and the plea side of the Exchequer. (Wyche's Pr., p. 1.) During the first twenty-two years of the State government there is no regular chronicle of the adjudications of the Supreme Court in the shape of Law Reports, and it is therefore apt to be assumed, and, indeed, is so stated, that its sphere of action was narrow and its administration imperfect. But it is susceptible of demonstration that this court was then quite equal to the more limited exigencies of the times. The chief justices during this period, John Jay, Richard Morris, Robert Yates and John Lansing, Jr., were all eminent as lawyers; and the associate justices, with the exception of Hobart, who was a scholarly man, were all bred to the law. Of associate justice Benson, who sat from 1794 to 1802, Chancellor Kent has said that he did more to reform the practice of the court than any member of it did before or since. (2 Thompson's Hist'y of Long Island, pp. 187-9.) Benson drew those rules of this court which were adopted April term, 1796; they are often termed the first rules of the court (N. Y. Civ. List, p. 93), but this is an error. Wyche, in the first treatise on the practice of the New York Supreme Court (N. Y., 1794), refers to rules of court adopted as early as 1727, or seventy years previously, and the rules of 1791-3 are published in Coleman's Cases, p. 31. As a master of special pleading, Justice Benson was hardly surpassed by Chief Justice Saunders himself. (Duer's Discourse on Kent, p. 14.)

It was, however, with Kent's elevation to the Supreme Court, in 1798, that its usefulness became more widely apparent through the medium of the reporters. Prior to this time law reporting in America had not ripened into a system; there were numerous pamphlets published, containing arguments of counsel and decisions of judges, but no systematic reports; and both the Colonial and State bars were compelled to have recourse to the English reports for illustrations and precedents. With the latter they were profoundly versed and thus the elements of the jurisprudence of the common law were firmly imbedded in American soil. The formative period of the Supreme Court, during which it exercised its greatest influence on the particular jurisprudence of this State, was during the judgeships of Kent, Spencer and Thompson. (1798-1823.) Then it was that many principles were settled and that fluctuating theories gave place to fixed and determinate rules embraced in leading cases, reported in the famous series by the official reporters, Caine and Johnson.

Down to the adoption of the Constitution of 1821, the Supreme Court justices continued to go the circuit as before the Revolution, and though various modifications were from time to time imposed by statute, they retained the powers of commissioners of the peace, nisi prius, assizes of novel disseisin, and other assizes. By the act of 1786 (ch. 9), the Court of Exchequer, held by a Supreme Court justice out of term, was revived for the hearing and determining of all causes concerning fines, forfeitures, amerciaments and debts due to the people of the State, and for auditing accounts of sheriffs, coroners and other officers in receipt of fines and forfeitures.* The practice of the

Supreme Court during this period presented but few features peculiar to itself, and was expressly supplemented by that of the King's Bench, at Westminster Hall. (*Dubois v. Phillips' Exrs.*, 5 Johns. 235.)

The court for the trial of impeachments and the correction of errors, commonly styled the Court of Errors, though called into being by the original Constitution of the State, was not organized until after the final peace with Great Britain, but thenceforth it occupied a very important place in the judicial polity of the State. It was subsequently an objection to this court that it was partly composed of the upper legislative house and thus became involved in the whirl of party politics. This court, however, like the Supreme Law Court and the Chancery Court, was not entirely novel. The elective senate was certainly a new constituent, but in the Provincial epoch the Court of Appeals was composed of the upper legislative chamber or the legislative council. The Court of Errors had cognizance of appeals from the Supreme Court, the Court of Chancery, the Court of Probate, and while it existed, of appeals from the Court of Admiralty. The practice in the Court of Errors, in cases not expressly provided for, was similar to that in the Court of Exchequer Chamber, in England, though on appeals it conformed to that of the House of Lords, when sitting as a Court of Appeals. (24 Rule of Court of Errors.)

The Court of Probates referred to in the Constitution of 1777 (§ 27), was organized pursuant to the act to organize the government of this State, passed the 16th of March, 1778 (ch. 12), and was expressly vested with that jurisdiction in testamentary matters which had previously been exercised by the Royal Governor of the Province. In 1787 a portion of its jurisdiction was transferred to the surrogates of the various counties (ch. 38, Laws 1787), over whom the judge of the Court of Probates exercised an appellate jurisdiction similar to that once exercised in the Court of the Delegates, in England. The Court of Probates flourished throughout the entire period that the first Constitution remained in force.*

The Court of Admiralty of New York, organized under the act of the Provincial Convention, passed the 31st of July, 1776, endured until its jurisdiction was relinquished by the State and devolved on the Federal establishment, pursuant to the Federal Constitution.

Like the great courts named, the minor branches of the judicial establishment of the Province continued under the first Constitution, without any substantial alteration; the county courts of Common Pleas, the mayors' courts of the several cities, the town courts of justices of the peace, with criminal jurisdiction in the courts of sessions, were all parts of the pre-existing order of things, and some of them were founded as early as the seventeenth century.

Throughout the first period of the State government the judicatories of New York were the creatures of the common law, and their whole structure was regulated and fashioned by the jurisprudence of the pre-revolutionary period. Hamilton affirmed that the new institutions were inexplicable without the aid of the common law (*Croswell's case*), and this idea in its various phases controlled, for a generation, not only the American bar, but the people at large, who claimed the Anglican common law as one of the highest achievements of Revolution. But the time was not far distant when the popular features of the new government were to have a counter-influence not merely on legislation but on the structure of the judicial establishment—an influence even now but partially solved.

* This excellent tribunal was a useful check upon maladministration and the peculations of dishonest officials.

* The probate of last wills and testaments, and granting administration, was declared by an act of the Provincial assembly, passed in 1693, to be vested in the governor, or in such persons as he should delegate under the seal of the prerogative court. (Bradford's Laws, 16; 1 V. S. 14.)

WHEN MONEY PAID ON ILLEGAL CONTRACT RECOVERABLE.

SUPREME COURT OF THE UNITED STATES, JAN. 31, 1881.

CONGRESS AND EMPIRE SPRING CO. v. KNOWLTON.

Where a contract is illegal (being *malum prohibitum* and not *malum in se*) money paid by one party in part performance can be recovered back when the other party has performed no part of the contract and both parties abandoned such contract before it was consummated.

A New York corporation, in violation of the laws of that State, provided for an increase in its capital stock. This increased stock was subscribed for and an assessment paid thereon. Thereafter the plan for increasing the stock was abandoned by the corporation and an adjustment with subscribers authorized by its trustees. In an action by a subscriber to recover from the corporation the amount of the assessment paid by him, *held*, that it was no defense that the payment was made upon an illegal transaction.

IN error to the Circuit Court of the United States for the Northern District of New York, to review a judgment in favor of plaintiff below. The opinion states the case.

WOODS, J. This suit was brought in 1869 by the intestate, Dexter A. Knowlton, against the plaintiff in error, in the Supreme Court of the State of New York, to recover the sum of \$13,980, with interest from February 20, 1866. In 1876 Knowlton died, and the present defendants in error having been appointed administrators of his estate, the suit was revived and continued in their names. At the time of his death Knowlton was a citizen of Illinois. His administrators were citizens of that State. On their application the suit was on March 20, 1877, removed to the Circuit Court of the United States for the Northern District of New York. The parties waived a jury and the case was tried by the court at the October term, 1877.

The court found the facts of the case to be substantially as follows:

The Congress & Empire Spring Company, the plaintiff in error, is a corporation of the State of New York, organized under the statute of that State passed February 17, 1848, authorizing the formation of corporations for manufacturing, mining, mechanical or chemical purposes, and subsequent acts amendatory thereof. The capital stock was \$1,000,000, divided into 10,000 shares of \$100 each, and was issued in payment of property purchased by the trustees of the corporation for its use.

The mode by which corporations such as the plaintiff in error might increase their capital stock is prescribed by sections 21 and 22 of chapter 40 of the laws of 1848.

Section 21 prescribes how the notice of a meeting of the stockholders to consider the proposition to increase the capital stock shall be given, and what vote of the stockholders shall be necessary to carry the proposition.

Section 22 prescribes how the meeting of the stockholders, called under section 21, shall be organized, and declares that if a sufficient number of votes has been given in favor of increasing the amount of capital stock, "a certificate of the proceedings showing a compliance with the provisions of this act, the amount of capital actually paid in * * * the whole amount of debts and liabilities of the company, and the amount to which the capital shall be increased * * * shall be made out, signed and verified by the affidavit of the chairman and countersigned by the secretary, and such certificate shall be acknowledged by the chairman and filed as required by the first section of this act; and when so filed the capital stock of such corporation shall be increased * * * to the amount specified in such certificate, * * * and the company shall be entitled to the privileges and provisions, and subject to the liabilities, of this act, as the case may be."

On January 11, 1866, the corporation passed a resolution to increase its capital stock by the addition thereto of \$200,000 for the purpose of building a glass factory for the manufacture of bottles and providing a working capital. It also resolved that the books of the company should be open for subscriptions to the additional stock and that each stockholder should be allowed to take one share of the new stock for every five shares he held of the original stock, and that when he had paid eighty dollars on each share the company should issue to him a certificate as for full-paid stock.

At a meeting of the board of trustees of the corporation, held February 8, 1866, a dividend of four per cent on the original stock was declared, payable February 20, and it was resolved that a call of twenty per cent on the new stock should be made, payable February 20, 1866; that the books of the company should be at once opened for subscriptions to the new stock, and that each stockholder should have the privilege of taking one share of the new stock for every five shares of the old stock held by him, and that on failure of any stockholder to pay, on or before February 20, 1866, twenty dollars on each share of the new stock taken by him, all his claim to such new stock should be forfeited and the same should be divided ratably among the stockholders who had paid the installment of twenty dollars per share.

A stock subscription agreement was immediately issued by the trustees in pursuance of the said resolutions, by which the subscribers stipulated to take the number of shares set opposite their names and to pay for each share eighty dollars, in installments, as called for by the directors, and upon failure to pay the installments within sixty days after call, that the money already paid on the stock should be forfeited to the company. And by the same agreement the company bound itself to pay interest up to February 1, 1867, on all sums paid on the new stock, and on February 8, 1867, to issue for every share of said new stock on which eighty dollars had been paid, a certificate to the holder as for full-paid stock, and it was provided that the holders of such stock should be entitled to vote thereon and the same should draw dividends and be treated in all respects as full-paid stock.

This agreement was signed by one C. Sheehan, who subscribed for 600 shares of the new stock, he being the holder of 3,490 shares of the old stock.

Thereupon a contract was made between Sheehan and Knowlton, the intestate, whereby Sheehan agreed to lend his dividend on the old stock held by him to Knowlton, and the latter agreed to assume the new stock subscribed for by Sheehan and pay all future calls thereon. Sheehan's dividend on his old stock amounted to \$13,988. Knowlton, in consideration of the transfer to him of this dividend, delivered his note to Sheehan for \$13,980, dated February 20, 1866, payable in one year, and secured the same by a pledge of 150 shares of the stock of the company, and paid the residue, to wit, eight dollars, in cash.

On March 8, 1866, Knowlton paid to the company the call of twenty per cent on the new stock subscribed by Sheehan and sold to him as aforesaid, by the application thereto of Sheehan's dividend on the old stock, amounting to \$13,980, for which the company gave Knowlton a receipt.

About December, 1866, Knowlton paid in full his note to Sheehan for \$13,980.

Calls and personal demands were made both upon Sheehan and Knowlton more than sixty days before January 26, 1867, for the payment of subsequent installments on the stock subscribed by Sheehan, and both of them neglected and refused to pay the installments called for; whereupon the trustees of the company passed a resolution by which they declared that the new stock subscribed by Sheehan and assumed by Knowlton should be and was forfeited.

From August, 1865, to August, 1866, Knowlton, the intestate, was a trustee and vice-president of the company; he advised the increase of the capital stock above mentioned, and proposed the resolutions in relation thereto and moved their adoption, and drew up the stock subscription agreement and signed it and advised others to sign.

On August 7, 1867, a meeting of the stockholders of the company was held, at which it resolved that the capital stock of the company should be reduced to the original sum of \$1,000,000, and that the trustees be authorized to arrange with the holders of the new stock for retiring the same on such terms and conditions as they should deem for the interest of the company.

On the same day the board of trustees met and passed a resolution, whereby the executive committee of the board was authorized to adjust, on the best terms for the company, the claims of all persons holding receipts for payments on the new stock ordered to be retired.

On March 27, 1868, the executive committee passed a resolution that the company issue five-year coupon bonds sufficient to refund the payments made on the new stock of the company which had been retired.

No tender of these bonds was ever made to Knowlton, the intestate, nor was any demand made for them by him, but he demanded repayment of the amount paid by him on his new stock, and the company refused to repay it or any part of it.

The majority of the holders of the original stock became subscribers for the new stock, and all of them, except Sheehan and Knowlton, the intestate, and one or two other subscribers for small amounts, paid the call made on them in respect to the new stock. The first call of twenty per cent on the new stock was paid mainly by the dividend on the old stock above mentioned, but about \$3,000 were paid in cash. All the stockholders who did not subscribe for new stock were paid their part of the dividend in cash. About \$86,500 of said five-per-cent bonds were issued by the company to retire the new stock.

The intestate, Dexter A. Knowlton, having commenced this action, and having died during its pendency, the plaintiffs, as the administrators of his estate, succeeded to his interest therein.

As a conclusion of law from these facts, the court found that the plaintiffs were entitled to judgment against the Congress & Empire Spring Company for the sum of \$13,980, with interest from February 20, 1868, and rendered judgment accordingly.

This writ of error is prosecuted by the Congress & Empire Spring Company to reverse the judgment rendered against it by the Circuit Court.

The plaintiff in error claims that the plan adopted by the company to increase its capital stock, by which certificates as for full-paid stock were to be issued on the payment of eighty per cent thereof, was against the law and public policy of the State of New York, and was therefore void; that Knowlton, having been an active party in devising this scheme, and having paid his money in part execution of it, his legal representatives cannot recover the sum so paid.

It is conceded by the defendants in error that the plan adopted by the company to increase its stock was in violation of the law of New York, and therefore void, and it has been so held, in effect, by the Court of Appeals of the State of New York in the case of *Knowlton v. Congress & Empire Spring Company*, 57 N. Y. 518.

We are then to consider whether, upon the hypothesis that the plan for the increase of the stock was illegal, there can be a recovery upon the facts of the case as found by the Circuit Court.

We think it clear that there was only a part performance of the illegal contract between the company and Knowlton in reference to the new stock, for which

Sheehan subscribed and which he agreed to transfer to Knowlton.

The company, in fact, created no new stock. It only proposed to do so. To increase the stock of the company, it was not only necessary that the meeting of the stockholders should be called, as prescribed by the law, and a vote of two-thirds of all the shares of stock should be cast at the meeting in favor of the increase, but that there should be a certificate of the proceedings, showing, among other things, a compliance with the provisions of the law, and the amount of the increase of the stock, signed and verified by the affidavit of the chairman of the meeting at which the increase was voted, and countersigned by the secretary, and such certificate should be acknowledged by the chairman and filed, as required by the first section of the act. And the law declared that "when so filed the capital stock of such corporation shall be increased to the amount specified in such certificate."

It does not appear from the findings of the Circuit Court that any such certificate was ever made or filed. Consequently it does not appear that the steps necessary, under the law, to an increase of the stock were ever taken. Neither does it appear that any scrip or certificates were ever issued to the subscribers to the new stock. So that all that was done amounted only to a proposition of the company, on the one hand, to increase its stock, and an agreement by Knowlton to take certain shares of the new stock when issued, and the payment by him of an installment of twenty per cent thereon. There was no performance of the contract whatever by the company, and only a part performance by Knowlton.

It is to be observed that the making of the illegal contract was *malum prohibitum* and not *malum in se*. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud.

The question presented is, therefore, whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance can be recovered back, the other party not having performed the contract, or any part of it, and both parties having abandoned the illegal agreement before it was consummated.

We think the authorities sustain the affirmative of this proposition. Their result is fairly stated in 2 Comyn on Contracts, 361, as follows: "Where money has been paid upon an illegal contract, it is a general rule that if the contract be executed and both parties are *in pari delicto*, neither of them can recover from the other the money so paid, but if the contract continues executory and the party paying the money be desirous of rescinding it, he may do so and recover back by action of *indebitatus assumpsit* for money had and received. And this distinction is taken in the books that where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained, but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, then it is consonant to the spirit and policy of the law that the plaintiff should recover."

Mr. Parsons, in his work on contracts, vol. 2, page 746, says: "All contracts which provide that any thing shall be done which is distinctly prohibited by law, or morality, or public policy, are void, so he who advances money in consideration of a promise or undertaking to do such a thing, may at any time before it is done rescind the contract and prevent the thing from being done and recover back his money." To the same effect see 2 Addison on Contracts, § 1412; Chitty on Con-

tracts, 944; 2 Story on Contracts, § 617; 2 Greenleaf on Evidence, § 111.

The views of the text-writers are sustained by a vast array of authorities, both English and American. A few will be cited. The case of *Taylor v. Bowers*, L. R., 1 Q. B. Div. 291, was an action to recover the value of property assigned for the purpose of defrauding creditors. A verdict was rendered for plaintiff with leave to move to enter a verdict for the defendant. A rule was obtained on the ground that the plaintiff could not by the allegation of his own fraud get back the goods from the defendant. The Queen's Bench sustained the verdict, the Chief Justice, Cockburn, delivering the opinion. The defendant then appealed to the Court of Appeals, where the judgment was affirmed. Both courts agreed that an illegal contract partially performed might be repudiated and the money paid upon it recovered.

Lord Justice Mellish, in the Court of Appeals, said: "If the illegal transaction had been carried out, the plaintiff himself could not, in my judgment, have recovered the money. But the illegal transaction was not carried out, it came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the illegal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined on and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither can he maintain an action; the law will not allow that to be done."

The same rule substantially is laid down in the following English cases: *Lovry v. Bourdieu*, Doug. 471; *Tappenden v. Randall*, 2 Bos. & P. 466; *Hartelov v. Jackson*, 8 Barn. & C. 221; *Bone v. Eckless*, 1 Hurls. & Nor. 925; *Lacausade v. White*, 7 T. R. 535; *Colton v. Thurland*, 5 id. 505; *Smith v. Berkmore*, 4 Taunt. 474; *Mount v. Stokes*, 4 Term, 564.

In *Morgan v. Groff*, 4 Barb. (N. Y.) 534, it was held that money paid on an illegal contract, which remains executory, can be recovered back in an action founded on a disaffirmance, and on the ground that it is void. To the same effect are the following cases: *Insurance Co. v. Kip*, 8 Cow. 20; *Merritt v. Millard*, 4 Keyes (N. Y.) 213; *White v. Franklin Bank*, 22 Pick. 184; *Lovell v. Boston & Lowell R. R. Co.*, 23 id. 32.

In *Thomas v. The City of Richmond*, 12 Wall. 355, this court cites with approval the note of Mr. Frere to the case of *Smith v. Bromley*, 2 Doug. 696, to the effect that a recovery can be had as for money had and received, when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiae*; the *delictum* is incomplete; the contract may be rescinded by either party.

The rule is applied in the great majority of the cases, even when the parties to the illegal contract are in *part delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial. We think, therefore, that the facts of this case present no obstacle to a recovery by Knowlton's administrators of the sum paid by him on the stock which had been subscribed for by Sheehan.

The law of New York does not in express terms forbid a corporation from issuing certificates for full-paid stock when the stock has not been fully paid. The illegality of such an issue is deduced from several sections of the law under which the Congress & Empire Spring Company was organized, namely, sections 38, 40, 41 and 49. We think it is fairly inferable from the record that the trustees of the company, one of whom was Knowlton, did not know that the plan adopted by

them for the increase of the stock was illegal, and that when they discovered that it was forbidden by the law, and before any harm was done or could have been done, the scheme was abandoned. Under such circumstances, the rule which would prevent the recovery of the money paid to carry on the illegal plan would be a very harsh one, not founded on any law or public policy.

It is suggested by counsel for plaintiff in error that the Court of Appeals of the State of New York has in this identical suit, upon the same state of facts, adjudicated the rights of the parties, and this court ought to consider the questions raised in this case as *res judicata*.

The reply to this suggestion is that it nowhere appears in the record that this case was ever before the Court of Appeals, or that it was ever decided by any court except the United States Circuit Court for the Northern District of New York, from which the case has been brought to this court on error. We cannot consider facts not brought to our notice by the record.

The judgment of the Circuit Court is affirmed.

Mr. Justice Harlan dissents on the ground that the plaintiff below was concluded by the decision in *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518, but does not express his views upon the propositions of law discussed in the above opinion.

VALIDITY, AS TO PAST OFFENSES, OF CRIMINAL STATUTE OF LIMITATION.

PENNSYLVANIA SUPREME COURT JANUARY 3, 1881.

COMMONWEALTH OF PENNSYLVANIA *v.* DUFFY.

A statute provided "that hereafter the offense of forgery shall not be held barred when the indictment therefor shall have been brought within five years next after the offense shall have been committed." At the time of its enactment the limitation of prosecution of certain forgeries was two years. Held, that the statute applied to offenses committed before the time of its passage and was valid to extend the two years' limitation to five in a case where, at the time mentioned, the two years had not expired.*

ERROR to Crawford Quarter Sessions to review judgment for defendant on a point reserved upon a trial for forgery. The opinion states sufficient facts.

GREEN, J. We are of opinion that under the 77th section of the Criminal Procedure Act of 31st March, 1860, the limitation of prosecutions for forgery, as a *misdeemeanor*, is two years and not five. It is true the first clause of the section enumerates "forgery" as one of the offenses subject to the five years' limitation, and were there not other considerations affecting the question we should hold that the limitation of five years applied to all forgeries. But the concluding clause of the section positively enacts that all indictments and prosecutions "for all misdemeanors, perjury excepted, shall be brought or exhibited within two years next after such * * * misdemeanor shall have been committed." Of course the Legislature did not intend to say that there should be two different periods of limitation for the same offense, in the same act. As certain forgeries are felonies, and others are misdemeanors, the reasonable construction of the act is that the former are barred only after five years and the latter after two years. The Legislature must have supposed that this was the true interpretation of the act of 1860, because in 1877 they enacted a new law,

* To same effect, *State v. Moore*, 62 N. J. L. 208.—*ED. ALB. L. J.*

making a uniform limitation of five years in all cases of forgery, "whether the same be misdemeanor or felony." They thus recognized the distinction between the two kinds of forgery, and necessarily proceeded upon the assumption that they were not subject to the same limitation, prior to the passage of the latter act. The act would have been useless upon any other theory. If the limitation was five years before, there was no occasion to pass an act to say that thereafter, it should be five years.

The next and more important question is, as to the effect of the act of 1877 upon a case where the forgery was a misdemeanor, and the two years' limitation had not expired at the time of its passage. Such is the present case, and it presents this exact question. The learned judge of the court below held that to apply the law to a case in which the offense had been previously committed, would make it retroactive, and as it related to a criminal subject-matter, it would be an *ex post facto* law, and therefore void under both the Federal and State Constitutions. If this view of the case were correct the conclusion of the court below that the case was subject only to the two years' limitation would be right and we should be obliged to affirm the judgment. But we are quite unable to agree with the reasoning of the learned judge on this subject, and have therefore reached a different conclusion. The language of the act of 1877 is as follows: "That hereafter the offense of forgery, whether the same be a misdemeanor or felony, shall not be held barred by the statute of limitation when the indictment therefor shall have been brought or exhibited within five years next after the offense shall have been committed." It is true that this language, as well as the title of the act, are somewhat indicative of an intent that the act of 1877 should be regarded as declaratory of the meaning of the act of 1860, but we prefer to rest the decision of the case upon a larger and broader ground. It is contended that the word "hereafter," in the connection in which it occurs, imports that the act was only intended to apply to cases in which the offense was committed after the passage of the act. We cannot so read it. The word "hereafter" in the act is connected with and qualifies the expression, "shall not be held barred," etc. That is, hereafter, when the statute of limitations is pleaded to an indictment for forgery, it shall not be held barred, if it shall have been brought within five years after the commission of the offense. The defendant would have us read the word "hereafter" as relating to the time of the commission of the offense, whereas in truth it relates only to the time when the question is raised, and the court is required to decide it. "Hereafter it shall not be held," etc., is the precise connection of the words. This is rendered quite plain by simply transposing the word to its more appropriate position and reading it thus: "That the offense of forgery, whether the same be misdemeanor or felony, shall not hereafter be held barred by the statute of limitation when the indictment therefor shall have been brought or exhibited within five years next after the offense has been committed." It is argued by the learned judge that the act is *ex post facto* if applied to past offenses, and he bases his reasoning upon the very precise and comprehensive definition given by the present chief justice in his valuable edition of Blackstone's Commentaries, vol. 1, p. 47. That definition is as follows: "An *ex post facto* law is one which renders an act punishable, in a manner in which it was not punishable when it was committed. Every law that makes an act done before the passing of the law, and which was innocent when done, criminal, or which aggravates a crime and makes it greater than it was when it was committed, or which changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed, or which alters the legal rules of evidence, and

makes less or different testimony than the law required at the time of the commission of the offense, sufficient, in order to convict the offender, falls within this definition." The learned judge of the court below argues that it would be altering the legal rules of evidence to apply the new bar of five years to a case which was only subject to the bar of two years when the offense was committed. The reasoning is that the Commonwealth in the one case would be required to prove that the offense was committed within two years, and in the other within five years, and because five years are more than two "the testimony required of the Commonwealth in the former case is less than in the latter." This argument assumes that there is something more to be proved than the commission of the offense. But it will be seen at once that whether the bar be five years or two years, the proof of the Commonwealth is precisely the same in either case. The period of limitation is not a subject of proof at all. The Commonwealth proves that the offense was committed, giving the circumstances in evidence, and necessarily, as a part of the *factum*, the time when it was committed. If then it happens that the law interposes a bar to a conviction if the offense was committed more than two years before the finding of the indictment, and such was the fact in a given case, there can be no conviction. But if the bar were five years the freedom from conviction would not arise till after five years had elapsed. In each case the actual proof is precisely the same. The Commonwealth proves no more and no less in one case than in the other. Hence both the *quantum* of proof and the rules of evidence are the same in both cases and there is no change in these respects in changing the time of the bar.

At the time the act of 1877 was passed the defendant was not free from conviction by force of the two years' limitation of the act of 1860. He therefore had acquired no right to an acquittal on that ground. Now an act of limitation is an act of grace, purely, on the part of the Legislature. Especially is this the case in the matter of criminal prosecutions. The State makes no contract with criminals, at the time of the passage of an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare. Such being the character of this kind of legislation, we hold that in any case where a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against *ex post facto* laws. A law enlarging or repealing a statutory bar against criminal prosecutions may therefore apply as well to past as to future cases if its terms include both classes. Such legislation relates to the remedy only and not to any property right or contract right. The act of 1877, in the present case, was legally operative to enlarge the period of limitation as to the defendant, he having acquired no right of acquittal by virtue of the previous limitation, at the time of the passage of the act. It follows from these considerations that the learned judge of the court below was in error in entering judgment in favor of the defendant on the point reserved and in arresting the judgment. That retroactive legislation is not necessarily unconstitutional, especially where it only affects remedies, has been so many times decided that a mere reference to some of the authorities will be sufficient. *Satterlee v. Matthewson*, 16 S. & R. 179; *Hepburn v. Curtis*, 7 Watts, 300; *Kenyon v. Stewart*, 8 Wright, 191; *Shenley v. Commonwealth*, 12 Casey, 29; *Waters v. Bates*, 8 Wright, 473.

Judgment reversed.

JOINT ACTION AGAINST SEVERAL WRONG-DOERS.

CALIFORNIA SUPREME COURT, DECEMBER 13, 1880.

HILLMAN v. NEWINGTON ET AL., Appellants.

Eight persons, each acting independently, diverted water from a creek whereby plaintiff was deprived of the quantity of water from such creek to which he was entitled. *Held*, that plaintiff could maintain an action for such diversion against the eight persons jointly.

ACTION to enjoin the diversion of water, and for damages. The facts appear in the opinion.

E. V. Spencer, for appellants.

J. S. Chapman, for respondents.

SHARPSTEIN, J. The respondent Hillman brought an action against eight defendants, the appellants herein, and alleged that he was entitled by virtue of a prior appropriation to 1,600 inches of the water flowing in a stream known as Willow creek, and that the appellants diverted the waters of said creek from the natural channel thereof so as to prevent them from flowing into the plaintiff's ditches, and thereby deprived him of the water to which he was entitled. He further alleged that the defendants threatened, and intended unless restrained by an order of the court, to continue said diversion and deprivation, and prayed that they be enjoined from so doing. There are other allegations of damages, and a demand of judgment therefor. Most of the material allegations of the complaint are specifically denied by the defendants. They first "deny that they have any joint interest in the subject-matter of this action or that they have jointly done any act or thing mentioned in the complaint; or that they are jointly liable to the plaintiff in any matter or thing connected with or growing out of the subject-matter of the action, either of the matters or things mentioned or set out in the complaint, or of the matters hereafter mentioned and set out in this answer.

"And the defendants aver that their rights and interests in all matters connected with the subject-matter of this action are separate and independent of each other, and that for these reasons they are improperly joined as defendants in this action."

Afterward they allege that each of the defendants is the owner and in the actual possession of a separate and distinct tract of land, and that each of them has, without any connection with any other, diverted a distinct and separate part of the water of said creek for his individual use. In other words, that they have acted severally and not jointly in the premises.

The court found that the rights of the plaintiff to 400 inches of the waters of said creek, measured under a four-inch pressure, were prior and paramount to the rights of the defendants or any of them in said waters; and that the defendants had severally and not in concert diverted said waters to such an extent that said 400 inches "did not pass down to the heads of plaintiff's ditches." The judgment of the court is that the defendants be perpetually enjoined from "diverting said waters or any part of them from their natural channel during the months of April, May and June of each year to such an extent as that 400 inches of water measured under a four-inch pressure shall not pass down the channel of Willow creek below the head of the defendant Newington's ditch and to the head of the plaintiff's upper ditch;" and that the plaintiff recover of the defendants \$1 damages and the costs of suit, taxed at \$787.01; and that as between the defendants the costs and damages should be apportioned. From that judgment the defendants appeal.

The point most strongly pressed upon our attention by appellants' counsel is that there is a misjoinder of

parties defendant, because they did not act jointly or in concert in diverting the plaintiff's water. It does appear, however, that the plaintiff is entitled to a certain quantity of water, of which he is deprived by the defendants. None of them have a right to use any of the water of Willow creek unless there is more than 400 inches flowing in it. If there be more than that amount flowing in it at any time, the plaintiff has no interest in the surplus. What the respective rights of the defendants may be in it in no way concerns him.

It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water. And the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action no wrong could be committed, and we think that in such a case all who act must be held to act jointly.

If there be a surplus, the defendants can settle the priority of right to it among themselves. That can in no way affect the plaintiff's right to the amount to which he is entitled. It does not seem to us that the defendants' answer that each one of them is acting independently of every other one, shows that the wrong complained of is not the result of their joint action; and if it does not the answer in that respect is insufficient to constitute a defense. The case, so far as we are advised, is *sut generis*. No parallel case is cited by either side. The objection that the judgment does not apportion the payment of the damages and costs equally between the defendants can be obviated by a modification of the judgment in that respect. And it is ordered that it be so modified, and with that modification it is affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

BOUNDARY—RIPARIAN OWNER—FIXED MONUMENT—ADVERSE POSSESSION—FENCES UPON LANDS NEAR TIDE-WATER—REMOVAL OF FENCE IN WINTER.—(1) In an allotment by a town of lands near the sea to defendant's predecessor in title, the tract was described as bounded "westerly by the cliff." The title of the town extended to high-water mark. At the time there was a strip of land between the cliff and high-water mark. There was evidence that since the allotment the cliff had been worn away by the sea, and that as it now exists high-water mark is within the boundary of the originally allotted land. *Held*, that the town held the strip of land subject to the incidents attending the title of riparian owners, namely, the gain by alluvion or the loss by the advance inland of high-water mark. *In re Hull & Selby R. Co.*, 5 M. & W. 327; *Scrutton v. Brown*, 4 B. & C. 486; *Phillips v. Rhodes*, 7 Mete. 322. But the boundary by the cliff would not advance or recede, it being a visible monument and there being nothing in the attending circumstances to show that the parties to the allotment apprehended that the shore-line would be materially changed. (2) Upon a strip of land along the shore of tide-water between a cliff on defendant's land and the water, defendant and his predecessors had built and maintained fences at each end across the strip into the water to or near low-water mark for more than twenty years. The fences

across the beach were taken away in winter to prevent them from being carried away by the ice and the tides; the posts were left standing and in the spring the fences were replaced and remained standing until taken away again in the fall. There were bars in the fences. There was no fence in front of the cliff; that side of defendant's land was open to the sea, but the cliff to some extent operated as a barrier for the protection of such land. *Held*, that there was a sufficient substantial inclosure to comply with the statute relating to adverse possession and to authorize a submission of that question to the jury. *Jackson v. Halstead*, 5 Cow. 216; *Becker v. Van Valkenburgh*, 29 Barb. 319. Judgment affirmed. *Trustees of Freeholders and Commonalty of Town of East Hampton v. Kirk*. Opinion by Andrews, J.

[Decided March 1, 1881.]

PRACTICE — CODE, § 451 GENERAL — ORDER NUNC PRO TUNC. — (1) Section 451 of the Code of Civil Procedure "is general, and we think intended to apply to all motions in which service by publication may be made." (2) "The court had power to direct the order in this case to be entered *nunc pro tunc* as of a time anterior to the death of John L. Bergen (a party) who died after argument." Order affirmed. *Bergen v. Wyckoff*. Opinion per Curiam.

[Decided March 8, 1881.]

CARRIER OF PASSENGERS — DUTY OF RAILROAD COMPANY TO PROVIDE SAFE EXIT FROM TRAIN — CONTRIBUTORY NEGLIGENCE — NOT LOOKING FOR APPROACHING TRAIN NOT. — The rule is not that in no case can a person attempt to cross a railroad track without looking for approaching trains without subjecting himself to the imputation of negligence. *Terry v. Jewitt*, 78 N. Y. 338. A passenger, when taking or leaving a railroad car at a station, has the right to assume that the company will not expose him to unnecessary danger, and while he must himself exercise reasonable care, his watchfulness is naturally diminished by his reliance upon the discharge by the company of its duty to passengers, to provide them a safe passage to and from the train. In this case intestate, a girl seventeen years old, who had for some months lived at East Syracuse, and who at the time lived in sight of the station and near to it, rode as a passenger upon one of defendant's trains to that station. The primary purpose of this train was to take defendant's employees to their work, but it also took passengers who paid fare. The train stopped to discharge those riding in it, not at the station but at a point 1,300 feet therefrom, opposite the freight-house and yards, where there were twenty tracks. The train stopped on the third track from the south, the two tracks south of it being used for ordinary passenger trains. There was nothing in the arrangement of the tracks and no planking to indicate in which direction passengers were to leave this train, and when it stopped no instructions were given to passengers what to do when leaving it, or any warning of danger. The employees who left went north to their work. Intestate, after alighting, assisted an aged female companion to alight and they two started to walk toward where Intestate lived, across the south tracks. While so doing they were struck by a passenger train from the east, which was ten or fifteen minutes behind time and running at the rate of thirty-five or forty miles per hour, and killed. If intestate had looked east before attempting to cross the track, she could have seen the approaching train, but she did not do so. At the trial of the action for damages for her death, the court refused to charge that the omission to look to the east was *per se* negligence, but did charge that if deceased knew or had reason to believe that the passenger train was behind time or that it might come along at any moment, then she was bound to look, and an omission

to do so was negligence. *Held* no error. The fact that the deceased did not look for the approaching train was a material and important fact to be considered by the jury upon the point of contributory negligence; but her omission to do so was not in law decisive against a recovery. Judgment affirmed. *Brassell v. New York Central & Hudson River Railroad Co.* Opinion by Andrews, J.

[Decided March 1, 1881.]

SALE — OF PERSONAL PROPERTY — TITLE — CONDITIONAL SALE DISTRESS FOR RENT — NEW JERSEY STATUTE. — (1) B, who had a lease of real estate of defendant's intestate and owned personal property thereon, leased the unexpired term to E., with a right to use the personal property, and made a conditional agreement to sell the personal property to E., but if E. failed to perform the conditions, B. was authorized to repossess himself of such property. On the 27th November, 1890, for a valuable consideration, the intestate of B. was transferred to plaintiff by an assignment, and a more specific transfer was made by a bill of sale, upon May 8, 1891. *Held*, that the effect of the transfer was to vest in plaintiff a title to the personal property, and upon a default being made by E., plaintiff had a right to take possession of the same. *Cole v. Mann*, 62 N. Y. 1. *Held*, also, that a provision in the agreement between B. & E. in regard to a re-entry and a sale, and the application of the proceeds to the payment of notes of E. and rents, did not transfer such a title to E. as rendered the property subject to the claim of intestate for rents due and to become due, nor vest an interest in the intestate for her benefit, within the principles decided in *Lawrence v. Fox*, 20 N. Y. 268; *Garnsey v. Rogers*, 47 id. 233; *Simson v. Brown*, 68 id. 355. (2) The statute of New Jersey authorizes a landlord to "take and seize as a distress for arrears for rent, any of the goods and chattels of his tenant, and not of any person, although in possession of such tenant, which may be found on the demised premises," and also provides that such distress must be made within six months after the rent is due. *Held*, that the statute limits the time in which distress must be made, but does not in any form render property which has been sold before the warrant of distress has been issued, liable to levy and sale. The property in question was not liable for rent in arrears, though it remained on the demised premises after the sale to plaintiff. See *Woodside v. Adams*, 40 N. J. Law, 417; *Allen v. Agnew*, 24 id. 443; *Hamilton v. Hamilton*, 25 id. 544. Judgment affirmed. *Bean v. Edge*. Opinion by Miller, J.

[Decided March 15, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

FRAUDULENT CONVEYANCE — DISCHARGE IN BANKRUPTCY OF DEBTOR NOT AVAILABLE TO GRANTEE — PLEADING EVIDENCE. — In an action to set aside a conveyance by a judgment debtor as fraudulent, the grantee set up that the debtor had been discharged in bankruptcy and that the debt on which the judgment was founded existed at the time of and was released by the discharge. The answer made no statement that any assignee was appointed in the proceedings for bankruptcy. The judgment debtor made no answer. *Held*, that the effect of the discharge was personal to the judgment debtor and did not avail to release the grantee from the fraud committed by him, and further, that it was not allowable under the answer to show that an assignee had been appointed for the purpose of defeating plaintiff's right to bring the action. Judgment of the New York Court of Appeals affirmed. *Moyer v. Dewey*. Opinion by Miller, J.

[Decided March 7, 1881.]

MANDAMUS — DECISION OF INFERIOR COURT WITHIN JURISDICTION NOT REVIEWABLE BY. — An application was made in this court for a mandamus requiring a district judge to compel a witness to obey the command of a *subpoena duces tecum*, and produce before a special examiner certain patterns, that testimony might be taken respecting them, to be certified and used on the hearing of an equity cause pending in a Circuit Court. From the application it appeared that the judge had already acted on the identical showing made to this court, and for reasons assigned in writing denied a motion for an attachment against the person named for refusing to obey the subpoena. *Held*, that the application would not be granted. A mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting (*Ex parte Railroad Co.*, 101 U. S. 729), or to reverse its decisions when made. *Ex parte Flippin*, 94 id. 350. The district judge took jurisdiction of the matter, as it was his duty to do, heard the parties, and decided adversely to the claim of the petitioner. In this he may have done wrong, and the reasons he has assigned may not be such as will bear the test of judicial criticism, but this court cannot, by mandamus, compel him to undo what he thus has done in the exercise of his legitimate jurisdiction. Application denied. *Ex parte Matter of Burtis*. Opinion by Waite, C. J. [Decided March 7, 1881.]

CANNOT BE USED IN PLACE OF WRIT OF ERROR — JURISDICTION UNDER STATUTE RELATING TO DISTRICT OF IOWA. — (1) A mandamus cannot be used as a writ of error to bring into this court for review the judgment of the Circuit Court upon a plea to the jurisdiction filed in the suit. (2) Under U. S. R. S., § 730, no civil suit, not local in its nature, can be brought in the Circuit Court of the United States against an inhabitant of the United States, by original process, in any other State than that of which he is an inhabitant or in which he is found at the time of serving the writ. An act relating to the holding of Federal Circuit Courts in Iowa (21 Stat. 155, ch. 129) divides that district into four divisions and requires suits against an inhabitant of the district to be brought in the division in which he resides, but provides that "where the defendant is not a resident of the district, suit may be brought in any division where property of the defendant is found." *Held*, that the provision last mentioned applied only to suits which may be properly brought in the district against a non-resident. Such a suit, if not local, must be in the division where the defendant is found when served with process; if local, in the division where the property which is the subject-matter of the action is situated. An inhabitant of Massachusetts in a suit not local, not found or served with process in Iowa, could not be sued and no attachment could issue against his property. Application denied. *Ex parte Des Moines & Minneapolis Railroad Co.* Opinion by Waite, C. J. [Decided March 21 1881.]

TAXATION — OF MONEY EMPLOYED IN EXPORT TRADE UNDER STATE LAW. — The New York statute relating to taxation provides that all lands and all personal estate within that State, whether owned by individuals or by corporations, shall be liable to taxation, subject to certain exemptions thereafter specified. It also declares that "the terms 'personal estate' and 'personal property,' whenever they occur, shall be construed to include all household furniture; moneys; goods; chattels; debts due from solvent debtors, whether on account, contract, note, bond or mortgage; public stocks; and stocks in moneyed corporations," etc. H., a resident of New York, was assessed upon his personal estate exclusive of bank stock as of the 1st of January, 1878, at \$60,000. He claimed in an

affidavit for reduction that, except \$5,500, during all the period covered by the assessment all his personal estate was "continuously employed in the business of exporting cotton from the United States of America to foreign countries, through the customs department of the United States aforesaid, and that said employment consists in purchasing and paying for the cotton in different States of the United States, and actually exported by deponent in said business, and for the payment of all the expenses of shipping the same as such exports," and that the only portion of his estate upon which he is liable to be assessed and taxed was the sum of \$5,500. In his examination before the tax commissioners he stated that his capital was uniformly and continuously invested in cotton situated outside of New York, and in transit to New York and other points, for the sole purpose of exportation, and that no part of the cotton was sold or intended to be sold in New York, etc. He alleged the assessment of such cotton to be in violation of the Federal Constitution as being a duty on exports and as an interference by a State with the regulation of commerce. *Held*, that there was not sufficient to exempt H. from taxation as claimed. If the capital was in fact in money on the first day of January, 1876, he could not escape a subsequent assessment of that money upon the ground that at the time the assessment was made it was invested in cotton for exportation to foreign countries. His capital may have been, in a business or mercantile sense, continuously so employed, and yet it may not have been in fact so invested at the date to which the assessment, whenever made, relates. Judgment of New York Supreme Court (affirmed by New York Court of Appeals) affirmed. *People ex rel. Harman v. Commissioners of Taxes and Assessments of City of New York*. Opinion by Harlan, J. [Decided Feb. 28, 1881.]

MAINE SUPREME JUDICIAL COURT ABSTRACT.*

ATTORNEY — DUTY OF COURT TO DISBAR ONE UNFAITHFUL TO CLIENT. — When it is shown to the court that an attorney at law has violated his official oath, in that he has not conducted himself in his office with all good fidelity to his clients, the court is not only warranted but required to remove such a one from the office of attorney and counselor of this court. In this case the accused person was charged with having obtained from a woman who sought his advice a bill of sale of goods to him; with thereafter inducing her to leave the State by a false representation that she was about to be arrested by an officer; and with taking possession of the goods covered by the bill of sale and refusing to surrender them to the woman when demanded. *Held*, that the acts charged were sufficient to warrant the disbaring of such person. *Strom v. Proctor*. Opinion by Virgin, J. [Decided July 1, 1880.]

EQUITABLE ACTION — BILL TO REMOVE CLOUD FROM TITLE. — A bill in equity will not be sustained to cancel or remove an alleged cloud upon the title when the invalidity of the agreement, deed or other instrument constituting such alleged cloud, is apparent on its face. Nor when the invalidity of a tax title is involved when the deed is void on its face. *Marsh v. City of Brooklyn*, 60 N. Y. 280; *Newell v. Wheeler*, 48 id. 486; *Boeker v. Lansing*, 74 id. 437; 1 Story's Eq. Jur., § 700; *Cox v. Clift*, 2 N. Y. 118. *Briggs v. Johnson*. Opinion by Appleton, C. J. [Decided June 4, 1880.]

MUNICIPAL CORPORATION — TOWN MANAGING FARM LIABLE FOR INJURY FROM VICIOUS ANIMAL OWNED BY

* To appear in 71 Maine Reports.

TR.—A town lawfully owning and managing property for purposes of gain incurs the same liability for the negligence of its agents and servants in its management as persons. A town may lawfully own and carry on a farm on which to keep and support its poor, and employ such of them as are able to labor. This power carries with it the power to stock it and manage it for purposes of gain in a manner comporting with the ordinary management of such property among farmers. This embraces the raising of cattle, horses, swine and sheep; and for the propagation of sheep it may lawfully own and keep a ram. For the proper keeping and restraining of it, when kept for such purpose, it rests under the same liability as persons; and if the ram is vicious and known to be by the town, and by reason of the negligence of the servants of the town it damages any person, the town is liable. *Small v. Danville*, 51 Me. 359; *Woodcock v. Calais*, 66 id. 234; *Oliver v. Worcester*, 102 Mass. 489; *Eastman v. Meredith*, 30 N. H. 285; *Mersey Docks Trustees v. Gibbs*, L. R., 1 H. L. 93; *Dill. on Mun. Corp.*, § 780, note. *Moulton v. Town of Scarborough*. Opinion by Libbey, J. [Decided June 28, 1890.]

SUNDAY—CONTRACT MADE ON, VOID.—Where the signing of an order, drawn by P. upon J. P. in favor of M., the acceptance, the delivery and the payment by M. to P. of the amount represented by the order, was all done on the Lord's day, in order that in that way J. P. might pay a sum due for labor to P. who was about to leave, *held*, that this was not a work "of necessity or charity," and that M. cannot recover of J. P. the amount so paid by him upon such accepted order because the whole transaction, upon which the claim to recover rests, is in violation of the statute. *Puttee v. Greely*, 13 Metc. 234; *Meador v. White*, 66 Me. 90; *Plaisted v. Palmer*, 63 id. 578. *Mace v. Putnam*. Opinion by Appleton, C. J. [Decided June 4, 1890.]

KANSAS SUPREME COURT ABSTRACT.

JULY TERM, 1890.*

ALTERATION OF NOTE—PAYMENT IN IGNORANCE THEREOF—RECOVERY.—Plaintiff was an accommodation maker of a note discounted and owned by the First National Bank of Wichita. While in the possession of the bank it was so materially altered by the officers of the bank, and without his knowledge or consent, as to render the paper void. Nevertheless, it being presented to him for payment, he, in ignorance of the alteration and without any critical examination to see that there had been no alteration, took it up, giving therefor certain money due by the bank to him, and four new notes to make up the difference. *Held*, that he might recover from the bank the money thus given to it, as money paid by mistake of fact, it appearing that there had been no change in the circumstances of the bank which would render it inequitable and unjust to refund it. In 2 Dan. Neg. Instr., § 1209, it is said: "It is a general principle of law, that money paid under a mistake of fact may be recovered back. And now the doctrine is favored that even negligence in making the mistake is no bar to recovery." In *National Bank of Commerce v. National M. B. A.*, 55 N. Y. 211, the court thus states the law: "It is now settled, both in England and in this State, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." See, also, *Lawrence v. American Nat. Bk.*, 54 N. Y. 436. *Fraker v. Little*. Opinion by Brewer, J.

* To appear in 24 Kansas Reports.

NEGLECT—INJURY TO CHILD OF TENDER YEARS ON CARS WITHOUT RIGHT—IMPUTED NEGLIGENCE—INEVITABLE ACCIDENT.—The plaintiff below, a little girl less than five years old, and another little girl about the same size, but older, were put into a railroad passenger car of defendant below, at White Cloud, Kansas, by an aunt of the plaintiff, with the intention that they should ride in such car to Iowa Point; and the little girls did ride in such car, along with several passengers, from White Cloud to Iowa Point, but without being in the care or custody of any person, without paying any fare, or having any ticket or money with which to pay fare, and without any intention, on their part or on the part of the plaintiff's aunt, that they should pay fare; and neither the conductor nor any other agent of the defendant asked them for fare; but it was a rule of the defendant not to take fare from children of the age of the plaintiff, who were in the custody of some older person who did pay fare, and such children were not allowed to ride in the cars except in the custody of some older person to take care of them; and no agent or employee of the defendant had any knowledge that the little girls had no guardian or protector on the train to take care of them, or that they wanted to get off the train at Iowa Point. The train stopped at Iowa Point a sufficient length of time for all passengers who wanted to get off, or to get on, to do so, and after the train had started, and while it was in motion, the little girls attempted to get off, and a man, who was a passenger on the train, assisted them; and the little girl who accompanied the plaintiff stepped off the train in safety, but when the plaintiff stepped off (being assisted by said passenger), she fell, and rolled off the station platform upon the ground between the platform and the car, and throwing her legs in front of the hind trucks of the car, the trucks ran over her legs and crushed them. *Held*, that the defendant was not liable for damages on account of the accident; that no person can be held responsible for an unforeseen accident which incidentally occurs while he is in the rightful and proper exercise of his lawful business. *Atchison & Nebraska Railroad Co. v. Flinn*. Opinion by Valentine, J.

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

DECEMBER, 1890.

BANKRUPTCY—CREDITOR WHOSE DEBT IS UNDERSTATED, NOT BOUND BY COMPOSITION.—In a composition in bankruptcy, the debt due a creditor was stated at less than its actual amount; the creditor did not join in the resolution for composition nor accept any money under it, but objected to its being recorded. *Held*, that he was not bound by it. A creditor whose name or the amount of whose debt is not shown in the statement of the debtor, is not bound by a composition in bankruptcy. If his debt is stated at less than its true amount, the composition is no more binding on him than if he is not named in the statement at all. In either case he would not obtain under the composition a like proportion of his actual debt with the other creditors, and may sue upon his debt, as if no proceedings in composition had been had. *Pratt v. Chase*, 122 Mass. 262; *Woolley v. Hogan*, 124 id. 497; *Ex parte Lang*, L. R., 5 Ch. D. 791. *Hewes v. Rand*. Opinion by Gray, C. J.

CONFLICT OF LAW—CHILD ADOPTED IN ONE STATE HAS SAME RIGHTS OF INHERITANCE IN ANOTHER STATE HAVING SIMILAR LAWS—INHERITANCE.—A child adopted with the sanction of a judicial decree and with the consent of his father, by another person, in Pennsylvania, where the parties at the time had their domicile, under statutes substantially simi-

lar to those of Massachusetts, and which like those give a child so adopted the same rights of succession and inheritance as legitimate offspring in the estate of the person adopting him, is entitled, after the adopting parent and the adopted child have removed their domicile into Massachusetts, to inherit the real estate of such parent in that State, upon his dying there intestate. It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property, is fixed by the law of the domicile; and that this status and capacity are to be recognized and upheld in every other State, so far as they are not inconsistent with its own laws and policy. Subject to this limitation, upon the death of any man, the status of those who claim succession or inheritance in his estate is to be ascertained by the law under which that status was acquired; his personal property is, indeed, to be distributed according to the law of his domicile at the time of his death, and his real estate descends according to the law of the place in which it is situated; but in either case it is according to those provisions of that law which regulate the succession or the inheritance of persons having such a status. See *Ross v. Ross*, 123 Mass. 212. *Ross v. Ross*. Opinion by Gray, C. J.

CRIMINAL LAW — BURGLARY — VARIANCE — INTENT ALLEGED MUST BE PROVED. — The indictment charged that defendant broke and entered a certain building, belonging to the Warren Institution for Savings, "with intent then and therein to commit the crime of larceny, and the property, goods and chattels of the said corporation in said building then being found, then and there in said building, feloniously to steal, take and carry away." At the trial the evidence was that defendant broke and entered the basement of the building in question, and worked his way into a part of the first story, occupied by the United States for a post-office; and that the sole intent of the defendant was to steal some postage stamps belonging to the United States. *Held*, that there was a fatal variance between the indictment and the proof. The intent with which the defendant broke and entered the building is an essential element of the crime, and must therefore be alleged in the indictment, and must be proved as laid. A charge of breaking and entering with intent to steal the goods of one person is not supported by proof of breaking and entering with intent to steal the goods of another. *Jenk's case*, 2 East's P. C. 514; *Commonwealth v. Shaw*, 7 Metc. 52; *Commonwealth v. Hartwell*, 128 Mass. 415; *Commonwealth v. Jeffries*, 7 Allen, 548, 571. *Commonwealth of Massachusetts v. Moore*. Opinion by Gray, C. J.

IOWA SUPREME COURT ABSTRACT. DECEMBER, 1880.

CORPORATION — OFFICER CANNOT RECOVER FOR SERVICES IN ABSENCE OF AGREEMENT — AGREEMENT WITH CORPORATORS BEFORE INCORPORATION DOES NOT BIND CORPORATION. — Defendant claimed to recover for his services as vice-president of a corporation. *Held*, that he could not recover for such services, if ordinary services, in the absence of a special agreement by the corporation to that effect, and that any thing that was said and done before the organization of the corporation by the corporators will not be evidence of an agreement. The rule is that when an officer of a corporation performs the usual and ordinary duties of his office, as defined by the charter or by-laws, he cannot recover compensation therefor, unless it has been so specially agreed. He cannot in such case recover what the services are reasonably worth. *New York & H. R. Co. v. Ketchum*, 27 Conn. 180; *Loan Ass'n v. Stonemetz*, 29 Penn. St. 534; *Merrick v. Peru*

Coal Co., 61 Ill. 472; *Cheney v. L. B. & M. R. Co.*, 68 id. 570; *Holder v. L. B. & M. R. Co.*, 71 id. 103; *Kirkpatrick v. Penrose Bridge Co.*, 49 Penn. St. 121. It was immaterial what was said as to salaries before the corporation was organized. The corporation not being then in existence could not be bound by what was said or agreed upon. The fact the services were performed after the corporation was organized can make no difference, unless there was an agreement by the corporation to pay therefor. The mere performance of services is not sufficient. See *Bliss v. Matteson*, 45 N. Y. 23; *Railroad Co. v. Sage*, 65 Ill. 328; *Hall v. Railroad Co.*, 28 Vt. 406. *Citizens' National Bank v. Elliott*. Opinion by SeEVERS, J.

EMBLEMENTS — PURCHASER NOT ENTITLED TO CROPS MATURED BEFORE TIME OF REDEMPTION FROM SHERIFF'S SALE BUT NOT CUT. — The time of redemption under a sheriff's sale upon the foreclosure of a mortgage expired August 15, and a deed was given the purchaser that day. At the time there was on the land uncut grain belonging to the tenant of the mortgagor. This grain was mature and ready to cut but rainy weather prevented its being cut before the deed was executed. *Held*, that the grain did not pass to the purchaser. The sheriff's deed vested the purchaser with the title of the land, and the right to all growing crops followed the title thus acquired. *Downard v. Graff*, 40 Iowa, 597. This rule is not applicable to grain which has matured and is ready for the harvest. It then possesses the character of personal chattels, and is not to be regarded as a part of the realty (1 School. Pers. Prop. 125, 126; *Bing on Sales*, 180, 181) for these reasons: The grain being mature, the course of vegetation has ceased and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. It no longer demands nurture from the soil. The ground now performs no other office than affording a resting place for the grain. It has the same relations to the grain that the warehouse has to the threshed grain, or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting it, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing. It is no longer living blades, which require the nourishment of the soil for its existence and development. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now the mature grain is not regarded by the law, like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil. *Hecht v. Dittman*. Opinion by Beck, J.

TAXATION — EXEMPTION FROM GENERAL TAXES DOES NOT INCLUDE SPECIAL ASSESSMENT FOR SIDEWALK. — Under a statute of Iowa relating to revenue or ordinary taxes, it is provided that certain classes of property, including that of a school district, when devoted entirely to the public use "are not to be taxed, and they may be omitted from the assessments herein required." *Held*, that the exemption from assessment did not extend to a special assessment for a sidewalk in front of a school-house not imposed under the statute referred to but under another relating to cities. Taxation is the rule and exemption the exception, and therefore strict construction of the statute under which the exemption is claimed is the rule. *Trustees of Griswold College v. State*, 46 Iowa, 275; *Cooley on Taxation*, 146, 148. In the leading case of *Application of Mayor of New York*, 11 Johns. 77, church property was exempted from being "taxed by any law of the State," and it was held this had reference to the general and public taxes only, and did not apply to assessments made for enlarging and improving a street. To the same effect are *Buffalo City Cemetery v. Buffalo*,

46 N. Y. 508; *Northern Liberties v. St. John's Church*, 13 Penn. St. 107; *City of Bridgeport v. N. Y. & N. H. R. Co.*, 30 Conn. 281; *Boston Seaman's Friends Soc. v. Boston*, 118 Mass. 181; *Dunleith & Dubuque Bridge Co. v. City of Dubuque*, 33 Iowa, 437. *City of Sioux City v. Independent District of Sioux City*. Opinion by Seevern, J.

FINANCIAL LAW.

CORPORATION—UNLESS AUTHORIZED MAY NOT HOLD STOCK IN ANOTHER, AND CANNOT COMPEL TRANSFER.—Plaintiff and defendant were corporations organized under the Ohio banking law. Such law forbids a corporation organized under it, under penalty of forfeiture of its charter, from being a holder or purchaser of any of its stock, or of the stock of any other incorporated company, unless such purchase should be necessary to prevent loss upon a debt previously contracted in good faith, on security, which at the time was deemed adequate to insure the payment of such debt independent of any lien upon such stock. The plaintiff loaned to F., president of the defendant, \$10,000 on his individual account, and received as security for the loan a certificate owned by F. of 200 shares of the capital stock of the defendant. The plaintiff presented said certificate to the defendant at its place of business and demanded a transfer of said shares to the plaintiff on the books of the company, which was refused, whereupon the plaintiff brought an action against the defendant for the conversion of said stock, founded on said refusal to transfer the same to the plaintiff. Held, that the plaintiff was not entitled to said transfer, and consequently that the defendant was not liable for refusing to make or permit it. Independently of statute, one corporation cannot become a stockholder in another. *Mutual Savings Bank v. Meridan Agency*, 24 Conn. 159; *Franklin Co. v. Lewiston Savings Bank*, 68 Me. 43; *Central R. Co. v. Collins*, 40 Ga. 582; *Sumner v. Maxey*, 8 W. & M. 105. That the stock was transferred to the corporation as a pledge would not affect the result. A person in whose name stock stands on the books of a corporation is, as to such corporation, a stockholder. *State v. Ferris*, 42 Conn. 509; *In re Barker*, 8 Wend. 509; *Hopkin v. Buffum*, 9 R. I. 513; *Field on Corp.*, § 69. This court has uniformly adhered to the doctrine in *Strauss v. Eagle Insurance Co.*, 5 Ohio St. 59, that corporations have such powers only as the act creating them confers, and are confined to the exercise of those expressly granted and such incidental powers as are necessary to carry into effect those specifically conferred. *Bank of Buffalo v. Toledo Ins. Co.*, 12 Ohio St. 601. To the same effect see *Thomas v. Railroad Co.*, 101 U. S. 71; *Ashbury Railway Car Co. v. Riche*, L. R., 7 H. L. 653. It was not the duty of the defendant to make the transfer when the same was demanded, and leave the State to impose the penalty of forfeiture on the plaintiff for a violation of its charter. The cases of *Union Nat. Bank v. Matthews*, 98 U. S. 631, and *Jones v. Guaranty & Indemnity Co.*, 101 id. 692, do not support a contrary proposition. Ohio Supreme Court, January, 1891. *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*. Opinion by Boynton, J.

— **THAT PURCHASE OF STOCK WAS INDUCED BY FALSE REPRESENTATIONS DOES NOT RELIEVE STOCKHOLDER FROM LIABILITY AS SUCH.**—In an action against defendant as a stockholder in a corporation to enforce the statutory liability for debts due from the corporation, one defense was that defendant was induced to become a stockholder by false and fraudulent representations by the president of the company; that the stock was full paid capital stock upon which there was no liability of the stockholders. Held, that the defense was not available. See *Oakes v. Turquand*,

L. R., 2 H. L. 335. Where a man has become a stockholder, no misconduct of the company or false representations made by them to induce him to take shares will release him from bearing the responsibility which he owes to creditors whatever effect it may have between himself and other creditors. *Henderson v. Royal British Bank*, 7 El. & Bl. 350; *Powls v. Harding*, 1 C. B. (N. S.) 633. In *Matter of Reciprocity Bank*, 22 N. Y. 17, it is said: "A person may show, in exoneration of himself, that his name was placed on the books of the bank without his authority. But if a party makes an actual purchase of shares, whether from the corporation or an individual stockholder, and voluntarily allows himself to be represented to the world as a stockholder, he must take the responsibility of the situation, that equities may exist between him and other parties, but the statute has no regard for such questions. He cannot disown the ownership when it ceases to be a benefit and becomes a burden." See *Ruggles v. Brook*, 6 Hun, 164; *Ellis v. Schmoock*, 5 Bing. 521; *Spear v. Crawford*, 14 Wend. 24. When a person has, through fraudulent representations of the seller of the stock or of the company, become a stockholder in a corporation where a personal liability to creditors may by statute arise, he can in the appropriate action, after tendering the stock to the person or company who fraudulently induced him to buy it and demanding back what he gave for it, be reimbursed for any loss or damage he has sustained, and be relieved thereafter from any further liability as a stockholder; but whilst he continues to be a stockholder his liability under the statute to creditors continues. *Wright's case*, L. R., 12 Eq. 351; *Clarke v. Dickson*, 1 E. B. & R. 148. And where by further inquiry he could at the time he purchased become aware of the liability he assumed, it would be his duty to make such inquiry. *Upton v. Tribilcock*, 1 Otto, 54; *Peel's case*, L. R. 2 Ch. 684; *Kincald's case*, id. 426. New York Common Pleas, Gen. Term, Jan. 3, 1891. *Briggs v. Cornwell*. Opinion by Daly, C. J.

NEGOTIABLE INSTRUMENT—INDORSEMENT—PAYMENT.—A note made payable to the maker's own order and indorsed by him, thereby becomes payable to the bearer. When a third person, a stranger to such a note, gives the holder his written obligation in consideration of the discounting of the note "to be holden precisely the same as if I had indorsed said note," he does not thereby become a party to the note; and upon non-payment according to its terms by those liable upon the note, if he pay it in pursuance of such written obligation he is entitled to the note undischarged, and to maintain an action on the same in his own name. See *Pacific Bk. v. Mitchell*, 9 Metc. 297; *Pollard v. Ogden*, 75 Eng. C. L. R. 452. Maine Sup. Jud. Ct., June 17, 1890. *Bishop v. Rowe*. Opinion by Danforth, J.

NEW BOOKS AND NEW EDITIONS.

FLANDER'S LIVES OF THE CHIEF JUSTICES.

The Lives and Times of the Chief Justices of the Supreme Court of the United States. By Henry Flanders, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson, 1891. 2 vols. Pp. xxv, 648; xvi, 580.

THIS is a reissue of the work originally published in 1875. It comprises memoirs of Jay, Rutledge, Cushing, Ellsworth and Marshall, and so far is the most exhaustive single history yet furnished of these eminent men. The style is simple and direct. The arrangement is methodical, and the treatment grave, impartial and sincere. The author seems to have had the command of some original sources of information. We have been especially pleased with the accounts of the Jay treaty, and of the mission of Marshall, Gerry



and Pinckney to the French Directory, and the mercenary conduct of Talleyrand and his emissaries. The review of Marshall's great constitutional decisions is eminently interesting at the same time that it is concise and comprehensive. It is to be hoped that the work will be completed with the same research, intelligence and impartiality. It is well printed.

WHARTON'S CONFLICT OF LAWS.

A Treatise on the Conflict of Laws, or Private International Law. By Francis Wharton, LL. D., Member of the Institute of International Law, author of Treatises on Criminal Law, on Evidence, on Negligence, and on Agency. Second edition. Philadelphia: Kay & Brother, 1881. Pp. xvii, 847.

In his preface, Dr. Wharton informs us that since the first edition of this work in 1872, "the literature on the topic has more than doubled," and gives a very interesting account of it. The original work has been remodeled "by reducing that portion of it which gave the views of the older jurists, so as to leave room for the necessary additions." In this way the author has accomplished his purpose "to exhibit private international law as it now is." For the American practitioner this work must at present be unrivalled. It is marked by all the distinguished author's characteristics of indefatigable research and thoroughness, lucid treatment, orderly arrangement and sound judgment. We have been surprised at the exhaustiveness of the notes. No case, even the most recent, seems to have escaped the author's eye. The work is a most desirable member of that unrivalled group which Dr. Wharton has made a monument to his learning and labor. The book is admirably printed.

POLLOCK ON CONTRACT.

Principles of Contract at Law and in Equity; being a treatise on the general principles concerning the validity of agreements, with a special view to the comparison of law and equity, and with reference to the Indian Contract Act, and occasionally to Roman, American and Continental law. By Frederick Pollock, LL. D., of Lincoln's Inn, Esq., Barrister-at-law, late Fellow of Trinity College, Cambridge. First American, from the second English edition. With notes by Gustavus H. Wald, of the Cincinnati Bar. Cincinnati: Robert Clarke & Co., 1881. Pp. lxxvi, 717.

There is certainly no dearth of works on contract, both English and American. Chitty and Addison in England, and Parsons and Metcalf in this country, are admirable and would seem to have exhausted the field. The present work, however, has obtained considerable popularity in England, where the first edition was published in 1878 and the second in 1878 or 1879. At a former time we examined the original edition and formed the opinion that it was a work of decided merits, but unfitted to practical use in this country. This defect has been amended by the copious annotations of the American editor, and the work now assumes an important place in this country. The original edition was of only 600 rather small pages, the difference between that and the present bulk being represented by the American notes. The original table of cases occupied only sixteen pages; the present covers fifty. The annotations seem to have been fairly done and without any "padding." Although an English work with American annotations must always be in some sense inferior to a first rate American treatise, yet on this all-important subject of contract any new light is valuable and every new work is important. The book is not a first rate specimen of printing; the trouble seems to be in the ink and press-work, rather than imperfect typography or poor paper; the result is rather faint. All western law books except those of St. Louis seem like the inhabitants of that region to have suffered from chills and fever.

NOTES.

THE *Ohio Law Journal* says it keeps this JOURNAL in its safe on account of its "notes." They are probably the most valuable "notes" in that safe. — The *London Law Journal* is not satisfied with "the almost contemptuous terms in which the Court of Appeal dismissed *Castro v. Regnum*" — the Tichborne Claimant's case — notwithstanding the affirmation by the House of Lords. — The *American Law Review* for April contains leading articles on Right of a Third Person to sue on a Contract made in his favor, by Henry O. Taylor; and *Lex Loc* in regard to Insolvent Assignments, by Charles R. Darling.

The case of *Lloyd v. Vickery*, recently tried before the Supreme Court of New South Wales, seems to have been somewhat voluminous and tedious. It had been under way seven years. The exhibits and the briefs were delivered to counsel in chiffoniers or cabinets under lock and key, all assorted and pigeon-holed in such a way that they could be attacked systematically and with due deliberation. One witness alone was in cross-examination before the master in equity for sixty-three days. The judge protested against hearing the evidence read, but had to submit, and the reading on one side took a fortnight. The suit involves some half a million dollars. — At a recent mock trial of the Manchester (Eng.) Law Students' Society, the question was of a wife's necessities. The *Law Journal* says: "A great deal of fun was extracted from Mr. Cleworth, who appeared in the box as Mrs. Ethel May Brown, wife of the defendant. He handled a fan and an eyeglass in an extremely ladylike manner, while he smiled on the judge and jury in a most winning style. Mrs. Brown stated that, married in 1872, she had now three children, all of whom had had the measles. She could not speak up well that night because she had had the misfortune to sprain her ankle. She had a private income, but that she used for charitable purposes, the two chief institutions to which she subscribed being the Society for the Abolition of Polygamy among the Aborigines of the North-western Division of South Australia, and the Society for the Better Education of Retired Washerwomen. She spoke to purchasing the goods in question from the plaintiff. She indignantly denied that she was in the habit of frequenting Parker's for luncheon and drinking sherry there, and said she did not know that she had come there to be insulted." (Our Boston brethren will appreciate this reference to "Parker's.") "Mr. J. F. Price appeared as Mrs. Jessie Isabella Anderson, attired in a black cape, and a straw hat trimmed with a large white feather, and tied under the chin with an immense bow of white lace. In answer to questions she declared that living in a similar house to Mrs. Brown, and having the same number of children, she could keep her establishment going on 150*l.* a year; in fact that was all her husband allowed her, and she managed on it." A barrister presided. The jury and witnesses were sworn on a volume of the *Law Journal Reports*, as was very proper.

De minimis is illustrated in *People v. Hoffman*, 57 Ill. 234. The clerk, in issuing a *captas*, used a printed blank with the figures "187—," drew his pen through the 7, and inserted "80," leaving the 7 still legible. Held, that the date must be deemed 1880 and not 18780. So in *State v. Green*, 32 La. Ann. 782, "cash made and provided," in an indictment, was held to answer for "cash made and provided." In *State v. Ross*, 33 La. Ann. 854, the verdict was written "guilty without capital punish," but being read correctly by the clerk to the jury and so assented to by them, it was held valid.

The Albany Law Journal.

ALBANY, APRIL 16, 1881.

CURRENT TOPICS.

A CORRESPONDENT writes to us combating the idea, which he thinks we have advanced, that codification of the common law will cheapen lawyers' charges. He quotes Cicero at some length, and concludes that the remedy is not to be found in legislative enactments. Our correspondent has entirely missed the point. Our remarks were to the effect that there is a popular belief that lawyers' charges are excessive, and that the result of codification would be—not to cheapen lawyers' charges—but to afford a cheaper system. The abolition of the Court of Chancery in this State was due in a great measure to the popular belief that it was an unduly tedious and expensive system, and that the Code of Procedure proposed a more prompt and a cheaper one. That result we believe has been attained. So now, we believe, the acceptance of general codification would simplify and cheapen justice as a system, and while it would not cheapen the lawyers' charges for a specific piece of service, it would dispense with some service now requisite—shorten and consequently cheapen litigation.

A curious case of contempt arose in *Plating Company v. Farquaharson*, Ch. Div., March 18, 1881. The plaintiff had obtained an injunction restraining the defendant from infringing their patent for nickel-plating. After the trial the plaintiffs inserted advertisements in certain papers warning electro-nickel platers and dealers that they should enforce their patent right against all infringers. The defendant had caused to be inserted in the same papers another advertisement, which stated that the above action had been decided against him, but that he proposed "to carry the case to the Court of Appeal, provided the trade will come forward and provide the necessary funds for doing so;" the advertisement also stated that the above action was a "test action," and then proceeded to solicit subscriptions for the purpose of the appeal, as the matter was of "urgent and vital importance to all nickel-platers;" for if the verdict of the court of first instance were not reversed, it would "deter any firm from practicing the art of nickel-plating by any process whatever, except the plaintiffs and their licensees." Bacon, V. C., considered that the insertion of this advertisement was an attempt on the part of the defendant to impede the course of justice, and that to solicit subscriptions for the purposes of appeal was an offense against the law of maintenance; and he therefore allowed the motion. The defendant was not so fortunate as the defendant in *Buenos Ayres Co. v. Wilde*, 22 Alb. L. J. 122, where he advertised that he was not at liberty to do the thing in question, and that was held no contempt of the injunction.

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The best explanation that we have seen of *Debenham v. Mellon*, ante, 271, is the following from the *London Law Journal*: "It will be seen that *Debenham v. Mellon* is not a case of startling novelty, as it is sometimes described. It simply destroys a prevalent idea, not unreasonably deduced by some from the principles of the law of husband and wife, that there is an inherent power in the wife to bind her husband. This power, it is held, only exists in the case of necessity. For the rest, the case lays down that the obligation on the husband, if any, depends on all the circumstances from which the fact of authority may reasonably be inferred, just as in other cases. The decision carefully abstains from disturbing the law as to the burden of proof. The lord chancellor admits that 'there are, no doubt, various authorities which say that the ordinary state of cohabitation between husband and wife carries with it some presumption, some *prima facie* evidence, of an authority to do those things which it is usual for a wife to have authority to do.' The chancellor does not call any of these authorities in question. Proof of cohabitation as husband and wife is still *prima facie* evidence of authority on the part of the wife to pledge the husband's credit for the necessities of the house, and her own and her children's persons. It may be rebutted by proof that the husband forbade his wife to pledge his credit; but if the husband has done any thing leading others to believe that his wife has his authority, it must be proved that the prohibition came to the knowledge of the tradesman. If therefore a plaintiff proves before a county court judge, that goods sued for being suitable for the station of the defendant's family, were ordered by the defendant's wife, and the proof stops there, the case for the plaintiff is made out. If the defendant comes and says that he forbade credit, there still may be a question whether he did not, on former occasions, pay bills run up by his wife. If he did, the plaintiff was entitled to notice of his change of intention. In short, the present decision is to the effect that the cohabitation of married persons does not *per se* constitute an ostensible agency." But if we should explain this matter every week the newspapers would still insist that a new and inequitable principle has been laid down.

The Mormons have scored a temporary victory in the Federal Supreme Court, in the bigamy case of *Miles v. United States*. The defendant has been granted a new trial because of the admission, on the trial, of the testimony of his second wife against him, touching his marriage with his alleged first wife, the law of Utah forbidding a wife to testify against her husband. In *Ganer v. Lanesborough*, Peake N. P. Cas. 17, Lord Kenyon ruled that the first wife of the defendant husband might speak as a witness to her divorce from him, at Leghorn, according to the Jewish custom. This was a civil suit, between third parties so far as the first wife was concerned, and the holding is not in conflict with the principal decision, but illustrates how

closely on parallel lines the rules of law may run without touching. This case does not seem to have been cited anywhere on the question of evidence.

Some difficulty seems to be made as to the removal of Judge Sanford, of the Superior Court, from office. The Judge has been disqualified from performing his judicial duties, for two years, by softening of the brain, and is incurably demented. The Governor addressed a message to the Senate advising his removal. Several of the most eminent lawyers of the city of New York have advised the Governor that this cannot be done under the Constitution. Others think it can be done. If it can be done, it must be under article 6, section 11, of the Constitution. This provides that all judicial officers, excepting judges of the Court of Appeals, justices of the Supreme Court, justices of the peace and judges and justices of inferior courts not of record, may be removed by the Senate, upon recommendation of the Governor, upon concurrence of two-thirds of the members. The "cause" shall be entered on the journals, and the party "complained of" shall be served with a copy of the "charges," and shall have "an opportunity of being heard." This provision seems to be independent of the provision for impeachment, which is made in article 6, section 1. As there is no moral delinquency in the present case, there can be no "impeachment," which might involve disqualification from holding any office, and subject the offender to indictment and punishment. Impeachment implies misconduct—malfeasance. This is a case of simple non-feasance. The word "charges" means simply "reasons," in such a case as this. If a judge should permanently remove from the country, this would be a proper ground for removal from office, and the fact of removal would constitute the "charge." We see no foundation for the argument that one cannot be removed from office except for moral misconduct. The spirit and letter of the Constitution cover the present case. But it is said that Judge Sanford cannot be "heard," because he is demented. Lunatics are subject to suit and judgment, even for divorce, and are "heard" in such proceedings. Why not in this? The judge can be heard by proxy, just as he receives his salary. As to any defect of title in his successor, the acts of a *de facto* judge, under claim and color of office, are perfectly valid.

Assemblyman Murphy proposes to abolish the evidence of "agents, informers and spies," acting as decoys, in penal actions. This will hardly do. The value of such evidence is for the jury. The time has long passed for narrowing or restricting the sources of evidence.—Mr. Scott proposes that when a vacancy shall occur in the office of any county judge (except in New York and Kings), the office shall be filled for a full term of six years at the next general election not less than three after.—Mr. Patterson proposes to invest boards of supervisors with the power to provide for and

regulate the employment at labor of paupers and persons sentenced to imprisonment in jails.—Mr. Waring proposes a new general act relating to wills, and the care, management and disposition of the property of decedents, designed to supersede all the present provisions, and covering some 57 pages.—Mr. Alvord proposes that prisoners discharged from penitentiaries shall be transported to the county whence they were sentenced, at the expense of the county.

In the Senate, Mr. Forster proposes that any creditor of an assigning debtor may sue to establish his claim and set aside such assignment without first procuring judgment; but this shall not extend to claims for breach of promise of marriage, or for wrongful taking or conversion of or injury to personal property.

NOTES OF CASES.

WE called attention some time ago to a decision by Justice Osborn, of our Supreme Court, in respect to inducements held out by a candidate for office to the electors. In *State ex rel. Attorney-General v. Collier*, 72 Mo. 13, it was held unlawful for a candidate for public office to make offers to the voters to perform the duties of the office, if elected, for less than the legal fees. An election secured by means of such offers is void. The court quote from *State ex rel. Newell v. Purdy*, 36 Wis. 213; S. C., 17 Am. Rep. 485; *Tucker v. Aikin*, 7 N. H. 140; *Alvord v. Collier*, 20 Pick. 428, and conclude as follows: "We must regard the cases above cited as conclusive of this one, and reiterate the statement that the offers in this case made by respondent differ in no essential particular from the Wisconsin case; the offers in each case are equally deserving of condemnation, and were in spirit and purpose the same. For if bribery in its larger sense, in its application to election cases, is the promise by the candidate to donate, if elected, a sum of money or other valuable thing to a third party, the promise in the case at bar ought to be held as falling within the same category, since though the suitors who may have to appear before the candidate when judge of probate, cannot in the nature of things be designated, yet the corrupting tendencies of the offer remain the same; remain to swerve the voter from his duty as a citizen; to blind his perceptions as to the sole question he should consider, the qualifications of the candidate, and to fix them upon considerations altogether foreign to the proper exercise of the highest right known to freemen, the right of suffrage—a right upon whose absolutely free and untrammelled exercise depends the perpetuity of our republican institutions. The transactions of which the State in the present instance complains may have been entered into with laudable motives, but it is, as we think has been successfully shown, decidedly demoralizing in its tendencies, and utterly subversive of the plainest dictates of public policy. The maxim in

such cases should be *obsta principiis*, and it is only by a rigid observance of this by the courts that the purity of elections can be preserved. The Legislature of this State has, as we are informed, at its last session, enacted a statutory prohibition against the employment in elections of agencies such as we have in the preceding pages condemned, thus giving legislative recognition to the principles herein enunciated."

In *Price v. Commonwealth*, 83 Gratt. 819, is an interesting decision on jurisdiction. Upon the trial of P. for murder the jury found him not guilty of the murder, but guilty of involuntary manslaughter, and assessed upon him a fine of \$500. And the court thereupon entered a judgment discharging him. At the same term of the court, in the absence of P., the court set aside the judgment and entered a judgment against him for the fine of \$500 and six months' imprisonment, and directed him to be arrested and committed to prison. *Held*: 1. The first judgment was erroneous. 2. During the same term of the court the matter was under the control of the court, and it was competent for the court to set aside the first and render the second judgment. 3. It was not necessary that P. should be present in court when the second judgment was entered. The court, Anderson, J., distinguished *Ex parte Lange*, 18 Wall. 163, observing: "No man can be twice lawfully punished for the same offense. In civil cases the maxim is *nemo debet bis venari pro uno et eadem causa*. In the criminal law the same principle is expressed in the Latin phrase, *nemo debet bis puniri pro uno delicto*. And *Ex parte Lange*, *supra*, was decided mainly upon this principle, that is, that no one ought to be punished twice for the same offense. The common law goes further, and forbids a second trial for the same offense, whether the accused had suffered punishment or not, if in the first trial he had been acquitted or convicted. And hence the plea of *autrefois acquit*, or *autrefois convict*, is a good defense to a criminal prosecution. The case under judgment does not fall within the inhibition of either of the foregoing principles. The defendant was not subjected to punishment twice for the same offense. Nor was he subjected to a second trial for the same offense, for which he had been before tried, and acquitted or convicted. He was certainly not subjected to punishment twice for the one offense; but by the first judgment was discharged from prosecution and permitted to go at large, before sentence had been pronounced against him for the misdemeanor of which he had been convicted by the verdict of the jury; and the court afterward pronounced against him the sentence of the law annexed to the commission of the offense of which he had been found guilty; but before proceeding to pronounce such sentence, set aside the erroneous judgment of acquittal, which was still under its control, it being during the same term of the court, and no injury or injustice resulting thereby to the defendant in consequence of the first judgment having been executed. But in this case after

the first judgment was entered it had not entirely passed from the control of the court, but remained in the breast of the court until the end of the term, subject to revision, alteration or rescission, no injustice or injury being done thereby to the defendant. It was therefore proper that the judgment which had been entered probably through inadvertence, and without due consideration, whilst during the term the whole subject-matter was under the control of the court, should be set aside, and an entire judgment rendered in conformity to the requirements of the law, upon the facts as found by the jury."

A very important decision was pronounced by the Supreme Court of New Hampshire, in *State v. U. S. & C. Express Co.*, March 18, 1881, on the constitutionality of an act to tax the gross receipts of express companies. The act in question is held to infringe the constitutional provision that taxes shall be "proportional and reasonable." Opinions are delivered by Doe, C. J., and Stanley, J. Among the cases cited to support the holding are *Portland Bank v. Apthorp*, 12 Mass. 452, as to capital stock of banks; *Com. v. Savings Bank*, 5 Allen, 428, *Com. v. Prov. Inst. for Savings*, 12 id. 312, affirmed 6 Wall. 630, as to bank deposits; *Oliver v. Washington Mills*, 11 id. 68, as to dividends of a corporation; *Com. v. Hamilton Manuf'g Co.*, 12 Allen, 298, as to tax on the property other than real estate and machinery; *Attorney-General v. Winnebago Lake Co.*, 11 Wis. 35, as to gross receipts; and the court say: "The same doctrine is held in Minnesota, where the constitutional provision is similar. *Smith v. Smith*, 8 Minn. 366, 372; *Sanborn v. Rice Co.*, 9 id. 273;—and in Illinois—*Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 id. 211; *Holbrook v. Dickinson*, 46 id. 285;—and in Nevada—*State v. Eastbrook*, 3 Nev. 173, 177; *State v. Kruttschnitt*, 4 id. 178;—and in Missouri—*Crow v. The State*, 14 Mo. 237. It is true, there are cases where a different doctrine is held; but they are in States in which the Constitution contains no provision requiring that taxes shall be proportional and reasonable, or that they shall be equal, or that they shall be assessed by a uniform rule, or any similar form or expression, limiting the power of the Legislature in this respect. Such are the cases of *Weber v. Reinhard*, 73 Penn. St. 370; S. C., 13 Am. Rep. 747; *Durack's Appeal*, 62 Penn. St. 491; *Bright v. McCullough*, 27 Ind. 223; *Butler's Appeal*, 73 Penn. St. 448; *Grim v. School District*, 57 id. 433. In *Weber v. Reinhard*, the validity of the tax is placed expressly on the ground that there is no provision of the Constitution requiring equality, and the inference fairly is, that if there were such provision the tax could not be upheld. In *U. S. Express Co. v. Ellyson*, 28 Iowa, 370, the court hold a similar tax valid, because there is no constitutional provision requiring uniformity or equality in taxation, and they concede that if there were, the tax could not be collected. If, then, the construction given to the constitutional provision in 4 N. H. 560, and to similar provisions in Massachusetts and in other States, is correct, chap. 63 can-

not be sustained. It imposes a tax of two per cent on gross receipts, or in lieu of that, five dollars per mile for the number of miles of railroad over which the business is done, thus impliedly taxing those only who do express business over a railroad, and thereby excepting from its operation business not part of which is done over railroads. This is in no sense a tax on property, or on polls or estates. It does not regard the capital invested, the expenses incurred, or the losses sustained. And if by any process of reasoning it could be held a tax on property, the tax imposed is not proportional and reasonable. It is based not on valuation, but on business; not on the amount of capital invested, but on the capacity for business of the managers or owners; not on net profits, but on gross receipts. The gross receipts of one company may be small, and the net profits large; while of another, the gross receipts may be large and the profits small; or there may be none at all. It makes no allowance for the skill, experience, business tact, or enterprise of the owners or managers, but all these which enter into the gross receipts are thus made to pay a share of the taxes. The tax assessed bears no such proportion to the whole sum to be raised as the property of the tax payer bears to the whole taxable property; and it is open to the further objection, that it is double taxation—for not only is the property employed in the business taxed, but its capacity to earn money, as evidenced by the gross earnings, is also taxed. It is the same in principle as if all the horses or oxen in the State were taxed, and then the owners were required to pay a percentage of their gross earnings. There is no provision for deducting the amount of the tax assessed on the capital; and herein is another element of inequality. It is not imposed in proportion to the whole amount to be raised by assessment on all the property in the State. It is a fixed assessment laid on a certain class of persons regardless of the amount called for from other property, or the percentage assessed on the valuation of other property. It is the same in all cases, whether the property invested or the profits received are large or small. The amount raised is limited only by the success of the persons engaged in the business, without reference to the amount required by the State. If in any case a tax of this character could be levied on business, even then this statute could not be sustained. It is not a tax on all business alike, but one particular kind is singled out from all the others without regard to whether it is advantageous or injurious to the community, and made to bear the whole burden placed on business." In *State v. Phila., etc., Co.*, 45 Md. 361; S. C., 24 Am. Rep. 511, it was held that a tax on gross receipts of a corporation in lieu of all other taxes is not a direct tax on property, forbidden by the Constitution. In *American Union Express Co. v. City of St. Joseph*, 66 Mo. 675; S. C., 27 Am. Rep. 382, it was held that a tax on gross receipts of an express company is valid under the constitutional provision for uniformity. To same effect, *City of New Orleans v. Kaufman*, 29 La. 288; S. C., 29 Am. Rep. 328.

THIRTY-THIRD AMERICAN REPORTS.

THIS volume contains the cases of general interest in 46 Connecticut, 91 Illinois, 67 Indiana, 51 Iowa, 23 Kansas, 31 Louisiana Annual, 49, 50 Maryland, 39 Michigan, 25 Minnesota, 69 Missouri, 14 Nevada, 77 New York, 82 North Carolina, 7 Oregon, 89 Pennsylvania State, 48 Wisconsin. Among the more important notes are those on contract to "satisfaction;" compelling prisoner to expose his person for identification; measure of damages for coal mined on another's land by mistake; evidence of pecuniary standing of defendant in slander; complaints of injured party to surgeon; insurance of stock of goods; constructive fraud as between physician and patient; surety—evidence of judgment against principal; trade-mark in name of publication. Among the most noticeable decisions are the following:

ACTION.—Under a statute of New York, giving a right of action for wrongfully or negligently causing the death of any person, an action may be maintained for negligently causing the death of a citizen of New York on the high seas, on a vessel hailing from and registered in a New York port, and employed by the owners at the time in their own business. *McDonald v. Mallory*, 77 N. Y. 546; p. 664.

AGENCY.—An insurance agent, who is also employed by the owner of property to watch it, may bind the company by a policy of insurance thereon. *Northrup v. Germania Fire Ins. Co.*, 48 Wis. 420; p. 815.

CARRIER.—A railroad company is not excused from receiving and transporting cattle by reason of a statute prohibiting such transportation, which is unconstitutional, although not so declared at the time of such refusal. *Chicago and Alton Railroad Co. v. Erickson*, 91 Ill. 613; p. 70.

A railway ticket marked, "good on passenger trains only," does not imply that all the passenger trains of the railroad company issuing it will stop at the station designated on it, nor impose on the company any obligation to stop there contrary to its rules. *Ohio and Mississippi Railway Company v. Swarthout*, 67 Ind. 587; p. 104.

CONSTITUTIONAL LAW.—Under the Pennsylvania Bill of Rights, the jury, in a criminal case, have the power, and consequently the right, to render a verdict contrary to the instructions of the court upon the law. *Kane v. Commonwealth*, 89 Penn. St. 522; p. 787.

CONTRACT.—Where one fails fully to perform a contract for labor, for any reason except voluntary abandonment, and the labor rendered is valuable, he may recover the value of the labor performed less any damages sustained by the other party for the breach. *Steeple v. Newton*, 7 Or. 110; p. 705.

A contract for a portrait to be "satisfactory" to the customer gives him the option of refusing it at his pleasure. *Gibson v. Cranage*, 39 Mich. 49; p. 351.

A woman and her husband, in consideration of the satisfaction of a demand of \$600 against the

husband, and the payment to them of \$275, absolutely assigned to A. and B. a policy in favor of the defendant on her husband's life; A. paid the subsequent premiums until maturity, when the amount due was \$1,477.73; the insurers refused to pay it without the defendant's receipt on the back of the policy; the defendant refused to sign her name without receiving \$477.73 when the policy was collected; accordingly A. executed a written agreement to pay her that sum on the payment of the policy; she signed her name, and A. and B. received the full amount; in an action against them on the agreement, *held*, that it was unconscionable, and not enforceable beyond an amount fairly due for her service and inconvenience in writing her name. *Kelly v. Caplice*, 23 Kans. 474; p. 179.

CRIMINAL LAW.—In a criminal case on a question of personal identity, a witness testified that the defendant had certain tattoo marks on his person. The court compelled the defendant, against his objection, to exhibit his person to the jury. *Held*, no error. *State v. Ah Chuey*, 14 Nev. 79; p. 530.

On an indictment for forgery, the prisoner is bound by his consent to be tried by less than twelve jurors. *State v. Kaufman*, 51 Iowa, 578; p. 148.

It is no defense to an indictment for escape that the jail was unhealthful and filthy. *State v. Davis*, 14 Nev. 439; p. 563.

If one finds lost property, and knows the owner, or there are marks on the property by which he can ascertain the owner, and he converts the property to his own use, intending at the time of finding so to convert it, he is guilty of larceny, but not so if that intention is not formed until afterward. *State v. Clifford*, 14 Nev. 72; p. 526.

A offered a \$5 bill to pay forty cents ferriage, received and kept the \$4.60 in change, but refused to deliver the \$5 bill. *Held*, larceny. *State v. Anderson*, 25 Minn. 66; p. 455.

On a prosecution for selling intoxicating liquor to a minor, it is a good defense to show that the seller reasonably believed him of age. *Faulks v. People*, 39 Mich. 200; p. 374.

DAMAGES.—In a civil action for damages by assault, evidence of the defendant's wealth is improper, unless it is a case for exemplary damages. *Morgan v. Durfee*, 69 Mo. 469; p. 508.

In an action of damages for mining and carrying away coal, the measure of damages is the value of the coal when first severed from the bed, allowing nothing for the expense of digging; and if the trespass was not unintentional, exemplary damages may be added. *Franklin Coal Co. v. McMillan*, 49 Md. 549; p. 280.

In trover for coal dug and carried away from the land of another, the measure of damages is the value of the coal at the mouth of the pit or shaft, less the cost of carriage from the bed thither, but allowing nothing for digging, separating, breaking or other acts necessary to render it marketable. *McLean County Coal Co. v. Lennon*, 91 Ill. 561; p. 64.

DEED.—The rule that a conveyance to husband and wife constitutes them tenants by the entirety, the survivor taking the whole estate, is not changed

by the abolition of joint tenancies, nor by the acts enabling married women to acquire and hold property separate from their husbands. *Marburg v. Cole*, 49 Md. 402; p. 266.

FISHERY.—In the absence of notice against trespass, no action will lie for taking fish from a small lake nearly surrounded by the plaintiff's land. *Marsh v. Colby*, 39 Mich. 626; p. 489.

FRAUD.—A. was seventy years old, very wealthy, infirm, and confined to the house, but of sound mind and judgment. F. was his physician and confidential friend. A. executed a contract with F., by which, in consideration of one dollar and F.'s services in securing certain stock for A., A. agreed to transfer a certain interest in the stock to F. F. received thereby about \$50,000. A. having died, his executors brought suit to set aside the transaction. *Held*, that F. was at liberty to show that the transaction was a gift; that a physician is not prohibited from receiving a gift from his patient by reason of the mere relation; and that the burden of proof of fairness is not on the defendant. *Audenreid's Appeal*, 89 Penn. 114; p. 731.

GUARANTY.—A guaranty of collection cannot be enforced until legal proceedings to collect have been instituted and proved ineffectual, although the principal may have been insolvent. *Bosman v. Akeley*, 30 Mich. 710; p. 447.

INSANITY.—A lunatic may be sued at law and judgment may proceed against him upon a debt contracted while he was of sound mind, and equity will not interfere. *Stigers v. Brent*, 50 Md. 214; p. 317.

INSURANCE.—Where a policy of fire insurance provides that no action shall be sustainable thereon until an award fixing the amount of claim, nor unless commenced within twelve months next after the loss shall occur, the action must be brought within twelve months from the occurrence of the fire, and the time does not continue until twelve months after the award. *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92; p. 47.

A policy insured "household furniture, useful and ornamental, including sewing machine, provisions and family wearing apparel, all contained in" a certain dwelling-house. The insured sustained damage to his personal apparel, part of the insured, while wearing it away from the insured premises. *Held*, that the policy covered the loss. *Longueville v. Western Assurance Co.*, 51 Iowa, 553; p. 146.

JUDGMENT.—An action by the owner of goods against a carrier, for damages for failure to transport such goods, is barred by a previous judgment in favor of the carrier against the owner for the freight of such goods. *Dunham v. Bower*, 77 N. Y. 76; p. 570.

MANDAMUS.—A *mandamus* will not issue to compel a canvassing board to canvass election returns and declare the result, where the returns to the board show that there were 2,947 votes cast, and there were in fact only 800 legal voters in the county. *State ex rel. Mitchell v. Stevens*, 23 Kans. 456; p. 175.

MARRIAGE.—The annulling of a decree of di-

force replaces the parties in the state in which they were before the divorce, without regard to a subsequent marriage and the birth of children; an agreement between the parties to the contrary is of no effect; and where the divorce was granted by the court of another State, it will be presumed that the annulling of the decree by the same court is regular and valid. *Comstock v. Adams*, 23 Kans. 513; p. 191.

Where alimony in a wife's suit for divorce has been fixed by the court and duly paid by the husband, the husband is not liable for subsequently furnished necessities. *Crittenden v. Schermerhorn*, 39 Mich. 661; p. 440.

A decree of divorce gave the custody of the infant child of the parties to the father, subject to the mother's right of access in a specified manner. *Held*, that the father might appoint a testamentary guardian, but this could not cut off the mother's right of access, to be regulated by the court. *Hill v. Hill*, 49 Md. 450; p. 271.

Where a decree of divorce awards the custody of a minor child to the mother, the father is not further bound for the support and maintenance of the child. *Husband v. Husband*, 67 Ind. 583; p. 107.

MECHANICS' LIEN.—Where a building is erected on a wife's land at the sole request of her husband, a mechanics' lien will not attach to the wife's estate in the land, although she knew of and did not object to the erection while it was in progress. *Flannery v. Rohrmayer*, 46 Conn. 558; p. 36.

MUNICIPAL CORPORATION.—If a municipal corporation, in improving its streets, accumulates surface water and turns it in new and destructive currents upon the lands of adjoining owners, it is liable in damages. *O'Brien v. City of St. Paul*, 25 Minn. 833; p. 470.

A municipal corporation, intrusted with the care of streets, in discharging that duty, and without negligence, increased the natural flow of surface water discharging into a certain mill-race, whereby the mill-owners sustained injury. *Held*, that no action was maintainable therefor. *Mayor, etc., of Cumberland v. Willison*, 50 Md. 138; p. 304.

A ruinous wall on private property in a city, dangerously near a public street, fell and killed a child in a building one foot outside the limits of the street. The city authorities knew of the condition of the wall, were authorized by the charter to declare and abate nuisances, and there was a city ordinance declaring dangerous buildings and structures nuisances. *Held*, that the city was liable in damages for the death. *Kiley v. City of Kansas*, 69 Mo. 102; p. 491.

A municipal corporation is not liable for injuries caused by the fall of a public market building, caused by a cyclone. *Flori v. City of St. Louis*, 69 Mo. 841; p. 504.

NATIONAL BANK.—A National bank, receiving a special deposit for safe-keeping without reward, is liable only for gross negligence; the burden of proof is on the plaintiff; and gross negligence is not the omission of that care which every attentive and diligent person takes of his own goods, but the omis-

sion of that care which the most inattentive takes. *First National Bank of Allentown v. Rea*, 89 Penn. St. 308; p. 767.

NEGLIGENCE.—A company, organized to supply the inhabitants of a city with water, contracted with the municipal authorities to supply their hydrants, but failing to do so, the fire department were unable to extinguish a fire in the city. *Held*, that the company were not liable in damages to the owner of the property destroyed. *Nickerson v. Bridgeport Hydraulic Co.*, 46 Conn. 24; p. 1.

NEGOTIABLE INSTRUMENTS.—A negotiable note for ten dollars was executed with a blank preceding the amount. Afterward the words "one hundred and" were fraudulently inserted before the word "ten." There was nothing in the note to excite suspicion, and it was subsequently transferred to an innocent person. *Held*, that he could not recover. *Knoxville National Bank v. Clarke*, 51 Iowa, 264; p. 129.

A provision in a note for an attorney's fee in case of proceedings to collect is void. *Bullock v. Taylor*, 39 Mich. 187; p. 356.

A waiver of protest by the indorsers of a promissory note includes a waiver of demand. *Harvey v. Nelson*, 31 La. 434; p. 222.

NUISANCE.—In an action of nuisance against several acting independently in polluting a stream by the discharge of sewerage from the premises of each, each is liable only to the extent of the separate injury committed by him. *Chipman v. Palmer*, 77 N. Y. 51; p. 566.

An injunction will issue to restrain the operation of steam machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation. *Dittman v. Repp*, 50 Md. 516; p. 325.

OFFICE AND OFFICER.—A county treasurer is liable for the public money lost by the failure of a bank in which he deposited it, although the county provided no safe place for such deposit. *Lowery v. Polk County*, 51 Iowa, 50; p. 114.

RELIGIOUS SOCIETY.—The pastor of a religious society got judgment against the trustees for his salary, and a levy was made on the church communion service. *Held*, invalid. *Lord v. Hardie*, 82 N. C. 241; p. 683.

REPLEVIN.—Where several own cereal grain of the same kind and value, mingled together by their consent, or by reason of circumstances reasonably to be foreseen, each may maintain replevin for his just proportion. *Piazzek v. White*, 23 Kans. 621; p. 211.

SLANDER AND LIBEL.—In an action of slander the pecuniary standing of the defendant may be shown to indicate the influence of his speech, but not in itself to enhance damage. *Brown v. Barnes*, 39 Mich. 211; p. 375.

STATUTORY CONSTRUCTION.—Under a statute prohibiting the disclosure by a physician of information acquired in professional attendance and necessary to enable him to prescribe, in an action for damages for a personal injury by defendant's violence, a physician is not precluded from divulging the plaintiff's admission to him that the injury ex-

isted before the defendant's act, unless it affirmatively appeared that the disclosure was necessary to enable him to prescribe. *Campau v. North*, 39 Mich. 606; p. 433.

SURETY.—A judgment against the principal obligor in an official bond, showing upon its face that it was recovered for a breach of the conditions, is *prima facie* evidence of the plaintiff's right to recover against the sureties, and of the amount of such recovery, although they had no notice of the action. *Stephens v. Shafer*, 48 Wis. 54; p. 793.

TRADE-MARK.—The complainant had for some twenty years published an almanac entitled "J. Gruber's Hagerstown Town and County Almanack," which had been established and long published by his ancestor. The defendant, in 1879, issued an almanac, with the same emblems, devices, marks, representations, and general exterior appearance, and entitled, "T. G. Robertson's Hagerstown Almanac." Held, that the defendant's publication would be enjoined. *Robertson v. Berry*, 50 Md. 591; p. 328.

TRESPASS.—In an action of trespass against two or more acting independently, and producing a result injurious to the plaintiff, one cannot be held for the acts of the others. *Blaisdell v. Stephens*, 14 Nev. 17; p. 523.

USURY.—Where a husband, as agent for loaning his wife's money, takes a commission for himself beyond the rate of legal interest, without his wife's knowledge or consent, the loan is not vitiated for usury. *Brigham v. Myers*, 51 Iowa, 397; p. 140.

WITNESS.—The conviction of one of felony in another State does not disqualify him as a witness in this. *National Trust Co. v. Gleason*, 77 N. Y. 400; p. 632.

We have no space for further citations, but there is not an unimportant case in the volume.

DRINKS, DRINKERS, DRINKING.

DURING the dry and thirsty days of last summer, we meditated awhile on these subjects, and now, in the cool, damp days of March, we return to them. The "public" says that these drinks are adapted to all times and every season; cooling in summer, warming in winter, drying in wet and wetting in dry weather.

In California a judge told a jury that to render a man an "habitual drunkard," the intoxication must be such as completely to disqualify him from attending to his business vocations. But the court held that that was laying down the rule in too stringent a manner, and that if there be a "fixed habit of drinking to excess to such a degree as to disqualify a person from attending to his business during the principal hours usually devoted to business," it is *habitual intemperance*. *Mahone v. Mahone*, 19 Cal. 627. The Iowa Supreme Court, on the other hand, was not prepared to say that if a person has a fixed habit of drinking intoxicating liquors to excess, is frequently drunk, and that such is his normal condition during the night and the time not devoted to business, his wife would not be entitled to a divorce on the ground of his "habitual drunkenness." 22 Alb. L. J. 68. "Drunkenness is a species of insanity." *Duffield v. Robeson*, 2 Harr. 375. It is not correct to say that one is "in the habit of becoming intoxicated," when

he has only once been seen drunk, and only sometimes takes a drink. *Calder v. Sheppard*, 61 Ind. 219.

Not only is the owner of a place for the unlawful sale of strong drinks considered the "keeper" thereof, but also any one who is in possession, has control, or is running the business. *Schultz v. State*, 32 Ohio St. 276.

Boys will be boys, as old Richard, or some one else, remarks; and will be continually getting others into trouble. In proceedings against a publican for selling liquor to a minor, the jury must not "view" the boy or consider his old looks, in determining whether or not the defendant acted in good faith, believing the boy to be—not the father of a man—but a man, himself. *Kirger v. State*, 53 Ind. 251. A reasonable and honest belief in the mind of the dramseller, that the "minor" is not a minor, but of full age, is a good defense in such an action. *Robbins v. State*, 63 Ind. 235. One may sell liquor to a minor, if his father or mother is to drink it. *Com. v. Lattnville*, 120 Mass. 385. For the law does not seek to prevent a boy being a carrier of strong drink, but only forbids it being warehoused within him. See *Ross v. People*, 17 Hun (N. Y.), 591.

Bergen walked up to Burnham's bar, somewhere down east, accompanied by two minors, and called for drinks for the three. The boys understood the proceeding and each named his liquor, and having received it took it without winking (at least the reporter does not say they did). Bergen paid for the party. On an action against Burnham for selling liquor to minors, the court held that he had not done so; that the sale was to the man Bergen, and that the fact of the boys choosing their own drinks and receiving them directly from the bar-keeper, did not alter the transaction. *St. Goddard v. Burnham*, 124 Mass. 578. In the eye of the law it is a greater misdemeanor to show one's self when drunk than it is to be drunk; the sin consists in the public exhibition, not in the intoxication itself.

If one becomes "gloriously drunk," as the poet Cowper says, "with the walnuts and the wine" (to quote Tennyson), at a social party held in the house of a friend, he cannot be prosecuted for being intoxicated in a "public place." *State v. Sowers*, 52 Ind. 311; *State v. Waggoner*, id. 681. Nor would one be liable if found drunk in his own house. *Reg. v. Blake*, 6 Pr. Rep. (Ont.) 244. A tavern-keeper found drunk at 11:30 P. M. in his own house, after the premises have been closed for the night, cannot be punished for being found drunk on "licensed premises;" for these words must mean premises open to the public during licensed hours, or during the time when the premises are a quasi public place. Mr. Justice Miller thought that to hold one liable for being drunk in the privacy of his own chamber would produce the most singular consequences. *Lester v. Torrens*, L. R., 2 Q. B. D. 603.

But once upon a time, in Yorkshire, a policeman, going up stairs in a tavern, found the landlord drunk (who believed as the poet sang:

"He who goes to bed, and goes to bed sober,
Falls as the leaves do, and dies in October;
But he who goes to bed, and goes to bed mellow,
Lives as he ought to do and dies an honest fellow.")

and haled him before the magistrates, and they fined him for being "drunk in a public place." Alas for the maxim, "*Domus sua cuique est tutissimum refugium!*" Wharton on Innkeepers, p. 81.

Doubtless an innkeeper, intoxicated on his own premises while they are open, was as much amenable to the penalty for being found drunk in a "public place" as if plucked up upon the highway. *Lester v. Torrens*, *supra*.

A "public place" is any place to which the public have admission free of charge; or any place which, though not open to the public without payment, is still open to all who are willing to pay certain charges, such as railways, omnibuses, etc. *Ex parte Davis*, 26

L. J., M. C. 178. But theaters and other places where the proprietors have a right to refuse admission to the public, notwithstanding their willingness to pay, are not public places. *Wharton*, p. 70.

Now as to the "drinks." "Ale" being produced by fermentation and not distillation, has been held not to be "spirituous liquor." *People v. Crilley*, 20 Barb. 268; *State v. Moore*, 5 Blackf. 418.

"Ale" and "strong beer" were, however, considered "strong or spirituous liquors," by Chancellor Walworth; he held both to be intoxicating drinks, and said that they differed from each other by the latter containing more hops than the former. *Nevin v. Ladue*, 3 Den. 43. We assume that the learned judge did not use the word "hops" in a sense similar to that in which an Indian brave spoke of the number of "fights" in a keg of whisky.

"Ale, beer, porter, rum, gin, brandy, whisky, and wine," are held to be "intoxicating liquors," in Missouri. *State v. Willmar*, 12 Mo. 407. May we argue from this that the Missourian liquor sellers are honest? If they diluted their drinks with the waters of their river, could the mud formed possibly affect one's brain?

"Lager bier" is recognized in the Rhode Island statutes as a malt liquor; and so the court can assume that it is such without actual proof of the fact. *State v. Goyette*, 11 R. I. 592.

Proof of keeping and selling "lager bier" is sufficient to sustain a criminal complaint for keeping ale, wine, rum and other strong and malt liquors. *State v. Campbell*, 18 Alb. L. J. 397.

"Spruce beer, spring beer, ginger beer and molasses beer," may properly be termed fermented beer; but they are never considered "strong liquors or intoxicating beverages." Chancellor Walworth stated that they contain a certain amount of alcohol. He says they have not been considered strong drinks or intoxicating beverages, either because it was supposed that the human stomach had not the capacity to contain a sufficient quantity of such things (if they were properly made), unduly or injuriously to excite the person who used them as a beverage; or for the reason that those who were in the habit of using them never got intoxicated by such use. *Nevin v. Ladue*, 3 Den. 450.

"Wine" is included under the term "intoxicating liquors," as a rule; but it is otherwise in Iowa, if it is manufactured from grapes, currants or fruits grown in that State. *Worley v. Spurgeon*, 38 Iowa, 465; *State v. Stapp*, 29 id. 551.

The intoxicating quality of "port wine," is a matter of common knowledge, and no proof need be given to a jury of that fact. *State v. Packer*, 80 N. C. 439.

Drink or medicine? So long as liquors retain their character as intoxicants, capable of use as beverages, notwithstanding other ingredients, roots or tinctures, may have been mixed therewith, they fall under the ban of the law and are still considered intoxicating liquors; but when they are so compounded with other substances as to lose that distinctive character, and are no longer desirable for use as stimulating beverages, then they are medicine and their use is not prohibited. *The State v. Laffer*, 38 Iowa, 422.

Even calling an article by the very mild name of "Pop," will not make it a temperance drink, if it contains malt liquor and will intoxicate if taken in sufficient quantities. *Godfriedson v. People*, 88 Ill. 284.

Is "Old Tom gin" spirits? This was the question with which the Court of Queen's Bench, in Ontario, had to wrestle upon one occasion, and it took the judges about six months to decide the point. Witnesses and dictionaries were called in to the assistance of the court. Some witnesses thought "spirits" meant pure, unflavored spirits; another thought that they lost their character as such if mixed with any thing

else; that then they became a cordial. The general notion was that "Old Tom gin" being a compound of spirits, sugar and flavoring matter, it was no longer spirits. But the judge could not see that the admixture of sugar, with some flavoring essences, to make it more agreeable to the taste, could deprive O. T. G. of its general character, any more than the mixing of spirits with water to reduce their strength; nor did he think that the giving a name, or prefix, such as "Old Tom," to any one of the various drinking beverages coming within the term "spirits," freed it from the generic appellation. On the whole, he was clearly of the opinion that Old Tom gin belonged to the family known as Spirits; and to hold otherwise, he considered, would be contrary to the fair and ordinary understanding of the term, and a mere trifling with words. *Winning v. Gow*, 32 A. C. R. 526.

"Sweet spirits of nitre" (we have it upon the authority of no less a judge than Baron Rolfe), is not adapted for ordinary use as an intoxicating beverage. *Atty.-Gen. v. Bailey*, 1 Ex. 292.

"Spirits" do not cease to be spirits because mixed with small quantities of water. *Scott v. Gilmore*, 3 Taunt. 226. This opinion is generally held by the whole body of liquor sellers.

Some time ago the Indiana courts could not say judicially whether "wine" was intoxicating or not (*Jackson v. State*, 19 Ind. 312), and yet about the same time they took judicial notice of the fact that "spirituous liquors" were intoxicating. *Carmon v. State*, 18 Ind. 450. Can we infer from this the nature of the judge's drink?

What is "malt liquor" is a question of fact for the jury to decide, and not one of law for the judge. *State v. Starr*, 67 Me.

Where a statute speaks of intoxicating liquors, and it is shown that "lager bier" was sold, it is for the jury to say (from the evidence, of course) whether it is intoxicating or not. *Ran v. People*, 63 N. Y. 277.

We must always do jurymen the credit of believing that they have an acquaintance with ordinary terms and allusions, whether historical, or figurative or parabolical. At least Judge Coleridge said so.

When a tavern is ordered to be "closed on Sunday," the law means that sales of liquor shall be entirely stopped and traffic shut off effectually, so that neither drinking nor the conveniences of drinking shall be accessible to the public. *Kurtz v. People*, 83 Mich. 279.

If the law says that "bar-rooms are to be shut" during certain hours, it is not obeyed by the restaurant keeper merely abstaining from selling, and hanging a curtain in front of his bar, if the room is still open to the *profanum vulgus*. *Baldwin v. Chicago*, 68 Ill. 418. But merely opening the door of the bar-room does not constitute the offense unless it is open as it is on week days. *Patten v. Centralia*, 47 Ill. 370.

The sale of a single "glass," if at the time the saloon is accessible to the public, is sufficient to render one guilty of keeping open a tippling-house on Sunday. *Koop v. People*, 47 Ill. 327.

Hyneman, when accused of selling it on the Lord's Day, tried to escape condemnation by saying that he was a descendant of Abraham and that he conscientiously believed that the seventh day should be observed as the Sabbath, and not the first. But it was of no use. *Com. v. Hyneman*, 101 Mass. 30.

The sale of a single glass of strong stuff was held sufficient to convict a man of selling intoxicating liquor in "less quantities than a quart." *Kansas City v. Muhlback*, 68 Mo. 638. If one sells an occasional drink of spirits out of a bottle not in a bar-room and without having the slightest intention of delaying the payment of the national debt by defrauding the national revenue, he cannot be said to be "carrying on the business of a retail liquor dealer." *U. S. v. Jackson*, 1 Hugh. 531. Nor of a wholesale one either we assume.

* See Mackay v. Tolman, 117 Mass. 238, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 1889, 1890, 1891, 1892, 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, 1901, 1902, 1903, 1904, 1905, 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545,

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intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next of kin of such deceased person."

It must be taken as established by the record that the accident, by which plaintiff's husband came to his death, occurred in New Jersey, under circumstances which brought the defendant within the provisions of the first section of the act making the company liable for damages, notwithstanding the death.

It is scarcely contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury.

It is indeed a right dependent solely on the statute of the State, but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here.

It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right.

Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.

The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial, and the local court in New York, and the Circuit Court of the United States for the northern district, were competent to try such a case when the parties were properly before it. See *Mostyn v. Fabrigas*, 1 Cowp. 161; *Rafael v. Verelst*, 2 W. Blacks. 1065; *McKeena v. Fisk*, 1 How. 241. We do not see how the fact that it was a statutory right can vary the principle. If the defendant was legally liable in New Jersey he could not escape that liability by going to New York. If the liability to pay money was fixed by the law of the State where the transaction occurred, is it to be said it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her Civil Code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases. See *Ex parte Van Riper*, 20 Wend. 614; *Lowry v. Inman*, 46 N. Y. 119; *Pickering v. Fisk*, 6 Vt. 102; *Railroad v. Sprayberry*, 8 Bax. (Tenn.) 341; *Great Western R. Co. v. Miller*, 19 Mich. 306.

But it is said, that conceding that the statute of the State of New Jersey established the liability of the defendant and gave a remedy, the right of action is limited to a personal representative appointed in that State and amenable to its jurisdiction.

The statute does not say this in terms. "Every such action shall be brought by and in the name of the personal representatives of such deceased person." It may be admitted that for the purpose of this case the words "personal representatives" mean the administrator.

The plaintiff is, then, the only personal representative of the deceased in existence, and the construction thus given the statute is, that such suit shall not be brought by her. This is in direct contradiction of the words of the statute. The advocates of the view interpolate into the statute what is not there, by holding that the personal representative must be one residing in the State or appointed by its authority. The statute says the amount recovered shall be for the exclusive benefit of the widow and next of kin. Why not add here also, by construction, "if they reside in the State of New Jersey?"

It is obvious that nothing in the language of the statute requires such a construction. Indeed, by inference it is opposed to it. The first section makes the liability of the corporation or person absolute where the death arises from their negligence. Who shall say it depends on the appointment of an administrator within the State?

The second section relates to the remedy, and declares who shall receive the damages when recovered. These are the widow and next of kin. Thus far the statute declares under what circumstances a defendant shall be liable for damages, and to whom they shall be paid. In this there is no ambiguity. But fearing there might be a question as to the proper person to sue, the act removes any doubt by designating the personal representative. The plaintiff here is that representative. Why can she not sustain the action? Let it be remembered that this is not a case of an administrator, appointed in one State, suing in that character in the courts of another State, without any authority from the latter. It is the general rule that this cannot be done.

The suit here was brought by the administratrix in a court of the State which had appointed her, and of course no such objection could be made.

If, then, the defendant was liable to be sued in the courts of the State of New York on this cause of action, and the suit could only be brought by the personal representative of the deceased, and if the plaintiff is the personal representative of the deceased, whom the courts of that State are bound to recognize, on what principle can her right to maintain the action be denied?

So far as any reason has been given for such a proposition, it seems to be this: that the foreign administrator is not responsible to the courts of New Jersey, and cannot be compelled to distribute the amount received in accordance with the New Jersey statute.

But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of the administratrix can compel distribution of the amount received in the manner prescribed by that statute.

Again, it is said that by virtue of her appointment in New York, the administratrix can only act upon or administer that which was of the estate of the deceased in his life-time. There can be no doubt that much that comes to the hands of administrators or executors must go directly to heirs or devisees, and is not subject to sale or distribution in any other mode; as the amount set apart in most of the States to the family, devisees of specific property to individuals, all of which can be enforced in the courts; and no reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and the duty of distributing under that law. There can be no doubt that an administrator, invested with the apparent right to receive or recover by suit property or money, may be compelled to deliver or pay over to some one who establishes a better right, or that what was so recovered was held in

trust for some one not claiming under the will or under the administrator. And so here. The statute of New Jersey says the personal representative shall recover, and the recovery shall be for the benefit of the widow and next of kin. It would be a reproach to the laws of New York to say that when the money recovered in such an action as this came to the hands of the administratrix, her courts could not compel distribution as the law directs.

It is to be said, however, that a statute of New York, just like the New Jersey law, provides for bringing the action by the personal representative, and for distribution to the same parties, and an administrator appointed under the law of that State would be held to have recovered to the same uses, and subject to the remedies in her fiduciary character which both statutes require.

We are aware that the case of *Woodward v. Michigan Southern R. Co.*, 10 Ohio St. 120, asserts a different doctrine, and has been followed by the cases of *Richardson v. New York Cent. R. Co.*, 88 Mass. 85, and *McCarthy v. Chicago, R. I. & P. R. Co.*, 18 Kans. 46; S. C., 26 Am. Rep. 742. The reasons which support that view we have endeavored to show are not sound. These cases are opposed by the latest decision on the subject in the Court of Appeals of New York, in the case of *Leonard v. Columbia Steam Navigation Co.*, not yet reported, but of which we have been furnished with a certified copy.

The right to recover for an injury to the person, resulting in death, is of very recent origin, and depends wholly upon statutes of the different States. The questions growing out of the statutes are new, and many of them unsettled. Each State court will construe its own statute on the subject, and differences are to be expected. In the absence of any controlling authority or general concurrence of decision, this court must decide for itself the question now for the first time presented to it, and with every respect for the courts which have held otherwise, we think that sound principle clearly authorizes the administrator in cases like this to maintain the action.

The judgment of the circuit court is therefore reversed, with directions to award a new trial.

NEW YORK COURT OF APPEALS, FEBRUARY 8, 1881.

LEONARD V. COLUMBIA STEAM NAVIGATION CO.

A statute of Connecticut provides that an action for personal injury caused by negligence and resulting in death shall survive to the executor or administrator of the injured person. A similar provision is contained in the New York statutes. Held, that an administrator of a person dying from injuries received in Connecticut, appointed in New York, could maintain an action in the courts of that State to enforce the liability incurred under the Connecticut law.

ACTION for injuries resulting in death, brought by Joseph Leonard, administrator, etc., of Sarah Leonard, deceased. The opinion states the case.

MILLER, J. The intestate was killed by reason of the explosion of a boiler of a steamer, within the boundaries of the State of Connecticut, which the jury found was occasioned by the negligence of the defendants, who were the owners thereof. The statutes of that State created a cause of action in favor of and for the benefit of the next of kin and heirs at law in certain cases which are enumerated. By the Revised Statutes (ed. of 1875, § 3, p. 488) a right of action is given to the representatives of a person killed by the negligence of any railroad company or its servants, to recover damages to the amount of \$5,000. By the provisions of the statutes of that State the common-law rule as to actions for injuries to the person is changed, and it is provided that an action to recover damages for injury to the person, etc., shall not abate by reason

of death, and that the executor or administrator may prosecute the same; and that all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, shall survive to his executor or administrator, etc. Statutes of Conn., revision of 1875, chap. 6, title 19, §§ 8, 9. It is held that under these provisions of the statutes of Connecticut an action lies in that State in favor of the representatives of a deceased party to recover damages. *Murphy v. New York & N. H. R. Co.*, 30 Conn. 184; 29 id. 496; *Soule v. New York & N. H. R. Co.*, 24 id. 275.

The construction thus placed by the courts of another State upon the statutes of that State should be followed, and is controlling in the tribunals of this State. *Jessup v. Carnegie*, 80 N. Y. 441; *Hunt v. Hunt*, 72 id. 218.

At common law, personal actions, whether *ex contractu* or *ex delicto*, are transitory. Bouvier Law Dict., Personal actions, transitory actions; and these actions may be brought anywhere and are governed by the *lex fori*. Bouvier; Story on Conflict of Laws, § 307, a, e. The cause of action which the statutes of Connecticut created is transitory in its nature, and unless excepted from the general rule as to places where such actions may be brought, can be enforced in the courts of this State or any other forum, provided the laws of that forum do not forbid its maintenance. In this State it is held that actions will lie for injuries to the person committed outside of the territorial limits of the State. In *Smith v. Bull*, 17 Wend. 323, it was decided that an action for an assault and battery committed in the State of Pennsylvania could be maintained in any Court of Common Pleas of this State. The rule, no doubt, is that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another State or country besides that in which they originated. In contemplation of law the injury arises anywhere and everywhere. The right to recover in such cases rests upon the presumption that the common law prevails in such other State, and that the injured party could have recovered there had the action been brought in such State. The remedy in such cases is given by the courts of one country or State upon the principle of comity which is due by one sovereign State or country to another under similar circumstances. While these general rules are recognized in numerous decisions in the courts of this State, it is also held that the statutes giving an action for damages resulting from death caused by culpable negligence do not apply where the injury was not committed in this State but in a foreign country, unless it is proved that the laws of that country are of a similar character. *Whitford v. Panama R. Co.*, 23 N. Y. 465; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. Co.*, id. 99; *McDonald v. Mallory*, 77 N. Y. 547.

These decisions rest upon the principle that the statutes of this State can have no operation in a foreign country where similar statutes do not exist, and that it is not a legitimate presumption that the statute laws of other States or countries are similar to our laws. In *Whitford v. The Panama R. Co.*, *supra*, the injury was done in New Granada. After considering the effect of the statutes in a foreign country, Denio, J., remarks: "Whatever liability the defendants incurred by the laws of New Granada by the acts (facts) mentioned in the complaint, might well be enforced in the courts of this State * * * but the rule of decision would still be the law of New Granada, which the court and jury must be made acquainted with by the proof exhibited before them." The doctrine of this case is approved in *McDonald v. Mallory*, *supra*, and it is laid down by Rapallo, J., that where the wrong is committed in a foreign State or country no action can be maintained here without proof of the

existence of a similar statute in the place where the wrong is committed." The rule here laid down is just and reasonable; and it is not essential that the statute should be precisely the same as that of the State where the action is given by law or where it is brought, but merely requires that it should be of a similar import and character. The statute in this State is certainly of the same nature, and the similarity is such as to authorize the conclusion that it is founded upon the same principle and possesses the same general attributes as the statutes of Connecticut which have been cited. The same remedy was to be accomplished, and an examination of the different provisions evinces an agreement in both of the statutes as to their main features, and that they are substantially alike and to the same effect as to the survivorship of the action. In fact when there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both States relating to the subject prevailed. The doctrine that an action will lie when the common law or the statutes of different States or countries correspond is sustained by numerous authorities. *Madrazo v. Wiles*, 3 B. & Ald. 353; *Melan v. Duke de Fitz-James*, 1 Bos. & Pul. 138; *Mostyn v. Fabrigas*, 1 Cowp. 161; 1 Smith's Lead. Cas. 765; *Skipp v. McGraw*, 3 Murphy (N. C.), 463; *Wall v. Hoskins*, 5 Ired. Law (N. C.), 177; *Stout v. Wood*, 1 Black (Ind.), 71.

We are referred to a number of cases by the learned counsel for the appellant as authority for the position that the death happening in the State of Connecticut, and there not being shown to have been any representative there who had taken out letters of administration, an administrator in New York has no right to bring such an action in the courts. The cases cited are the decisions of other State courts, and a brief reference to them will indicate how far they should be allowed to bear upon the question considered. In *Richardson v. New York Cent. R. Co.*, 98 Mass. 85, the plaintiff brought an action for damages under the statute of New York for the killing of the intestate in New York. There was no statute in Massachusetts of a similar character, and it was held that the action could not be maintained. It will be noticed that the statutes of the different States were not of a similar nature, and the common-law rule prevailed in Massachusetts. The case therefore is not analogous.

In *Woodward v. Mich. So., etc., R. Co.*, 10 Ohio, 121, it was held that an administrator in Ohio could not maintain an action under the statute of Illinois authorizing the personal representatives of a person who comes to his death by a wrongful act of another to sue for damages. It was questioned whether the petition went far enough to make out an action under the statute of Illinois, or whether an administrator appointed under the laws of Illinois might not maintain an action. The question now presented is not fully considered, and therefore the decision has no force as a case in point.

In *Needham v. Grand Trunk R. Co.*, 38 Vt. 295, the death occurred in the State of New Hampshire, and there was no law existing or alleged to exist which gave the plaintiff a right of action. In *Allen v. Pittsburg & C. R. Co.*, 45 Md. 41, there was no allegation that there was any statute in the State where the death was caused creating a cause of action, and it was held that in the absence of any proof there was no presumption in favor of a positive statute law of the State, but it must be presumed that the common law prevailed. The case therefore is not in point. In *Selma R. Co. v. Lacy*, 43 Ga. 461, the same general state of facts existed, and the same rule was recognized. *Marcy v. Marcy*, 32 Conn. 308, does not directly affect the question considered. From this review of the cases it is manifest that the authorities cited do not sustain the position that this action cannot be maintained in

this case under the circumstances existing, and we are of the opinion that the right of the administrator to bring this action is clear and beyond question. The letters of administration granted by the surrogate are conclusive as to his authority. *Roderigas v. East River Savings Inst'n*, 63 N. Y. 460; *Richardson v. West*, 80 id. 139. The letters on their face show that the intestate died "leaving assets" in the State and county of New York, and this gave the surrogate of the county of New York jurisdiction. 3 R. S. (6th ed.) 76, § 24. Nor was it essential, we think, that letters should have been taken out in the State of Connecticut. Be that as it may, however, the letters issued by the surrogate are conclusive as to the right of the administrator to maintain this action.

In regard to the question as to the right to recover interest, there is no evidence that the interest was added to the verdict upon the trial. It does appear, however, to have been inserted in the judgment from the record before us. We may assume that it was added on the taxation of the costs, and the question can only be properly reached by a motion to retax the costs or to correct the judgment at Special Term and not by appeal. See Code of Civil Proc., §§ 1346, 1349.

Where a clause is inserted in the judgment without authority, the proper remedy is by motion to correct the judgment and not by appeal. *People v. Goff*, 52 N. Y. 434; *Kraushaar v. Meyer*, 72 N. Y. 602; *De Lavallette v. Wendt*, 75 id. 582.

There was no error in the refusal of the judge to charge any of the requests submitted to him by the defendant's counsel; and after a careful examination we are unable to discover that any error was committed by the judge in the various rulings as to the admissibility of evidence.

After full consideration we think that the case was properly disposed of at the Circuit, and that the judgment should be affirmed.

All concur except Rapallo, J., absent, and Folger, C. J., who concurs in result.

NEW YORK COURT OF APPEALS ABSTRACT.

BANK.—PAYING FORGED CHECKS MUST BEAR LOSS—DUTY OF DEPOSITOR AS TO EXAMINATION OF ACCOUNT.—Plaintiffs, merchants doing business, kept an account at defendant bank, making deposits and drawing checks. They kept a check-book, in the margin of which all checks drawn by them were entered and a pass-book, in which the bank entered the deposits. Every quarter day this book was delivered to the bank and the amount of the checks entered and a balance struck. Each check was entered separately and the checks returned as vouchers to plaintiffs. In all this matter, G., a book-keeper of plaintiffs, acted for them, he having charge of their bank account and of the books. The checks drawn on the bank were always filled up by G., but in all cases genuine checks were signed by one of plaintiff. G. forged a number of checks upon the bank in plaintiffs firm name; these were paid from time to time, charged and returned as vouchers. Upon the return of the pass-book and vouchers, plaintiffs, on each occasion examined, with the assistance of G., the account, comparing the checks which were given them by G. with the memorandum of checks in the pass-book, and the balance in the two books, which were found to correspond. The checks were then compared with the pass-book, G. reading the entries and one of the plaintiffs examining the checks, and no discrepancy appearing, all was deemed to be correct. This was done on several occasions, but G., by forged vouchers and false balances and readings, deceived plaintiffs and prevented the discovery of the forgeries. Thirty-four checks were returned as vouchers before plaintiffs discovered the

forgeries. *Held*, that plaintiff was entitled to recover from the bank the amount of deposits detained by it to pay the forged checks. *Weissner's Admr. v. Denison*, 10 N. Y. 68. A bank cannot pay money of a depositor on a forged check, and it makes no difference that the forger is a confidential clerk of the depositor. While the depositor is under a duty to attend to his account when made up, and a negligent omission of all examination may, when injury happens to a bank, which the depositor might have prevented, preclude a depositor from questioning its correctness, he is under no duty to the bank so to conduct his examination that it will necessarily lead to a discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skillful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank. Banks are bound to know the signatures of their depositors, and they pay checks purporting to be drawn by them at their peril." If a depositor, in the ordinary course of business, commits the examination of the bank account and vouchers to clerks and agents, and they fail to discover checks that are forged, the duty of the depositor to the bank is discharged, although the principal might personally have detected the forgery. The failure of plaintiffs to detect the forgeries did not discharge the bank in this instance from liability for the amount charged to plaintiffs. Judgment affirmed. *Frank v. Chemical National Bank of New York*. Opinion by Andrews, J.

[Decided March 1, 1881.]

MUNICIPAL BONDS—TOWN BONDS UNDER LAWS 1866, CHAPTER 306—AFFIDAVIT OF ASSESSOR AS TO CONSENT OF TAXPAYERS NOT CONCLUSIVE IN FAVOR OF BONA FIDE HOLDER.—By Laws 1866, chapter 306, authorizing towns to subscribe to the stock of the Midland Railroad Company, and to issue bonds, etc., and notes amendatory thereto, it is provided that upon the application of twelve freeholders of a town the county judge may appoint railroad commissioners; that these commissioners may borrow money on the credit of the town, and execute bonds therefor to the extent of thirty per cent of the assessed value of the taxable property, "providing, however, that the consent shall first be obtained in writing of a majority of the taxpayers of such town, owning or representing more than one-half of the taxable property of the town assessed, which consent shall be proved in the same manner as conveyances of real estate." It is further provided that the fact that a majority of the taxpayers representing a majority of the taxable property, has been obtained and acknowledged, shall be proved by an affidavit in writing of one of the assessors of the town, etc., annexed to the consent, and the consent and affidavit shall be filed, etc., and that "the same or a certified copy thereof shall be evidence of the facts therein contained, and shall be admitted as evidence in any court in this State, etc., and it shall be the duty of the said assessor, etc., to make such affidavit when said consent shall have been obtained," etc. *Held*, that the affidavit of the assessor was not conclusive evidence that the requisite consent of taxpayers to the issue of town bonds had been given, in an action by the bona fide holder for value, and without notice of interest coupons of town bonds against the town, to enforce their payment. See *Starin v. Town of Genoa*, 28 N. Y. 429; *People v. Mead*, 36 id. 224; *Town of Venice v. Woodruff*, 62 id. 463. The statute is satisfied by holding that the affidavit of the assessor is *prima facie* evidence. If it is intended in a statute to make an affidavit or any writing conclusive evidence, there is usually something in the statute clearly to indicate such intention. See 1 R. S. 173, § 22; id. 412, § 61; 2 R. S. 377, § 2; Code, § 1935; *People v. Brown*, 55 N. Y. 296; *Town of Wallboro v. New York*, etc., R. Co., 76 id. 156. In the case of *People v. Mitchell*, 35 id.

551, the affidavit that the requisite consent was given was made conclusive by the statute. In *Town of Springport v. Teutonia Sav. Bk.*, 75 id. 397, it was made presumptive evidence. In *Bank of Rome v. Village of Rome*, 19 id. 20, the certificate was not as to the action of the town in subscribing, but as to the performance of a collateral condition. Although in determining whether the requisite consent has been given and making the affidavit, the assessors exercise quasi judicial functions (*Howland v. Eldridge*, 43 N. Y. 457; *People v. Allen*, 62 id. 538), and their determination of the matters embraced in their affidavit is in the nature of a judgment, yet where there is no consent of the taxpayers they have no jurisdiction to act and do not get it by determining that they have it. See *Bank of Chemung v. City of Elmira*, 53 N. Y. 48. Judgment affirmed. *Cogswell v. Town of Hancock*. Opinion by Earl, J.

[Decided March 15, 1881.]

PRACTICE—CODE, § 1023, AND SUPREME COURT RULE 32.—Section 1023 of the Code is inconsistent with rule thirty-two of the Supreme Court as it stood before the recent revision, and made that rule inoperative by providing that a request for findings of a court or referee should be made and passed upon before a final decision or report, the rule mentioned allowing such requests and findings after the decision or report and upon the settlement of the case. The revised rules are however in accordance with the Code. Order reversed. *Gormley v. McGlynn*. Opinion by Finch, J. [Decided March 1, 1881.]

SHERIFF—ACTION FOR ESCAPE—SERVICE OF SUMMONS—THAT PROCESS UNDER WHICH PRISONER WAS HELD VOIDABLE AS DEFENSE—PLEADING—INSOLVENCY OF DEBTOR—INTEREST ON SHERIFF'S DECREE—ADMINISTRATOR—AUDITOR'S FEES MAY BE CHARGED AGAINST.—(1) In an action against a sheriff for the escape of an imprisoned debtor, the service of the summons was made by the delivery of the same to a deputy and clerk of defendant at a room which was in fact the office of the defendant as sheriff. *Held*, a sufficient service under Code, § 423, subd. 3, even though the sheriff had not filed a notice of such room as his office as required by 2 R. S. 285, § 55. The filing of the notice was not needed to make the room in question his office, and the fact that he had failed to do his duty as to filing would not absolve him from the effect of the service. (2) Auditor's fees may be charged against an administrator personally under Laws 1867, chap. 782, § 8. (3) That a process directing the arrest of a debtor by the sheriff had been erroneously issued, it being voidable only and not void, cannot be set up by the sheriff in an action by the creditor for an escape of the debtor. *Cable v. Cooper*, 15 Johns. 155. (4) Under the provisions of the Code, § 1211, that every judgment shall bear interest from the time of perfecting the same, every determination of a court awarding a sum of money to one party to be paid by another carries interest. A decree of a surrogate bears interest from its date. And the sheriff is liable to pay interest upon the amount of a decree for the failure to pay which an escaping debtor had been imprisoned. (5) The complaint avowed that the defendant wrongfully permitted the debtor to escape. It was shown that the transgression of the debtor was but momentary, for a short distance, and without the knowledge of the defendant. *Held*, that defendant was still liable. Under the Code, the form of action is not material. (6) The fact that the debtor was insolvent *hied*, no defense, though it might have been at common law. Judgment affirmed. *Dunford v. Weaver*. Opinion by Folger, C. J.

[Decided March 8, 1881.]

TITLE—CHOSE IN ACTION TRANSFERABLE BY PARTY—JUDGMENT TO USE OF ANOTHER UNDER COMMON LAW

BELONGS TO SUCH OTHER.—(1) The firm of W. & Co., who were largely indebted to E., in pursuance of an understanding delivered to E. a policy of insurance upon which they had a claim against defendant, and at the same time made a written order expressing a consideration upon defendant to pay the amount due to them to E., the order stating that the receipt of E. should be a full discharge. There were other circumstances tending to show that the policy belonged to and was intended to be transferred to E. *Held*, sufficient to show a transfer of the right of action upon the policy to E. The authorities hold that a chose in action may be assigned by parol and a delivery where there is a valuable consideration. *Hooker v. Eagle Bank*, 30 N. Y. 83; *Mack v. Mack*, 3 Hun, 323; *Doremus v. Williams*, 4 id. 453. Here was more than a parol assignment and delivery, for the order was virtually an assignment which transferred the policy. An equitable assignment is recognized as a legal assignment under the Code. (2) The firm of W. & Co. brought an action in the courts of Mississippi, where the common law forbidding an assignment of a chose in action prevails, in their name for the use of E. upon the policy against defendant. *Held*, that the judgment recovered belonged to E. The bringing of an action for the use of a party in interest, in accordance with the common-law rule that a chose in action is not assignable, is recognized in the decision. *Merton v. Merton*, 13 S. & R. 107; *Welch v. Mandeville*, 1 Wheat. 233, n; *McCullom v. Coxe*, 1 Dallas, 150; *Canby v. Ridgway*, 1 Bin. 496; *Southgate v. Montgomery*, 1 Paige, 41. The plaintiff in such action is merely a nominal party. The judgment belongs to the one for whose use it is recovered as much as if he was named as plaintiff, and under the Code he alone can sue upon the same. Judgment affirmed. *Greene v. Republic Fire Insurance Co.* Opinion by Miller, J. [Decided March 22, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

AGENCY—AGENT TO INSURE OF INSURANCE COMPANY, BORROWING MONEY TO REMIT TO COMPANY, DOES NOT MAKE IT LIABLE TO LENDER.—The agent at Baltimore of an English insurance company to issue policies, adjust and pay losses, but without any authority to borrow money on the credit of the company, and who had never done so except by the negotiation as agent of bills to pay losses, was behindhand in his accounts. He was at the time agent of other insurance companies and of private persons. He had been introduced to the plaintiff's bank as the agent of the English company, and had opened an account in his own name as agent, the name of the company not appearing. All his deposits from whatever source were made to the credit of this account and all his checks were drawn against it. His remittances to the English company were made by bills purchased from a firm dealing in foreign exchange at Baltimore, and were paid for with checks on the bank payable to that firm. This was known to the bank. Being pressed for a settlement by the company, he arranged with the bank for an over-draft upon his account which was made and the check used to purchase a bill from the firm mentioned, which bill was sent to the English company. Upon a similar arrangement he made another over-draft which was used in like manner to pay the company. Thereafter he left Baltimore and his agency was revoked. *Held*, that the English insurance company was not liable to the bank for the amount of the over-drafts. A borrowing by an insurance agent to enable him to remit his company the proceeds of his

business is *prima facie* the borrowing of the agent himself rather than the company, and will be so treated unless the contrary is shown. Judgment of U. S. Circ. Ct., S. D. New York, affirmed. *Central National Bank of Baltimore v. Royal Insurance Co.* Opinion by Waite, C. J. [Decided March 21, 1881.]

CONTRACT—MUTUALITY NECESSARY—CUSTOM—IN ABSENCE OF CONTRACT NOT PROVABLE.—Plaintiff brought action against the city of Chicago and county of Cook, claiming to recover for services as architect in preparing plans for a court-house and city hall and for superintendence in erecting such building. It was shown that the authorities of the defendants had offered prizes for three plans for such building with a statement of the contents and an estimate of the cost of the same. Designs were submitted by a number of architects and a plan prepared by plaintiff was given the third prize (others being given the first and second) and he was paid the sum awarded therefor. The city and county authorities then adopted a resolution that the award of a prize should not indicate as to which plan should be finally adopted, but afterward adopted a resolution that the building should be constructed in accordance with that prepared by plaintiff, "provided the estimate of the architect who presented said plan as to the cost of construction should be verified." In the trial of the action plaintiff gave evidence of the facts mentioned; that he was an architect of some years' experience, and that he verified the estimate accompanying his plan. He produced his plans and offered to show their value, the time and expense of preparing them; to show that by the usage and custom of architects in the absence of contract the superintendence of the construction of a building belonged to the architect whose plans were accepted, that by such usage the plans of successful architects in a competition belonged to them, and if adopted as the plans to build by they were to be paid for in addition to the prize, and to show the value of the services rendered in verifying the cost of the building. There was no evidence that the plans of plaintiff were used or that the building was erected. The trial court excluded the evidence and directed a verdict for defendants. *Held*, no error. Plaintiff could not recover on any resolution of the authorities of defendants, as such resolution did not bind him to furnish the plans, and there was therefore no mutuality. If one does not accede to a promise as made, the other party is not bound by it. *Tuttle v. Love*, 7 Johns. 470. When A. signs a writing by which he declares he will sell to B. his house at a certain price, this is a mere proposition and not a contract. *Tucker v. Woods*, 12 Johns. 190. See, also, *Wood v. Edwards*, 19 Johns. 265; *Kingston v. Phelps*, Peak, 227; *Eliason v. Henshaw*, 4 Wheat. 225; *Welch v. Alton*, 5 Gil. (Ill.) 225; *McClay v. Harvey*, 90 Ill. 525. Usage could not be shown. Unless some contract is shown, evidence of usage is immaterial. Proof of usage can only be received to show the intention or understanding of the parties in the absence of a special agreement, or to explain the terms of a written contract. *Hutchinson v. Tatham*, L. R., 8 C. P. 482; *Field v. Lelean*, 30 L. J. Ex. 168; *Baywater v. Richardson*, 1 A. & E. 508; *Robinson v. United States*, 13 Wall. 363. In all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract. *Holding v. Pigot*, 7 Bing. 465, 474; *Clark v. Royston*, 13 M. & W. 752; *Yeats v. Prim*, Holt N. P. 95; *Truman v. Loder*, 11 A. & E. 580; *Bilvin v. New England Screw Co.*, 23 How. 420. If usage compelled a party to pay for plans not used and for superintendence of a building not erected, because such party announced his intention to use the plans, it would be unreasonable and not binding. As to the value of

plaintiff's services in verifying, there was no proof that he was requested to render them. Judgment of U. S. Cir. Ct., N. D. Illinois, affirmed. *Tilley v. City of Chicago and County of Cook*. Opinion by Woods, J. [Decided Feb. 28, 1881.]

JUDGMENT—ENTRY OF—AFTER DEATH OF PARTY WHERE CAUSE SUBMITTED BEFORE, BY ORDER NUNC PRO TUNC, PROPER.—At the October term, 1880, of an Iowa court of general jurisdiction, a cause on trial between Stutzman, plaintiff, and Mitchell and others, defendants, was submitted by the parties, a jury trial having been waived and it being stipulated that the decree should be rendered "as of the term of said trial and submission." In 1880 Stutzman died. At the October term, 1870, Mitchell not knowing of Stutzman's death, obtained leave to amend his answer upon terms. He did not comply with the terms and his amendment was disallowed, and a decree entered in November, 1872, in favor of Stutzman, as of the October term, 1868. Held, that the decree was proper. The rule established by the general concurrence of the American and English courts is, that where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business, or the intricacy of the questions involved, or for any other cause, not attributable to the inaction of the parties, but within the control of the court, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim *actus curie neminem gravabit*—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice—it is the duty of the court to see that the parties did not suffer by the delay. Whether a *nunc pro tunc* order should be made depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the cause may require. These principles control the present case. Stutzman was alive when the cause was argued and submitted for decree. He was entitled at that time, or at the term of submission, to claim its final disposition. A decree was not then entered, because the case, after argument, was taken under advisement. The delay was altogether the act of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree. *Bank U. S. v. Wells*, 2 Pet. 481; *Clay v. Smith*, 3 id. 411; *Griswold v. Hill*, 1 Paige's C. C. Rep. 484; *Gray v. Brignardello*, 1 Wall. 636; *Campbell v. Meier*, 4 Johns. Ch. 342; *Vroom v. Ditmas*, 5 Paige, 828; *Wood v. Keyes*, 8 id. 479; *Perry v. Wilson*, 7 Mass. 305; *Currier v. Lowell*, 16 Pick. 170; *Stickney v. Davis*, 17 id. 160; *Springfield v. Wooster*, 2 Cush. 62; *Hess v. Cole*, 3 Zabr. 118; *Cumins v. Ware*, 1 Str. 428; *Astley v. Reynolds*, 3 id. 818; *Davies v. Davies*, 3 Vesey. 461; *Belsham v. Percival*, 2 Coop. Cases, in time of Cottenham; *Green v. Cobden*, 4 Scott's Cas. 486; *Lawrence v. Hodgson*, Y. & J. 870; *Freeman v. Tranah*, 12 C. B. 406; *Collinson v. Lester*, 1 Jurist, P. N. 8. 836 (20 Beavan's R. C. 365); *Blaisdale v. Harris*, 52 N. H. 191; 3 Dan. Ch. Pr. 1017-18 (5th Am. ed.); *Tidd's Pr.* 862, (4th ed., Am. Notes); 1 Barb. Ch. Pr. (2d ed.) 341; *Freem. on Judg.*, § 57. No importance is to be attached to the fact that while the cause was under advisement as to a final decree, Mitchell asked and obtained leave to amend his answer. The leave was granted upon terms, but as the terms were not complied with, the amendment was stricken from the files. The question must therefore be determined as if no amendment of the pleadings had been attempted. Decree of U. S. Cir. Ct., S. D. Ohio, affirmed. *Mitchell v. Osorman*. Opinion by Harlan, J.

[Decided Feb. 28, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

JURISDICTION—OF ADMIRALTY IN SUITS FOR NEGLIGENCE UNDER STATE STATUTES—STATUTE OF OREGON.

—(1) Although an action may not lie at common law to recover damages for the death of a person, it will at the civil law, and therefore *semble* that it will in admiralty. A marine tort is one that occurs on any public, navigable water of the United States, whether caused by a wrongful act or omission, and the proper District Court, as a court of admiralty, has jurisdiction of a suit to recover damages therefor. The jurisdiction of the National courts does not always, nor often, depend upon the origin of the rights of the parties; and where a State statute gives a right, the same may be asserted or enforced in such courts whenever the citizenship of the parties or the nature of the subject will permit. (2) The right given by section 367 of the Oregon Civil Code to an administrator, to recover damages on account of the death of his intestate, from the party by whose act or omission such death was caused, may be enforced in the National courts. When a passenger on the railway ferry-boat, plying across the Willamette river between East Portland and Portland, was drowned by reason of the negligence of the owner of the boat or its servants, a marine tort was committed, for which a suit may be maintained in the District Court by the administrator of the deceased to recover the damages given therefor by section 367, *supra*. Cases referred to: *Waring v. Clarke*, 5 How. 451; *Genesee Chief*, 12 id. 320; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Towboat Co.*, 23 id. 214; *The Commerce*, 1 Black. 573; *The Belfast*, 17 Wall. 637; *Insurance Co. v. Dunham*, 11 id. 25; *Higgins v. Butcher*, 14 id. 80; *Baker v. Bolton*, 1 Campb. 403; *Carry v. Berkshire R. Co.*, 1 Cush. 477; *Green v. Hudson, etc., R. Co.*, 3 Keyes, 294; *Fred v. Monroe*, 20 Wend. 210; *Sullivan v. Union P. R. Co.*, 3 Dill. 341; *Insurance Co. v. Brane*, 95 U. S. 756; *The Charles Morgan*, 4 P. C. L. J. 151; *Steamboat Co. v. Chase*, 18 Wall. 532; *The Sea Gull*, Chase's Dec. 156; *Cutting v. Seabury*, 1 Sprague, 522; *The Highland Light*, Chase's Dec. 151; *Railway Co. v. Whitton*, 13 Wall. 270; *The Orleans*, 11 Pet. 184; *The Planter*, 7 id. 824; *The Lottawana*, 21 Wall. 579; *Curtis v. Sutter*, 15 Cal. 202; *Clark v. Smith*, 14 Pet. 200; *Lorman v. Clark*, 2 McLean, 500; *Fitch v. Creighton*, 24 How. 108; *Mackay v. Central R. of N. J.*, 4 Fed. Rep. 617. *United States Cir., Oregon*, July, 1880. *Holmes v. Oregon & California Railroad Co.* Opinion by Deady, D. J.

NATURALIZATION—MARRIAGE OF ALIEN WOMAN TO CITIZEN NATURALIZES HER.—Under section 2 of the act of February 10, 1855 (section 1994, U. S. R. S.), an alien woman of the race or class of persons that are entitled to be naturalized under existing laws, who is married to a citizen of the United States, becomes by that act a citizen of the United States; and such admission to citizenship has the same force and effect as if such woman had been naturalized by the judgment of a competent court. The clause in the statute aforesaid, "might herself be lawfully naturalized," does not require that the woman shall have the qualifications of residence, good character, etc., as in case of admission to citizenship in a judicial proceeding, but it is sufficient if she is of the class or race of persons who may be naturalized under existing laws. *Regina v. Manning*, 2 C. & K. 880; *Burton v. Burton*, 1 Keyes, 359; *Kelley v. Owen*, 7 Wall. 498; 2 Blah. on Mar. Wom., § 505; *Kane v. McCarthy*, 63 N. C. 280. *United States Cir., Oregon*, Dec. 15, 1880. *Leonard v. Grant*. Opinion by Deady, J.

REMOVAL OF CAUSE—CONTESTED DETERMINING

*Appearing in 5 Federal Reporter.

RIGHT TO, NEED NOT BE PRINCIPAL ONE. — Under the second clause of section 2 of the act of March 3, 1875, any suit mentioned therein is removable whenever it involves a controversy wholly between citizens of different States, and which can be fully determined as between them, upon the petition of either one or more of the plaintiffs or defendants actually interested in such controversy; and it is immaterial whether such controversy is considered the main or principal one in the suit or not, or what other controversies or parties are incidentally or otherwise involved in it. See Removal Cases, 100 U. S. 468; *Coal Co. v. Blatchford*, 11 Wall. 174; *Gaines v. Fuentes*, 92 U. S. 20; *Taylor v. Rockefeller*, 18 Law Reg. 301; *Donahue v. Mariposa Land Co.*, 5 Saw. 166; *Osgood v. Chicago, D. & V. A. Co.*, 6 Biss. 338. United States Circ., Oregon, Dec. 13, 1880. *Bybee v. Hawkeell*. Opinion by Deady, D. J.

— CONSOLIDATED CORPORATIONS. — When a corporation is created by the laws of one State and then becomes consolidated with the corporations of other States, by virtue of the laws of the State of its creation and of such other States, and then changes its name and is used by such changed name in a court of the State where it was created, by a corporation of the same State, one of the consolidated corporations created by the law of another State cannot go into such State court and have the cause removed into the Federal court. United States Circ., N. D. Illinois, Jan. 5, 1881. *Chicago & Western Indiana Railroad Co. v. Lake Shore & Michigan Southern Railway Co.* Opinion by Drummond, C. J.

TITLE—TO LOGS CUT UNDER PERMIT RETAINING TITLE IN GRANTOR—BONA FIDE PURCHASER—DAMAGES. — A contract between a citizen of New Jersey and a citizen of Maine, called a conditional license, authorizing the grantee to enter upon the lands of the grantor, in the State of New Hampshire, and cut logs therefrom, contained this clause: "Said grantor reserves and maintains full control and ownership of all logs and lumber which shall be cut under this permit, wherever and however situated, until all matters and things appertaining to or connected with this license shall be settled and adjusted, and the sum or sums due or to become due for stumpage or otherwise shall be fully paid." Held, that a bona fide purchaser of logs cut under this permit could not acquire a better title than the grantee. It was further provided that if any default should be made, the grantor should have full power and authority to take all or any part of said lumber and to sell and dispose of the same at public or private sale, and after deducting reasonable expenses, commissions, and all sums which were then due or might become due for any cause "herein expressed," should pay the balance to the grantees. Held, under this clause, that the grantor was not entitled to recover in trover of such bona fide purchaser the whole value of the logs sold. Authorities cited: *Sawyer v. Fisher*, 82 Me. 28; *Emerson v. Fisk*, 6 Greenl. 200; *Prentiss v. Garland*, 67 Me. 345; *Crosby v. Redman*, 10 Rep. 306; *Whipple v. Gilpatrick*, 19 Me. 427; *Rawson v. Tuel*, 47 Id. 506; *Bunker v. McKenney*, 63 Id. 529; *Hotchkiss v. Hunt*, 49 Id. 213; *Sargent v. Gile*, 8 N. H. 325; *Hirschhorn v. Canney*, 98 Mass. 149; *Coggill v. Hartford, etc., R. Co.*, 3 Gray, 545; *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 Id. 500; *Sargent v. Metcalf*, 5 Gray, 306; *Burbank v. Crooker*, 7 Id. 158; *Deshon v. Bigelow*, 8 Id. 159; *Zuchtmann v. Roberts*, 109 Mass. 53; *Benner v. Puffer*, 114 Id. 876; *Salomon v. Hathaway*, 123 Id. 482; *Kenney v. Ingalls*, Id. 488; *Copland v. Bosquet*, 4 Wash. C. C. 588; *Clark v. Wells*, 45 Vt. 4; *Duncan v. Stone*, Id. 118; *Dunbar v. Rowles*, 28 Ind. 225; *Griffin v. Push*, 44 Mo. 412; *Ridgeway v. Kennedy*, 52 Id. 24; *Bailey v. Harris*, 8 Iowa, 331; *Robinson v. Chapline*, 9 Id. 91; *Baker v. Hall*, 15 Id. 277; *Sumner v. McFarlan*, 15 Kan. 600; *Rose v. Story*, 1 Penn. St.

190; *Becker v. Smith*, 59 Id. 469; *Enlow v. Kleim*, 79 Id. 488; *Angier v. Taunton Manuf. Co.*, 1 Gray. 621; *Brown v. Haynes*, 52 Me. 578; *Duncan v. Stone*, 45 Vt. 118. U. S. Circ. Ct., Massachusetts, Dec. 21, 1880. *Homans v. Newton et al.* Opinion by Lowell, C. J.

MICHIGAN SUPREME COURT ABSTRACT.

JANUARY, 1881.

CORPORATION—THAT MORTGAGE WAS INVALID AS TO, MAY NOT BE SET UP BY PURCHASER UNDER EXECUTION AGAINST.—A notice of meeting of stockholders of a corporation was stated among other things to be to authorize the issue of bonds to the extent of \$100,000 to be secured by mortgage on the corporate property. The meeting actually authorized the issue of \$150,000 bonds, which were issued. Held, that a purchaser at an execution sale of the corporation's equity of redemption could not object to the validity of the bonds and mortgage even under a statute providing that no mortgage of the real estate of any corporation should be valid unless authorized at a meeting, notice of the object of which had been given to the stockholders. The purpose of the statute was to protect stockholders only. A statute making usurious mortgages utterly void was in Massachusetts construed not to authorize strangers to the consideration to question such a mortgage. *Green v. Keep*, 13 Mass. 515. In *Rex v. Hipwell*, 8 B. & C. 466, it was intimated, that the word void in a statute might be construed voidable where the provision is introduced for the benefit of parties only, but not where it is introduced for public purposes and to protect those who are incapable of protecting themselves, and though this distinction has been questioned (*Rex v. St. Gregory*, 2 Ad. & El. 99), much good reason lies at the foundation of it. If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determinate individuals who are *sui juris*, the purpose is sufficiently accomplished if they are given the liberty of avoiding it. A statute would strike blindly if the letter alone were to be regarded, not the spirit. A statute declared that certain indentures not made as by the statute provided should "be clearly void in law to all intents and purposes;" and it was nevertheless held that if acted upon, the apprentice gained a settlement thereby. *St. Nicholas v. St. Peter, Strange*, 1066. And in Ohio a purchase at a judicial sale by one who acted as appraiser of the property, though the statute declared it should be "considered fraudulent and void," was held to be voidable only on a proceeding by a party in interest directly for the purpose of avoiding it. *Terrell v. Auchauer*, 14 Ohio (N. S.), 80. This subject is considered at length and many authorities examined in *State v. Richmond*, 26 N. H. 132. *Beecher v. Marquette & Pacific Rolling Mill Co.* Opinion by Cooley, J.

EXECUTION—AGAINST INDIVIDUAL PARTNER NOT LEVIABLE ON PARTNERSHIP PROPERTY—REPLEVIN.—A sheriff, under an execution against one Van Etten, levied upon and removed specific articles constituting the stock of a livery stable in the possession of one Dubois, on the ground that Van Etten had an interest as partner with Dubois therein. Held, that the seizure was wrongful even if Van Etten was partner in the ownership of the property, and Dubois was entitled to maintain replevin therefor against the sheriff. Though Van Etten's interest as partner was subject to his debts, it would not be an interest in the specific articles belonging to the firm, but only an interest in the surplus that should remain after the debts of the firm were paid. *Hawkey v. Garrett*, 1 Ves. 236; *Tay-*

lor v. Fields, 4 Id. 389; Skip v. Harwood, 2 Swanst. 586. Meantime his share is not separable from the share of his copartner, for he has no separate property in the assets of the firm. *Newman v. Bean*, 21 N. H. 98, 99. His share is also subject to the final adjustment of accounts between the partners themselves. *Berrine v. Briggs*, 31 Mich. 443. If any levy of an execution upon such an interest can be made, it must be so made and enforced as to protect all rights of others. One man's interest must not be sacrificed because another who is associated with him in business happens to be in debt. Specific chattels must not be taken on the execution, because the specific chattels are owned by the firm and not by either of the partners. *Gibson v. Stevens*, 7 N. H. 353; *Morrison v. Blodgett*, 3 Id. 238; *Tradewell v. Brown*, 43 Id. 290; *Brewster v. Hammet*, 4 Conn. 540; *Matter of Smith*, 16 Johns. 102; *Niles v. Maddox*, 26 Mo. 77. The utmost extent of the officer's rights — if he can levy at all — must be to seize the interest of the partner, whatever it may be, subject to all the partnership debts and to the final accounting. *Church v. Knox*, 2 Conn. 514; *Tappan v. Blaisdell*, 5 N. H. 193; *Sirrine v. Briggs*, 31 Mich. 443; *Romkelmer v. Hemingway*, 30 Penn. 433; *Knerr v. Hoffman*, 65 Penn. St. 126. As was said by Campbell, J., in *Haynes v. Knowles*, 36 Mich. 407, 410: "The partner not sued cannot on any principle of justice be placed in any worse condition by a creditor of his partner than he could have been by his own partner." At most for the purposes of his writ the officer only takes the debtor's place and seizes an interest that can only be measured by final account. *Vandike v. Rosekam*, 63 Penn. St. 330. And the action of replevin could not be defeated on the ground that the partner bringing it was not possessed of the entire ownership. Each partner "has an entire as well as a joint interest in the whole of the joint property. A levy then to affect the interest of a partner, cannot touch a specific proportion of the goods, nor the whole, because others have property in every part as well as the whole, complied with a right, vesting in contract, to use them for the purposes for which the partnership was instituted." *Deal v. Bogue*, 30 Penn. St. 228, 233. And see *Atkins v. Saxton*, 77 N. Y. 195. *Hutchinson v. Dubois*. Opinion by Cooley, J.

PARTNERSHIP — WHEN ONE PARTICIPATING IN GROSS RECEIPTS OF BUSINESS NOT LIABLE. — *Beecher* was the owner of a hotel, and Williams proposed in writing to "hire the use of it" from day to day and open and keep it as a hotel. The proposal was accepted and Williams opened the hotel and kept it as such, it being agreed that Beecher should receive for the use a sum equal to one-third the gross earnings or receipts. Beecher was not held out as a partner, and had no control over the business. Held, that Beecher was not liable as partner for supplies furnished Williams in the hotel business. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. Gross returns are not profits and may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time. It was recognized in *Hinman v. Littell*, 23 Mich. 484. And in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions. *Eager v. Crawford*, 76 N. Y. 97. See, also, *Loomis v. Marshall*, 13 Conn. 3, 60. In *Cox v. Hickman*, 8 H. L. Cas. 268, it is said that the real ground of liability of one sought to be made a partner is that the trade has been carried on by persons acting on his behalf. When that is the case he is liable in the trade obligations, and entitled to the profits or to a share of them. It is not strictly correct to say that his right to share in the profits

makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf; i. e., that he stood in the relation of principal to the person acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made. What was declared to be law in *Wangh v. Carver*, 1 H. Bl. 235, is overruled in Great Britain. *Kilshaw v. Jakes*, 3 B. & S. 847; *Shaw v. Gault*, 10 Irish C. L. 357; *Holme v. Hammond*, L. R., 7 Exch. 218; *Ex parte Delbane*, 7 Ch. Div. 411. And though in New York courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in *Cox v. Hickman* to the full extent, the American authorities in the main are in harmony with it. That is shown in *Eastman v. Smith*, 63 N. H. 278, where the authorities are collated. It must be admitted, however, that the attempts at an application of the test to the complicated facts of particular cases have not been productive of harmonious results. See *Champion v. Bostwick*, 16 Wend. 175; *Eastman v. Clark*, 53 N. H. 278; *Farmer's Ins. Co. v. Ross*, 29 Ohio St. 429; *Musler v. Trumbour*, 5 Wend. 274; *Everett v. Chapman*, 6 Conn. 347; *Loomis v. Marshall*, 12 Id. 69; *Moore v. Smith*, 19 Ala. 574; *Bowman v. Bailey*, 10 Vt. 370; *Price v. Alexander*, 2 Greene (Iowa), 427; *Danham v. Rogers*, 1 Penn. St. 255; *Perline v. Hankinson*, 11 N. J. 181; *Holmes v. Old Colony R. Co.*, 5 Gray, 58; *Bradley v. White*, 10 Mete. 308. *Beecher v. Bush*. Opinion by Cooley, J.

INSURANCE LAW.

FIRE POLICY — WAIVER OF CONDITION AS TO OTHER INSURANCE BY ACT OF AGENT. — Plaintiff applied to an insurance agent, who was soliciting agent for two fire insurance companies, defendant and another one, with authority from defendant to receive and forward for its approval applications for insurance, to have the same property insured in the two companies. The agent filled up the application to defendant, which was signed by plaintiff, the agent explaining to him how the question in regard to other insurance should be answered. The application did not mention the contemplated assurance in the other company, but the agent was to notify defendant of it. Upon this application defendant issued its policy and sent it to the agent for delivery. He delivered it at the same time with the policy of the other company, defendant's policy not having indorsed on it a consent to such other insurance. The policy contained a condition that in case of other insurance without a consent indorsed on the policy, such policy should be void. Held, that defendant was chargeable with its agent's knowledge of the application for and issuance of the policy of the other company, and that by delivering its policy without indorsing its consent to the other insurance, it waived as to such other insurance the condition in its policy referred to. *Minnesota Supreme Court*, Dec. 30, 1890. *Brandup v. St. Paul Fire and Marine Ins. Co.* Opinion by Gilfillan, C. J.

CONDITION IN, CONSTRUED AGAINST INSURER — VACANCY OF PREMISES. — (1) A continuing warranty in a policy of insurance, the breach of which (whether injurious to the insurer or not) avoids the policy, being in the nature of a forfeiture, must be construed as strongly against the insurer, and as favorably for the insured, as its terms will reasonably permit. See *Lowe v. Hyde*, 39 Wis. 345; *Lyman v. Babcock*, 40 Id. 593; *Morse v. Ins. Co.*, 30 Id. 534, 540; *Appleton Iron Co. v. B. A. Ass. Co.*, 49 Id. 23, 32; *Ins. Co. v. Wright*, 1 Wall. 468; *Western Ins. Co. v. Cropper*, 53 Penn. St. 351; *Hoffman v. Ins. Co.*, 32 N. Y. 414; *Clinton v. Ins.*

Co., 45 id. 454, 464; *Livingston v. Stickles*, 7 Hill, 256; *Cullen v. Springfield Ins. Co.*, 1 Sum. 43, 44; *Breasted v. Farmers' Loan & Trust Co.*, 4 Seld. 365; *Yeaton v. Fry*, 5 Cranch, 341; *Nat. Bank v. Ins. Co.*, 5 Otto, 678; *Smith v. Ins. Co.*, 32 N. Y. 399; *Boon v. Aetna Ins. Co.*, 40 Conn. 586; *Schunck v. G. W. & W. F.*, 44 Wis. 360. (2) A fire insurance policy declares that if the premises shall become vacant "without immediate notice to the company, and indorsement made on the policy," the contract of insurance shall become void. It then provides that the insurance "may also be terminated at any time at the option of the company, by giving a written notice to that effect to the insured," and that "in such case the assured shall be entitled to claim a ratable proportion of the premium," etc. *Held*, that the indorsement here mentioned cannot be construed to be an indorsement of the consent of the company to a continuance of the insurance during such vacancy, but merely of the fact that notice of the vacancy had been given, and that where such a notice has been promptly given, if the company would relieve itself from further liability on the policy, it must notify the insured of its option to do so, and return the unearned part of the premium. The want of such notice from the insurer to the assured is not waived or cured by knowledge on the part of the assured that the insurer's agents had general instructions not to carry policies in such cases. See *Boone v. Aetna Ins. Co.*, 40 Conn. 586. Wisconsin Supreme Ct., Dec. 17, 1880. *Wakefield v. Orient Insurance Co. of Hartford*. Opinion by Taylor, J.

LIFE POLICY—DECLARATIONS BY BENEFICIARY OF POLICY CONTRADICTING WARRANTIES BY INSURED IN APPLICATION.—In an application for life insurance made by a husband in his wife's name in 1874 upon his own life, were these questions: "Are your habits of life correct and temperate? Have they always been so?" To which he answered: "Yes; drink at times." In 1877 the wife, in a petition in an action against her husband, upon information and belief swore that ever since her marriage "defendant had been addicted to the excessive use of intoxicating liquors, causing him to be frequently in a drunken and irresponsible condition of mind." In an action upon the life insurance policy by the wife, this petition was introduced in evidence and there was no contradictory evidence. *Held*, that the evidence furnished by the petition showed the statements in the application referred to to be untrue, that although the wife had not signed the application she was bound by it, and that under a condition making such statements warranties rendering the policy void if untrue, plaintiff was not entitled to recover on the policy. New York Superior Court, General Term, October, 1880. *Furness v. Mutual Life Insurance Co.* Opinion by Sedgwick, J.

NEW BOOKS AND NEW EDITIONS.

GREAT SPEECHES BY GREAT LAWYERS.

A Collection of Arguments and Speeches before Courts and Juries. By eminent lawyers, with Introductory Notes, Analysis, etc. By William L. Snyder, of the New York Bar. New York: Baker, Voorhis & Co. Pp. xvi, 748.

THE plan of this book is one that must commend itself to the profession. To preserve, collect and group the perishing memorials of the learning, the eloquence, the independence, and the lofty morality of the apostles and prophets of the law, is an interesting, a pious and a useful undertaking. It is probable that several of the living great men of our profession will be mainly made known to posterity by this volume, and others, whose reputation is part of the history of our country, will be the more clearly and firmly fixed in the mind of coming generations by these pages. Such a work must be difficult of execution. Where

the remains are abundant, the task of selection is perplexing; and in many cases the remains are exceedingly small and scattered. To illustrate this, we are informed that the pamphlet of the speech by Choate contained in this volume is so scarce as to be almost unattainable. The compiler must needs combine speeches involving great principles of government and of human action, those illustrating great crises in history, and those appealing to the passions and the emotions. In this respect of general complexion, Mr. Snyder has succeeded well. He gives us the patriotic fervor of Henry; the calm consideration of constitutional law by Webster; the wrapt brilliancy of Choate; and the bold, indignant and independent vindication of the rights of the citizen against an encroaching government, by Black and Beach. And what a galaxy of power and genius he sets before us! What a bead roll of honored names—Henry, Plunkney, Wirt, Webster, Prentiss, David Paul Brown, Seward, O'Connor, Choate, Stanton, Brady, Evarts, Porter, Beach, Black, Field, Erskine, Mackintosh, Plunkett, Curran. But the reader will miss several names, on both sides of the ocean, which he would naturally look for here. In England, scarcely second to the greatest advocate of all time—Erskine, whose name we never write or pronounce without a thrill of admiration and gratitude—are Brougham, Scarlett, Dunning, and Follett. And in America the two very greatest, perhaps, as pure lawyers, are Cushing and Curtis. These omissions cannot be accidental, and lead us to believe, what we cannot but hope, that this volume is but the opening number of a series. Passing the selection of names, the selection of representative examples of their powers and characteristics is even more difficult. In this, the limits of the work no doubt frequently compel a reluctant adoption. But a recital of the subjects will attest the good judgment which the editor has generally displayed, and the variety which he has managed to infuse. The list is as follows: Patrick Henry, on the right of the State to confiscate British debts; William Plunkney, on the law of constructive treason, in the *Hodges* case; William Wirt, on the right of Congress to regulate commerce, in the steam-navigation case of *Gibbons v. Ogden*; Daniel Webster, on State insolvent laws, in *Ogden v. Saunders*; Prentiss, on the right of self-defense, in the *Wilkinson* murder case; David Paul Brown, on the right of self-preservation, in the case of *Holmes*, the mariner, indicted for throwing overboard passengers to save the crew in shipwreck; Seward, in defense of the idiot Freeman accused of murder; O'Connor, on the right of the citizen to indemnity from the government, in the case of the brig *Armstrong*; Choate, in the *Dalton* divorce case; Stanton, on the right of the husband to kill his wife's seducer, in the *Sickles* case; Brady, in defense of the "Savannah" privateer, indicted for piracy; Evarts, for the government in the same case; Porter, on the constitutionality of the legal-tender acts, in the case of *Metropolitan Bank v. Van Dyck*; Beach, in defense of Col. North, before the military commission, on the charge of tampering with soldiers' votes; Black in defense of the right to trial by jury, in *Ex parte Milligan*; Field, on the constitutionality of the "Enforcement Act," in *U. S. v. Cruikshank*; Erskine, in vindication of Christianity, in *Williams' case*; Mackintosh, in vindication of free speech and free printing, in behalf of Peltier, indicted for libel on Napoleon; Plunkett, in the "bottle riot" case of *Rez v. Forbes*; Curran, in vindication of the rights of an outraged husband, in the crim. con. case of *Massy v. Marquis of Headfort*. We omit any particular mention of the speeches of North in *Rez v. Forbes*, and Hoar, Quinn, and Pousouby in the *Massy* case, thinking the space occupied by them might have been better employed, not only for greater names but for greater variety. With a number of these speeches we have long been

familiar; others are quite new to us. We should have preferred Pinkney's speech in the case of the *Neireide*, if obtainable—a speech which the great chief justice felt constrained to praise and refute in his judgment. For Webster we certainly should have preferred the extant speech in the White murder case, one of the two greatest speeches ever delivered in a criminal court in this country, to the very dry bones of the insolvent law case. This is the extent of our criticism. In every other instance, so far as we can judge, Mr. Snyder has made the best possible selection where there was any room for choice. In the instances of Henry, Seward, and Mackintosh, there was no place for hesitation. These three speeches are immortal. In the instances of Prentiss, Choate, Brady, Stanton, Brown, it was probably a case of "Hobson's choice;" where there was ample room for choice, as in the instances of Erskine and Curran, the choice has been discreetly exercised. In the instances of living men—O'Connor, Evarts, Porter, Beach, Black, Field—the choice was probably regulated by the predilection of the orators and the constraint of space. This volume will somewhat shake the current belief in the disappearance of eloquence from our times, and our living advocates do not here suffer by comparison with their great predecessors. It will be sufficient, in proof of this assertion, to cite the peroration of Mr. Beach's grand speech in the *North* case, and a comparison of this with that of Pinkney, or those of Prentiss and Brown. Compare also the speeches of our other living advocates with those of Wirt and Webster on constitutional questions, and pause will be given to the *laudator temporis acti*. Above all, however, in the domain of mere emotional advocacy, shines the name of Choate, while on a plane even still higher and nobler we rank the unrivalled plea of Seward in the *Freeman* case. This production we have read probably a dozen times, and its freshness, interest, independence, humanity, and overmastering power are as potent over our mind now as at the first. All things considered, it seems to us this wonderful effort is at the head of the intellectual triumphs chronicled in this volume. This country owes a debt for the statesmanship of Seward which future ages will recognize, but can never cancel; but what a lawyer was lost in the statesman!

Mr. Nelson's editorial contributions are of the most useful and intelligent description. He gives an excellent Introduction, on the subject of oratory. He prefixes to each speech a careful numbered analysis of its topics, and divides and numbers the speech to correspond. He also prefixes to each a concise explanation and statement of the occasion of its delivery. He has furnished a detailed index. On the whole there can be no hesitation in pronouncing this an admirable work, worthy a place in the library of every lawyer and scholar, and of earnest study by every man who needs to learn something of what the cause of human freedom and good government, and the protection of the citizen in the enjoyment of life, liberty and happiness owe to the legal profession.

CORRESPONDENCE.

APPOINTMENT OF GUARDIAN BY FATHER.

Editor of the Albany Law Journal:

In your JOURNAL of April 2, 1881, page 262, I find therein that a Mr. Rockwell proposes to introduce a bill in the Legislature "that no father shall appoint a guardian of his child by will, and dispose of its custody and tuition by deed, without the written consent of the mother, if living." And then follows the remark, "We believe this is already the law."

At the last General Term of the Supreme Court in this district, before Davis, Brady and Daniels, J.J., I

argued the case of *Fitzgerald v. Fitzgerald*, for appellant, claiming that the act of April 10, 1862, which reads as follows: "§ 6. No man shall bind his child to apprenticeship or service, or part with the control of such child, or create any testamentary guard thereof, unless the mother, if living, shall in writing assent thereto," is the law of this State at the present time, but the General Term held, Brady, J., writing the opinion, that that act was repealed by implication by the act of 1871, chapter 32, which amended the Revised Statutes, and sustaining the opinion of Justice Van Vorst, delivered at Special Term, in the case of *Thompson v. Thompson*, 55 How. Pr. 494.

It is but just to remark that in 1872 I had a case, case of *Coles v. Coles*, not reported, and involving the same question which came up before the late Justice Ingraham, on *habeas corpus*, at Special Term, Chambers, and he held the act of 1862 to be in full force notwithstanding the act of 1871, already alluded to. As has been very justly remarked by Justice Brady in the opinion in *Fitzgerald v. Fitzgerald*, not yet reported, the court is bound to hold the act of 1862 repealed, and by thus holding, grave wrongs and hardships may be inflicted on affectionate and deserving mothers, but that it is the duty of the Legislature to proper legislation, to rectify the evil, rather than that courts should depart from the well-settled rules of statutory construction.

With these considerations in view, it is eminently just that this vexed question should be settled by proper legislation.

Your obedient servant,

NEW YORK, April 6, 1881.

THOMAS NOLAN.

[We were not aware of the above state of facts, and we fully agree with our correspondent's recommendation.—ED. ALB. L. J.]

AN EXPLANATION.

Editor of the Albany Law Journal:

As a member of the committee of the Bar Association of the city of New York who made the report upon the Civil Code—which was adopted by the Association and to which Mr. David Dudley Field has published a reply—I feel it due to our committee to make a statement of fact as to one feature of the report which Mr. Field has specially criticised and to which you have called attention in your editorial column. This feature is that the report "purports to be an unanimous report of the committee, yet it is signed only six of the nine members, and among those signing is Mr. Austin Abbott."

The facts are these: Our committee is one of the standing committees of the Association, not a special committee appointed for the purpose of examining the Civil Code. We were directed by the Association to examine into and report upon the Civil Code, because it is part of the duties of our committee to inquire into the advisability of proposed amendments to the laws of the State.

All the nine members of the committee were notified of our meetings by a formal notice sent to their offices by myself as secretary. Only six attended either the meetings or participated in our deliberations. It was a matter of great surprise to us that all of us who attended—differing as we did on the advisability of codification in general, and not specially appointed for the reason of our expressed or understood opinions on the subject, yet agreed so thoroughly in our conclusions as to the merits of this Code, and we naturally emphasized this fact in our report.

What we understood and meant others to understand by the term *unanimous* was that all the mem-

bers of the committee who took part in our meetings or expressed any opinion whatever were agreed. This is the ordinary parliamentary meaning of the term — absence of dissent.

But it will be asked, why did not the other members of the committee attend? The three absent members were Mr. Willis S. Paine, Mr. David J. Dean and Mr. Austin Abbott. Mr. Paine, as I am informed, has been in Florida all the winter. He has never attended a meeting of our committee during the year and a quarter that I have been a member of it. Mr. Dean sent a letter of apology stating that he was obliged to be absent at the Court of Appeals. Mr. Abbott sent a letter of apology stating that he was recovering from illness and could not go out in the evening. So that none of these gentlemen stayed away from any unwillingness to co-operate with us in this work.

So far as the opinions of these gentlemen were ascertained, they agreed with us in our conclusion that the adoption of this particular Civil Code was inadvisable. Mr. Paine's views we did not know and could not ascertain. We understood Mr. Dean to have expressed himself as hostile to the Code in an informal discussion at a previous meeting. Mr. Abbott relieved us of all doubt on the subject in a letter addressed to myself as secretary of the committee, which I read to the committee and which now lies before me. In this letter Mr. Abbott said that he was strongly in favor of codification if well done; but that "the Code should represent the settled law without adopting too many so-called improvements, and it also must be in harmony with other parts of the statute law left in force after its adoption;" and he expressed himself as opposed to the passage of the present Code in its present shape.

So that even if we were bound to take into consideration the opinion of absent members of our committee, we were justified in stating that our report was unanimous in its conclusion. All that we did in fact state was that the six members of the committee who acted as members in the consideration of the subject referred to them were unanimous in their conclusion.

Yours truly,

WM. R. HORNBLLOWER.

NEW YORK, April 6, 1881.

NOTES.

MESSRS. J. C. & F. L. WELLS have commenced the publication of the *Indiana Law Reporter*, a weekly issue, designed to furnish all the decisions of the Indiana Supreme Court promptly and in full. The opening number is an octavo of 32 pages, indifferently printed, and disfigured by bad proof-reading. Doubtless the future numbers will be more carefully prepared and published. This number contains five opinions in full, filed between February 21 and March 18. — In a very admirable sketch of Judge Blackford in the *Southern Law Review* for February, is the remarkable statement that "despite excessive diffidence, which seemed to increase with advancing years, he was most exemplary in all the social relations." Does the writer think that only bold men are virtuous? — On the Whittaker trial the judge advocate has made the important discovery that Whittaker must have kept one of his pillow-cases in the laundry three weeks!

We have on several occasions called attention to certain lawyers' Bible classes in different parts of the country, hoping thus to disabuse the public of the idea, too commonly prevailing, that lawyers are irreligious. We must now add that a New York city lawyer, Mr. Hamilton Cole, was so anxious to possess a copy of the

Bible that he recently paid \$8,000 for one. To be sure, it was the famous Mazarine Bible, the first book known to have been printed with movable types, and was printed by Gutenberg about 1455, and is somewhat scarce. — In *Horton v. Champlin*, 12 R. I. 550, the court say: "Within my own experience I have known lawyers to make points in a case almost as a matter of desperation, and to succeed by them. There is hardly any nonsense for which some authority cannot be found in a large law library." — Another black eye for the handwriting experts — On the Whittaker trial it is proved that on the opinion of Messrs. Payne and Southworth as to a certain handwriting, Palmer, an employee in the Montreal post office, was dismissed, but on the confession of another was reinstated. In that case Mr. Payne said that if the writing in question was not Palmer's, then the experience of his own life-time had been in vain.

The General Term in the Fourth Department, which adjourned in January last from Utica to Rochester, has been in session in the latter city since March 21, and adjourned *sine die* on Monday, April 4, having heard 160 causes argued at the two sessions. Notwithstanding the large number of causes thus disposed of, the calendar of the April term, which opened on the next day, contained 629 cases, being 72 more than were on the calendar of the January term.

A biographer of Judge Blackford, writing in the *Southern Law Review*, shows that the judge did not believe in *de minimis*. In preparing his opinions and the matter for his reports, he studied the art of punctuation; he read the best books for style; searched the latest reports for law, and as far as possible remodelled the opinions of his associates until it is said they became like his own "clear, compact and complete, carrying no weight of immaterial discussion and losing no weight through grammatical leaks or rhetorical cracks." "He was equally exacting in the use and in the spelling of words." It is stated that while his eighth volume was in press, he delayed the entire establishment three days in order to determine the orthography of the word "jenny," a female ass. He had written it with a "g," but finding it spelled differently, he was not content to pass it until every book in his library had been searched, paying \$125 for the delay occasioned to the press and printers. The word "muley," a cow without horns, gave him great trouble. He traced it to the Irish "moileu," the name of a breed of cattle in Ireland, spelling it m-u-l-e-y, although he never felt satisfied with having suffered the use of the word, especially as it had been ignored by lexicographers. It is stated that Mr. Judah, a prominent lawyer of the State, boasted that he secured the delay of a decision for three years by simply suggesting to his honor, who had the case in hand, that Chancellor Kent and Judge Story differed in their manner of spelling the word "eleemosynary." Gov. Porter, when a practicing lawyer, on one occasion discovered the word "optionary" in one of Judge Smith's opinions. He noted it, as requested, indicating that there was no such word. He was surprised several months thereafter at the announcement of his appointment as Supreme Court reporter. He sought the governor who had made the appointment to tender his acknowledgments, but he referred him to Judge Blackford, who had urged his appointment on the ground of his discovering the error aforesaid. But in eating and drinking he enforced the maxim *de minimis*, for he lived for days on crackers and cheese, and banqueted five political friends on a bottle of champagne, a few crackers and two pounds of hard shelled almonds, cracking the shells with his boot heel on the floor. He died worth a quarter of a million.

The Albany Law Journal.

ALBANY, APRIL 23, 1881.

CURRENT TOPICS.

COURTS and lawyers have gone great lengths in vindicating the privileges of advocacy, but it was left for the court, in *Hatch v. State*, 8 Tex. Ct. App. 416; S. C., 34 Am. Rep. 751, to say that it is right for one lawyer purposely to annoy and stir up his antagonist and provoke him to say unbecoming things. This was a case where a new trial was granted to the convicted accused, on account of improper comments on his character by the district attorney. These comments were "fellow," "land thief," "as guilty as hell," etc. The court observe: "In almost nine cases out of every ten, prosecuting officers, carried away by their zeal to convict, are themselves to blame that mere technical errors, sufficient to render necessary a reversal of a cause, are suffered to inject themselves into the proceedings on the trial." "It may be, as we infer was his opinion from the explanations furnished us by the presiding judge, that the skillful counsel for defendant, by such constant interruptions and objections, had the purpose in view, and were seeking to entrap the able counsel employed in the prosecution by the State into some such intemperance of language and gross violation of the law as was indulged in by him. He should have been on his guard against, and prepared to resist, all such attempts. Instead, however, he was by such arts and devices (which, by the by, his honor should have protected him against) goaded into a perfect frenzy of irritation, which for the moment rendered him wholly oblivious or totally reckless of the consequences to follow. Still this does not extenuate or excuse the error. Counsel for the defendant, though such a course is not to be commended, can scarcely be blamed if by such means, when permitted by the court, they are enabled so easily to succeed in the accomplishment of their intended purpose. An attorney for the defense has the right, when permitted to do so by the court, to use all the means in his power, consistent with law and professional propriety, to obtain his client's acquittal." Now the question is, are such means "consistent with professional propriety?" We should say, decidedly not; and we should say, "by the by," the trial court should have shut up the indecently offending lawyer.

In connection with this subject, it may be remarked that the lawyers representing the New York city police commissioners, in the inquiry instituted by the mayor in regard to their alleged neglect of duty in cleaning the streets, seem to be running riot in their attempts to insult and annoy the mayor, and behave in a manner which they would not dare indulge in before a court of justice. It is of course very lively reading for the public, but these learned

counsellors may as well set it down that the public are determined to have their streets cleaned, even if it makes forty lawyers mad, and that this professional mud-flinging and bullying will not prevent it. So, for example, when Mr. Bliss violently and insultingly objects to Mr. Ivins whispering to the mayor — Mr. Ivins being a lawyer and the mayor's private secretary — Mr. Bliss simply shows that he stands in great need of some faithful friend to whisper to him — as we do now — to calm his perturbed spirit; not to make a spectacle of himself; and to try to be a gentleman, even if he is a lawyer and there is no one to restrain him.

Still another curious question of contempt came up in England, before the Court of Appeal, in *Plating Company v. Farquharson*, on the 23d of March last. This was the same case in which the vice-chancellor had held that it was contempt to advertise in a newspaper for funds to carry on an appeal. See *ante*, 301. The present alleged contempt was an advertisement in a newspaper offering a reward of £100 to any one who could produce documentary evidence that the process to which the patent in question related had been performed before the year 1869. The plaintiffs alleged that the publication of this advertisement was a contempt of court, and applied to the Court of Appeal for an order to commit the publishers. It was urged that the advertisement would tend to induce the forging of documents, and reliance was placed on the case of *Pool v. Sacheverel*, 1 P. W. 675, in which Lord Chancellor Macclesfield committed for contempt a person who had inserted in a newspaper an advertisement offering a reward to any person who should discover and legally prove that a marriage, the validity of which was in question in the suit, was invalid. The lord chancellor was of opinion that the advertisement was a direct inducement to subornation of perjury. The Court of Appeal refused the application. Jessel, M. R., said that the advertisement had been inserted by the publishers in the ordinary course of business, and it was clear that they had no intention of interfering with the administration of justice. In order to justify an order for committal, it must be shown that the advertisement, on the face of it, would convey to the mind of a person of ordinary intelligence that it would tend to interfere with the administration of justice. In his lordship's opinion the advertisement was a very harmless one; £100 was not a very large sum, and documentary evidence was not easily forged. The notion that the advertisement would induce the forgery of documents was a wild one, and was not founded on any reasonable construction of it. It was a common practice to offer rewards for the discovery of a lost deed or a lost marriage certificate, and his lordship had never heard it suggested that this was illegal. He did not profess to understand the case of *Pool v. Sacheverel*, as it was reported, and said that if necessary he should disregard it. He thought it inconsistent with the practice of government in offering rewards for the conviction of offenders.

On the subject of a widow's right to appoint the burial place of her husband, attention is called to the recent decision by Justice Macomber, of the New York Supreme Court, in *Southworth v. Southworth*, which may be read in connection with *Weld v. Walker*, ante, 283. The plaintiff and her husband were residents of this State, as was the husband's father, the defendant. The husband died February 15, 1880, and his remains were placed in a receiving vault at Geneva in this State, at the suggestion of the defendant. Before his death the plaintiff had expressed a desire to remove his remains, after his death, to Louisville, Kentucky, the residence of her parents, and to bury them there, in her father's lot, to which her father had consented. On the husband's death, the plaintiff removed to Louisville, where she remained till May, 1880, when she returned to this State, where she now resides. About the first of April, 1880, without her knowledge or consent, the defendant caused the remains to be buried in his own lot at Geneva. The plaintiff, wishing to carry out her purpose to inter the remains at Louisville, brought this action to restrain the defendant from interfering with the disinterment of the remains, and the removal of them to Louisville. Justice Macomber upon these facts decides as follows: 1. That presumptively, and in the absence of circumstances and facts overcoming such presumption, and in the absence of a lawful request made by the deceased in his life-time, the plaintiff as wife of the deceased has the right of controlling the place of burial of the deceased. 2. That such right is not absolute, but conditional, and must yield to considerations which make the assertion of such right unreasonable or inequitable. 3. That under the facts established in this case, the plaintiff had not and has not the right to remove the remains to the State of Kentucky, nor to disturb them in their repose. 4. That the plaintiff's complaint be dismissed upon the merits, but not with costs. This is an interesting, and so far as we know, a novel question, and we shall probably hear more of it.

In looking over the current (70th) volume of Maine Reports we find several noticeable utterances by that excellent court. Judge Barrows says: "A defeated party hardly ever attributes the loss of his cause to what is usually the real cause, its own demerits; but this is no reason why he should be permitted to waste time and make expense in the investigation of the numerous idle rumors which almost always accompany a lawsuit, mere creatures of the imagination, the fruit of the unwholesome suspicions of the parties or their sympathizing friends, or of the idle babble of partially-informed bystanders." Again: "A certain amount of carelessness has been engendered, perhaps, by the facility with which our statutes of jeofails and amendments enable parties frequently to avoid what would seem to be the legitimate results of the want of diligent exactness. It is an unfortunate delusion of the times, a delusion doomed to end in disappointment, to suppose that we can dispense with

faithful work and prudent care by legislation, or by common consent, without losing the advantages which they alone can yield." Judge Virgin says: "And if we should decide otherwise, our only reason would be that which is sometimes assigned as the ground of some verdicts, to wit—the plaintiff is a woman and the defendant a town." The court hold that, as it is a presumption of law that an infant cannot commit rape till he is fourteen, nor consent to rape till she is ten, nor commit any crime under seven, so it is presumed that a pauper boy of ten cannot walk five miles and a half in the winter. This presumption would doubtless be overcome by proof that there was a circus or general training at the end of the journey.

NOTES OF CASES.

IN Ponsell v. Board of Education, 97 Ill. 375, which we derive from Mr. Freeman's advance sheets, it is held that in that section of the School Law specifying the branches of studies to be taught in the common or free schools, the words "and in such other branches, including vocal music and drawing, as the directors, or voters of the district, at the annual election of directors, may prescribe," authorize the teaching of the German or any modern language. While the medium of communication must be the English language, the teaching of the modern languages is not prohibited. The court observe: "Observing the constitutional restriction, the general assembly can only establish a 'system of free schools' that will afford 'a good common-school education.' But what is 'a common-school education?' As the Constitution is silent on the subject, it is evidently left to the wisdom of the general assembly to declare what would constitute such an education. No doubt that body would be bound to conform to the popular understanding of what constitutes 'a common-school education.' Without being able to give any accurate definition of a 'common school,' it is safe to say the common understanding is, it is a school that begins with the rudimental elements of an education, whatever else it may embrace, as contradistinguished from academies or universities devoted exclusively to teaching advance pupils in the classics, and in all the higher branches of study usually included in the curriculum of the colleges." "Notwithstanding the omission of the words 'English education' from the statute, it must be conceded the education to be afforded to the children of the State by the system of free schools the general assembly is required to establish, is what is popularly understood to be an 'English education.' But what is an 'English education?' The sciences are taught in the languages of all civilized peoples. Mathematics, geography, geology, and other sciences taught in the schools are no more a part of an English education than they are of a German education. An education acquired through the medium of the English language is an English education; but if the same branches were taught in the German language it would be a German educa-

tion. It is therefore the language employed as a medium of instruction that gives distinctive character to the education, whether English, German or French, and not the particular branches of learning studied." The court lay some stress on the fact that the modern languages have been for many years taught in the common schools, without prohibition by the Legislature. Walker, J., dissented. Similar doctrine was held in *Stuart v. School District*, 80 Mich. 69, where Cooley, J., said: "When this doctrine was broached to us, we must confess to no little surprise that the legislation and policy of our State were appealed to against the right of the State to furnish a liberal education to the youth of the State in schools brought within the reach of all classes. We supposed it had always been understood in this State that education, not merely in the rudiments, but in an enlarged sense, was regarded as an important practical advantage to be supplied at their option to rich and poor alike, and not as something pertaining merely to culture and accomplishment to be brought as such within the reach of those whose accumulated wealth enabled them to pay for it." And he concludes: "Neither in our State policy, in our Constitution, nor in our laws, do we find the primary school districts restricted in the branches of knowledge which their officers may cause to be taught, or the grade of instruction that may be given, if their voters consent in regular form to bear the expense and raise the taxes for the purpose."

In re Barnum, Minnesota Supreme Court, 8 N. W. Rep. 375, holds that a person who receives less than a plurality of the votes cast at a popular election for lieutenant-governor is not entitled to the office, though the next highest candidate who receives such plurality is ineligible to the office—the fact of such ineligibility not appearing upon the ballots which he so received. The great weight of English and American authority is to the effect that "the ineligibility of a candidate who has received the highest number of votes for an office will not, in the absence of any statute declaring them to be void, work the result of giving the election to the next highest candidate, when the voters for the former had no prior actual knowledge of the disqualifying fact, together with such other information as would raise a reasonable inference that they also knew that the fact amounted in law to a disqualification rendering the person voted for ineligible." *Queen v. Mayor*, L. R., 13 Q. B. 629; *People v. Clute*, 50 N. Y. 451; *McLaughlin v. Sheriff of Pittsburg*, 56 Penn. St. 270; *Saunders v. Haynes*, 13 Cal. 145; *Crawford v. Dunbar*, 52 id. 37; *State v. Giles*, 1 Wis. 112; *State v. Smith*, 14 id. 497; *State v. Swearingen*, 12 Ga. 23; *People v. Molliter*, 23 Mich. 341; *State v. Gastinel*, 20 La. Ann. 114; *Fish v. Collins*, 2 La. 289; Opinion of Maine judges, appendix, 38 Me.; *Sublett v. Bedwell*, 47 Miss. 266; *In re Corlies*, 11 R. I. 644; Cooley Const. Lim. 620; Dill. Mun. Corp. 135. The cases of *Gulick v. New*, 14 Ind. 93, *Carson v. McPhetridge*, 15 id. 327, and *Price v. Baker*, 41 id. 572; S. C., 13 Am. Rep. 346,

holding that where the disqualification arises from the candidate's holding of another office, the electors are chargeable with notice, and votes cast for him are nullities, are disapproved in the principal case. The court also observe: "For the purpose of determining the choice of the electors, no provision is made for any inquiry into their motives and intentions, or their means of knowledge concerning the qualifications of the persons voted for, other than what is furnished by the ballots themselves." "Every ballot, therefore, cast at any election, which substantially conforms to all the requirements of the statutes, and which does not disclose upon its face any fact making it void, such as the ineligibility to an election of the person voted for, from which, possibly, a knowledge of that fact on the part of the voter might be inferred, and a presumption raised of an intention to waste his vote, must be taken as a valid and *bona fide* expression of the voter's choice in favor of the person therein named for the office designated, and cannot be treated as a nullity. It cannot be presumed, in opposition to the declared purpose of the vote itself, that it was cast in bad faith, and with no intention to make it effectual, as might perhaps be the case with one voting with actual knowledge that the person voted for was in fact and in law ineligible to an election. To allow such a presumption to nullify more than half the votes given at a State election, as we are called upon to do in this case, would be doing violence to the fundamental principles of a popular government, which, in recognizing the fitness and capacity of the people for self-government, necessarily implies that the right of suffrage will be exercised in good faith and in accordance with the best judgment and information of the electors." Gilfillan, C. J., dissented. In *Richards v. Raymond*, 92 Ill. 612; S. C., 34 Am. Rep. 151, it was held that under a constitutional provision for common-school education the establishment of high schools by vote is valid.

In *Murphy v. S. C. & P. R. Co.*, Iowa Supreme Court, 8 N. W. Rep. 320, it was held that where a person entered upon the land of another without license, and cut grass therefrom and made the same into hay, he acquired no property in such hay, and could not maintain an action for its destruction, caused by the negligence of another, while it was stacked upon such land. The court distinguished the cases where labor to a great amount had been expended in good faith upon another's property, as in *Wetherbes v. Green*, 22 Mich. 311, and remarked upon *Isle Royal Mining Co. v. Hartin*, 37 Mich. 332; S. C., 26 Am. Rep. 520, where cordwood was cut in good faith upon the land of another, and hauled to a landing and piled, and the court held that the party cutting the wood was not entitled to compensation for his labor, because the identity of the property was not destroyed, nor its value greatly increased. They then observe: "A willful trespasser, however, acquires no property in the goods of another by any change wrought in them by his

labor or skill, however great the change may be, provided it can be proved that the improved article was made from the original material. *Silbury v. McCoon*, 8 Comst. 370. In this case it was held, where a quantity of corn was taken from the owner by a willful trespasser, and converted by him into whisky, that the property was not changed, and that the whisky belonged to the owner of the original materials. In *Chandler v. Edson*, 9 Johns. 362, it was held that where a party entered upon the land of another and cut down trees, of which he made shingles, he acquired no property in the timber or shingles. In *Brock v. Smith*, 14 Ark. 431, it was held that where one entered upon land as a trespasser, felled timber, and split it up into cordwood, the bestowal of his labor in splitting the timber into cordwood neither wrought a change in its specific character nor gave him any title by accession. To the same effect are also the following cases: *Bells v. Lee*, 5 Johns. 348; *Nesbit v. St. Paul Lumber Co.*, 21 Minn. 491; *Brown v. Baz*, 7 Cow. 95; *Freeman v. Underwood*, 66 Me. 229. In this last case the defendant purchased a quantity of blueberries from persons who picked them from plaintiff's land as trespassers, and it was held that although he acted in good faith he became liable in trover to the true owner." *Turley v. Tucker*, 6 Mo. 583, is directly in point. The plaintiff was owner of a saw-mill, and had men employed to cut down trees in a pinery. Plaintiff's employees cut down some 1,400 trees, cut off the tops, and marked them in convenient lengths for stocks, and left them there. The land on which plaintiff's employees cut the trees was government land. Defendant hauled away some of the trees cut by plaintiff's employees, and plaintiff brought an action in trover against the defendant for the logs taken. In holding that the plaintiff had no right of action, the court say: "To maintain this action plaintiff must have a property either absolute or special, and the possession, or the right to immediate possession, of the goods which are the subject of controversy. There is no pretense that plaintiff had the absolute, had he such a special property as will enable him to maintain an action of trover. The cases of special property referred to by the authorities, in illustration of the maxim that mere possession is sufficient *prima facie* evidence of property to maintain an action against a wrong-doer, are those of a bailee, a carrier, a lessee for life, a lord who seizes an estray, a sheriff who has levied on goods, and the finder of a jewel. In all these cases, and every other instance of special property, the possession has been a peaceable and lawful possession, or a possession acquired by some show of title from the absolute owner. Did plaintiff, by cutting the timber on government land, acquire such possession? There is no case of a mere trespasser acquiring by his trespass constructive possession. It seems to be contrary to the settled usage of law for courts to interfere in such cases, and aid one trespasser against another. For the peace of society the law will interfere so far as to protect actual possession, but will not raise a presumptive possession as the foundation of a special property." See note, 26 Am. Rep. 526.

OBJECTION TO GRAND JUROR.

THE question whether the personal incompetency of a grand juror can be taken advantage of after indictment found is much mooted. In the affirmative are Alabama, Virginia, Maine, New Hampshire, Vermont, North Carolina, New Jersey, Tennessee, Georgia, Mississippi, Texas, Arkansas, Nebraska and Rhode Island. In the negative, Massachusetts, New York, Indiana, Pennsylvania, Minnesota. But it is almost universally held that the objection must be raised before general issue, either on motion to quash, or by plea in abatement. *State v. Easter*, 30 Ohio St. 542; S. C., 27 Am. Rep. 478; Whart. Cr. Pl., § 350, etc. Thus, in *State v. Easter*, *supra*, it was held not a good plea to an indictment for murder, that one of the grand jury which found the indictment was a nephew of the murdered man. This case contains a learned review of the authorities, but does not decide the question whether the objection would be good after indictment and before general issue.

In *Wallace v. State*, 2 Lea, 29, among recent cases, it was held that objections to the manner of selection and appointment of a grand jury can only be taken by plea in abatement. And in *Reich v. State*, 53 Ga. 73; S. C., 21 Am. Rep. 265, it was held that it is a good plea in abatement that one of the grand jurors was an alien; and so that the venire summoning the grand jury was not sealed. *State v. Flemming*, 66 Me. 142; S. C., 23 Am. Rep. 552.

The most recent reported decision on this point is *State v. Davis*, 12 R. I. 492, holding that an objection to a grand juror for want of the statutory qualifications may be raised by plea of abatement. The court in this well-considered case observe: "The attorney-general contends that the objection comes too late after the jury has been impanelled and sworn. He cites cases which hold that such is the rule; *Com. v. Smith*, 9 Mass. 107, 110; *Com. v. Gee*, 6 Cush. 174; *People v. Jewett*, 8 Wend. 814, 821; at least if the accused has previously been held to answer. *People v. Beatty*, 14 Cal. 566. Other cases hold that the objection may be taken by plea in abatement. *State v. Rockefeller*, 6 N. J. Law, 333; *Com. v. Cherry*, 2 Va. Cas. 20; *Stanley v. State*, 16 Tex. 557; *State v. Middleton*, 5 Port. 484; *Barney v. State*, 12 S. & Marsh. 68; *State v. Duncan*, 6 Yerg. 271; *Doyle v. State*, 17 Ohio, 222; *Huling v. State*, id. 583; *Kitrol v. State*, 9 Fla. 9. We think these latter cases rest on the stronger reasons. It is certainly not reasonable to require a person, who has not been held to answer, to object to the juror before he is impanelled; for he may be on the other side of the globe, or he may have no reason to suppose he is going to be indicted, being guiltless. And even if a person has been held to answer, he may be in prison, or sick at home, or if in court, he may be ignorant, without fault, of the disqualification of the juror until after he has been sworn. Indeed, a person may be indicted for an offense committed pending the inquest. Moreover, the action of the grand jury is *ex parte* and preliminary, and

it is contrary to principle to hold that a person shall forfeit his rights by not intervening in a proceeding to which he is not a party. No English case has been cited, but English treatises of authority recognize the plea. 2 Hale P. C. 155; Bacon Abr., Juries, A; 1 Chitty Crim. Law, 309. The statute 11 Henry IV, ch. 9, which has been referred to as the source of the English rule, is deemed to be declaratory of the common law. *State v. Foster*, 9 Tex. 65; *Com. v. Cherry*, 2 Va. Cas. 20."

But this doctrine seems to be restricted to cases of want of statutory qualifications. Thus, it has been held that the expression of an adverse opinion will not disqualify. In a very recent case, *State v. Hamlin*, to appear in 47 Conn., it was held that any objection to the competency of a grand juror, on account of his previous expression of opinion that the accused is guilty, must be taken before the grand jury is sworn. The court in substance said:

"The expression of an opinion that an accused person is guilty, by a grand juror before he was sworn, appears never to have been a ground of challenge in the English courts. Some respectable authorities in this country hold that it is, but these generally hold that the exception must be taken before the grand jury is sworn. The common law requires grand jurors to be good and lawful freeholders and inhabitants of the county, and where that law prevails a disqualified grand juror may be challenged before indictment found. 3 Bac. Abr., Juries, A; 1 Chitty on Crim. Law, 309; *U. S. v. Williams*, 1 Dill. 492. In *People v. Jewett*, 3 Wend. 314, it is said: 'There are causes of challenge to grand jurors, and these may be urged by those accused, whether in prison or out on recognizance, and it is even said that a person wholly disinterested may as *amicus curiæ* suggest that a grand juror is disqualified. But such objection to be availing must be made previous to the juror's being impanelled and sworn.' In the case of *U. S. v. Burr*, before the Circuit Court of the United States at Richmond, Va., the prisoner was allowed to challenge grand jurors, on the ground that they had formed and expressed opinions of the prisoner's guilt. But the challenges were made before the grand jury was impanelled and sworn. Burr's trial by Robertson, 38. In *Tucker's case*, 8 Mass., the court said that Burr's case was solitary in allowing challenges to grand jurors, and a juror objected to by the *amicus curiæ* was sworn. In *Com. v. Smith*, 9 Mass. 107, it was held that objections to the personal qualifications of a grand juror, or to the legality of the returns, cannot affect any indictments found by the jury after they have been received by the court and filed. In *Musick v. People*, 40 Ill. 268, it was held that if an expression of opinion by a grand juror were a ground of challenge, the objection must be taken before the juror is sworn. In Indiana a person under prosecution for crime, and in custody or on bail, may challenge for good cause any person returned or placed on the grand jury. *Hudson v. State*, 1 Blackf. 317; *Jones v. State*, 2 id. 475; *State v. Horndon*, 5 id. 75; *Hardin v. State*, 22 Ind. 347; *Morshom v. State*, 51 id. 14. In *Har-*

din v. State the court say that 'no doubt challenges to the polls may be made where any of the jurors have not the necessary qualifications. These challenges, however, must be made before the jury are sworn and charged.' In Pennsylvania the defendants in the case of *Com. v. Clark*, 2 Browne, 325, being in jail on a charge of homicide, were allowed to challenge grand jurors for favor before the grand jury were sworn. In New Jersey the court in the case of the *State v. Rockefeller*, 1 Halst. 332, held that it was a good plea in abatement to an indictment for rape that one of the grand jurors by whom the bill was found was not a freeholder as required by the statutes of that State. In *State v. Richey*, 5 Halst., a plea in abatement of the indictment, that two of the grand jurors who found it had expressed an opinion before they were sworn, was not sustained. See, also, *U. S. v. White*, 5 Cr. C. C. 457; *Boyington v. State*, 2 Port. 100; *State v. Easton*, 30 Ohio St. 542; S. C., 27 Am. Rep. 478. If a disqualification discovered after indictment found can be taken advantage of, it must be one that is pronounced such by the common law, or by the statute (if it be a matter of statute), and one that absolutely disqualifies, as alienage or the want of a freehold."

In a very recent New Jersey case, unreported, we understand it has been held that the array of the grand jury cannot be challenged for favor after indictment found.

In the case of *Com. v. Moran*, Massachusetts Supreme Court, January, 1881, the defendant filed a special plea, alleging that the grand jury which found the indictment was not drawn and summoned according to law. The plea was entertained, although it was held unmeritorious, the court remarking that there was no question of identity or qualifications. This would seem to indicate that the want of qualifications can now be raised in Massachusetts by special plea.

OUR JUDICIAL SYSTEM—ITS FAULTS AND THEIR REMEDIES.

LIKE most members of the profession, I have suffered inconveniences from the overcrowded condition of the Supreme and Circuit Courts. While those courts are overcrowded, the County and other inferior courts as a general rule in most counties of the State do but very little business. This state of affairs is unfortunate. To remedy it we must find and remove the cause. The following objections are frequently made to the County Court:

1. Litigation costs too much in it for an inferior court.
2. The amount necessary to carry costs is too high.
3. The same judge is very sure to preside at every term. If, as a result of political combination, you get a good politician but a poor judge on the bench, you cannot dodge him with a case which is to turn on delicate points of law as you can a poor judge in the higher courts. He is the neighbor of the attorneys and litigants. He has his intimate personal and political friends as well as enemies among them. His experience is not as extensive as the experience of the Circuit judge, consequently he makes more mistakes. For the foregoing reasons litigants and attorneys have not as

much respect for his judgment or rulings as for those of the Circuit judge.

4. It requires security to perfect an appeal from the County Court to the General Term, while appeals may be perfected from the Circuit Court and Special Term without security.

In brief, the County Court does not afford the advantages to litigants that the Circuit and Supreme Courts do, while it costs them as much to litigate in it. Therefore litigants, like all others, invest their money where they can get the greatest returns, and patronize the higher courts.

To the Justices' Courts we shall have to make the objections above specified in reverse order.

1. Litigation is too cheap—for the defendant at least. Its procedure is designed to tempt him to annoy his creditor. He is not bound to verify his answer. He can delay his creditors at no greater hazard than the payment of the contemptible fees of these courts. He is sued at his door. The creditor cannot verify his complaint as in the Supreme Court, and thus force upon the debtor the alternative of committing perjury or suffering a default. Therefore if the delinquent debtor is not frank enough to admit the claim, the creditor must attend with his witnesses, and no matter how many miles they may travel he can recover but twenty-five cents for each. It does seem that courts thus instituted for the protection of defendants and annoyance of plaintiffs are misnamed. The title of these courts should be changed to courts of "injustice" to creditors.

2. The justices are incompetent to discharge the important power given to them. Very many of them are persons who have not energy or ability to seek and engage in some private business to occupy their mind or time, and can make no better use of their time than to take the office of justice of the peace and try cases for seventy-five cents trial fees. Without learning in the law; without ordinary intelligence; the moment they are elected to the office they get the idea that in and by the election they become mysteriously wise and qualified to do things they never would have thought of doing before. They will draw wills, deeds and contracts of all kinds, and sit in judgment upon their fellow citizens put upon trial for their liberty or property. Instead of resorting to the little natural sense of justice they may have as a guide for their decisions, they think they must resort to the law—to them a mysterious something of which they know nothing—and then, oh! horrors! with what results! They beat you; you appeal; they take pride in having their judgments affirmed; they go to the adverse counsel for assistance in making up their return. If he is honest the return will be honestly made. It is needless to dwell further on objections to these courts. They are the sphere of the "pettifogger" and the "shyster." It is with reluctance that an honorable able lawyer will engage in them, and yet the justices who preside in those courts have "exclusive" jurisdiction in many cases to try you, brand you a criminal, send you to the penitentiary for a year and fine you \$250. And these courts have jurisdiction to give judgment against you for \$200 or deprive your title to property of that value. So that litigation in the inferior courts is on the one hand cheap but dangerous and degrading to engage in, and on the other not as well or satisfactorily conducted but with equal expense as in the higher courts. Is it strange then, that the higher court is overcrowded, the lower courts comparatively idle, and citizens suffering wrong very frequently rather than resort to law in the manner in which it is administered?

What we need is a new inferior court where justice will be administered with less expense and more promptly than in the County Court, and with more dignity and ability than in Justices' Courts. Such a

court can be organized under section 19 of article 6 of the Constitution. It should, in my judgment, be organized so as to be substantially the same as our Supreme Court—a miniature Supreme Court as it were—with jurisdiction concerned with the County Court. Each senatorial district to be the department, and subdivided into as many districts as there are judges. There to be one judge for each 10,000 inhabitants. New subdivisions to be made and additional judges to be elected for every increase of 10,000 inhabitants within the department. The rules, practice and procedure of the Supreme Court to apply to and regulate its proceedings, including conventions of its judges, assignment of judges to hold General and Special Terms, etc., with the following exceptions:

1. No clerk to attend the sittings of the court except at General Term.

2. No orier to attend.

3. The trial jury to consist of six men.

4. Costs to be allowed the same as in the Supreme Court, but only at one-fourth of the amount, and to be allowed upon the recovery of \$10 instead of \$50. Every person against whom costs are recovered to pay \$5 to the county treasurer toward defraying the expense of the court.

5. No person to be eligible to the office of judge excepting a counsellor of the Supreme Court. The judges to be paid a moderate salary.

6. Each judge of the court to have the same power to grant orders in actions and special proceedings in the Supreme Court that county judges now possess.

7. Appeals to be allowed from the General Term of the new courts to the General Term of the Supreme Court only when the judges who preside at the former certify that the case is a proper one for the consideration of the General Term of the Supreme Court.

I would also invest the new court with jurisdiction to try all criminal prosecutions of which justices of the peace now have cognizance. I would deprive the justices of the peace of jurisdiction in all criminal prosecutions except the power to issue warrants to be returnable before a judge of the new court, and deprive them of jurisdiction in all civil cases where more than \$10 was involved.

ALBION, N. Y.

GRATIO DICTUM.

PROOF OF FIRST MARRIAGE IN TRIALS FOR BIGAMY.

UNITED STATES SUPREME COURT, MARCH 21, 1881.

MILES V. UNITED STATES.

In a prosecution for bigamy, the fact of the first marriage may be proved by the admissions of defendant or by circumstantial evidence. It is not necessary to prove it by eye-witnesses of the ceremony.

In such prosecution, as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. Until the first marriage is established she is *prima facie* the wife of the accused, and cannot be used as a witness against him.

It is an error to the Supreme Court of Utah Territory, to review the conviction for bigamy of the plaintiff in error, Miles.

Section 5352 of the Revised Statutes of the United States declares: "Every person having a husband or wife living, who marries another, whether married or single, in a Territory or other place over which the United States has exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars and by imprisonment for a term not more than five years."

The plaintiff in error was indicted under this section in the Third District Court of Utah, at Salt Lake City.

He was convicted. He appealed to the Supreme Court of the Territory, where the judgment of the District Court was affirmed. That judgment is now brought to this court for review upon writ of error.

The indictment charged that the plaintiff in error, John Miles, did, on October 24, 1878, at Salt Lake county, in the Territory of Utah, marry one Emily Spencer, and that afterward, and while he was so married to Emily Spencer, and while she was still living, did, on the same day and at the same county, marry one Caroline Owens, the said Emily Spencer, his former wife, being still living and at that time his legal wife.

Upon the trial evidence was given tending to show that a short time before the date laid in the indictment, October 24, 1874, the plaintiff in error was in treaty for marrying, at or about the same time, three young women, namely, Emily Spencer, Caroline Owens and Julia Spencer, and that there was a discussion between them on the question which should be the first wife, and that upon appeal to John Taylor, president of the Mormon Church, the plaintiff in error and the three women being present, it was decided by him that Emily Spencer, being the eldest, should be the first wife; Caroline Owens, being the next younger, the second, and Julia Spencer, being the youngest, the third wife; that being according to the rules of the church.

It appeared further that marriages of persons belonging to the Mormon Church usually take place at what is called the Endowment House; that the ceremony is performed in secret, and the person who officiates is under a sacred obligation not to disclose the names of the parties to it.

It further appeared, that on October 24, 1878, the plaintiff in error was married to the said Caroline Owens, and that on the night of that day he gave a wedding supper at the house of one Cannon, at which were present Emily Spencer, Caroline Owens and others. Evidence tending to establish these facts having been given to the jury, the court permitted to be given in evidence the declarations made by the plaintiff in error, on that night, in presence of the company assembled, and on subsequent occasions, to the effect that Emily Spencer was his first wife.

Section 1604 of the Compiled Laws of Utah declares: "A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband."

Upon the trial, and after the evidence above recited had been given, tending, as the prosecution claimed, to prove the marriage of the plaintiff in error to Emily Spencer just before his marriage to Caroline Owens, the latter was offered as a witness against him to prove the same fact.

Thereupon the defendant admitted in open court the charge of the indictment that he had been married to Caroline Owens, and even offered testimony to prove it, but this was ruled out by the court. The defendant therefore objected to the introduction of Caroline Owens as a witness against him, the objection being based on the statute just quoted. The court overruled the objection and admitted her as a witness, and she gave testimony tending to prove the marriage of the plaintiff in error to Emily Spencer previous to his marriage with the witness.

It appeared from the evidence that the name of Caroline Owens' father was Maile, but that she had been adopted by an uncle and aunt named Owens, and had taken their name, by which she was called and known, but that when she was baptized in the Mormon Church she was required to be baptized in her father's name, and was married to Miles under that name.

The court, among other things, charged the jury as follows: "If you find, from all the facts and circumstances proven in this case, and from the admissions of the defendant, or from either, that the defendant

Miles married Emily Spencer, and while she was yet living and his wife he married Caroline Owens, as charged in the indictment, your verdict should be guilty."

"A legal wife cannot, but when it appears in a case that a witness is not a legal wife but a bigamous or plural wife, then she may testify against the bigamous husband, and her testimony should have just as much weight with the jury as any other witness, if the jury believe her statements to be true. And her evidence may be taken like the evidence of any other witness to prove either the first or second marriage. And so in this case you are at liberty to consider the testimony of Miss Caroline Owens, if you find from all the evidence in the case that she is a second and plural wife, and give it all the weight you think it entitled to, and may use it to prove the first marriage alleged, to wit, the marriage of defendant and Emily Spencer, or any other fact which in your opinion is proven by the testimony, if you believe it, as you do the testimony of any witness to prove any fact about which she has testified."

"The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist, so that you feel certain that it exists. A balance of proof is not sufficient. A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence; no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests."

Mr. Justice WOODS (after stating the facts and passing upon a question relating to the exclusion of certain jurors whom the triers found to be possessed of bias). It is next assigned for error, that the court admitted the declarations and admissions of the plaintiff in error to prove the fact of his first marriage, and the charge of the court that the declarations of the accused were evidence proper to be considered by the jury as tending to prove an actual marriage, and that such marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence, and that it was not necessary to prove it by witnesses who were present at the ceremony.

To hold that on an indictment for bigamy, the first marriage can only be proven by eye-witnesses of the ceremony, is to apply to this offense a rule of evidence not applicable to any other. The great weight of authority is adverse to the position of the plaintiff in error.

In *Regina v. Simmonsto*, 1 Car. & Kir. 164, it was held that "on an indictment for bigamy, the first marriage may be proved by the admissions of the prisoner; and it is for the jury to determine whether what he said was an admission that he had been legally married according to the laws of the country where the marriage was solemnized.

The same view is sustained by the following cases: *Regina v. Upton*, 1 Car. & Kir. 165, note (1 Greav. ed. of Russ. on C. & M. 218); *Duchess of Kingston's case*, 20 How. State Trials, 355; *Truman's case*, 1 East P. C. 470; *Cayford's case*, 7 Grant, 57; *Ham's case*, 2 Fair, 391; *State v. Hilton*, 3 Rich. 434; *State v. Britton*, 4 McCord, 256; *Warner v. Commonwealth*, 2 Va. Cas. 595; *Norwood's case*, 1 East P. C. 470; *Commonwealth v. Murtagh*, 1 Ashm. 272; *Regina v. Newton*, 2 Moody & R. 503; *State v. Libby*, 44 Me. 469; *State v. McDonald*, 25 Mo. 176; *Cameron v. State*, 14 Ala. 546; *Wolverton v. State*, 16 Ohio, 173; *State v. Seals*, 16 Ind. 352; *Quin v. State*, 46 Id. 725; *Arnold v. State*, 53 Ga. 574; *Brown v. State*, 52 Ala. 388, Com-

monwealth v. Jackson, 11 Bush, 629; *Williams v. State*, 51 Ala. 131.

The declarations of the plaintiff in error touching his marriage with Emily Spencer, admitted in evidence against him, appear to have been deliberately and repeatedly made, and under such circumstances as tended to show that they had reference to a formal marriage contract between the plaintiff in error and Emily Spencer.

We are of opinion that the District Court committed no error in admitting such declarations, or in its charge to the jury concerning them.

The charge of the court defining what is meant by the phrase "reasonable doubt," is assigned as ground of error.

The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term "reasonable doubt," do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favorable to the accused, and is sustained by respectable authority. *Commonwealth v. Webster*, 5 Cush. 320; *Arnold v. State*, 23 Ind. 170; *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 id. 435; *Donnelly v. State*, 2 Dutcher, 601; *Winter v. State*, 20 Ala. 39; *Giles v. State*, 6 Ga. 276.

We think there was no error in the charge of which the plaintiff in error can justly complain.

The plaintiff in error next alleges that the description of the woman named in the indictment as the person with whom the crime of bigamy was committed was not sufficiently specific, and that on the trial she turned out to be not Caroline Owens, but Caroline Maile.

The designation of Caroline Owens as the person with whom the second marriage was contracted is clearly sufficient. If it were not, it is too late after verdict to object. As to the fact, the jury has found that the person with whom the plaintiff in error was charged to have married while his first wife was living, and still his legal wife, was Caroline Owens and not Caroline Maile, and that question is therefore conclusively settled by the verdict. This court cannot re-examine questions of fact upon writ of error. R. S., § 1011.

The plaintiff in error lastly claims that the court erred in allowing Caroline Owens, the second wife, to give evidence against him touching his marriage with Emily Spencer, the alleged first wife; and in charging the jury that they might consider her testimony, if they found from all the evidence in the case that she was a second and plural wife.

This assignment of error, we think, is well founded. The law of Utah declares that a husband shall not be a witness for or against his wife, nor a wife for or against her husband.

The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The fact of his previous marriage with Emily Spencer was therefore the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was *prima facie* his wife, and she should not be used as a witness against him.

The ground upon which a second wife is admitted as a witness against her husband in a prosecution for bigamy is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted or has been duly established by other evidence that the second wife is allowed to testify, and

she can then be a witness to the second marriage and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency and at the same time prove the issue. The authorities sustain these views.

Upon the prosecution for bigamy under the statute of 1 Jac., ch. 11, it was said by Lord Hale: "The first and true wife is not allowed to be a witness against her husband, but I think it clear the second may be admitted to prove the second marriage for she is not his wife, contrary to a sudden opinion delivered in July, 1664, at the Assizes in Surrey, in *Arthur Armstrong's* case, for she is not so much as his wife *de facto*." 1 Hale's Pleas of the Crown, 693.

So in East's Pleas of the Crown the rule is thus laid down: "The first and true wife cannot be a witness against her husband, nor *vice versa*; but the second may be admitted to prove the second marriage, for the first being proved she is not so much as wife *de facto*, but that must first be established." 1 East's P. C. 469. The text of East is supported by the following citation of authorities: 1 Hale, 693; 2 M. S. Sum. 331; *Ann Cheney's* case, O. B. May, 1730, Sergt. Foster's Manuscript.

In Peak's Evidence (Norris), 248, it is said: "It is clearly settled that a woman who was never legally the wife of a man, though she has been in fact married to him, may be a witness against him; as in an indictment for bigamy, the first marriage being proved by other witnesses, the second wife may be examined to prove the marriage with her, for she is not *de jure* his wife."

Mr. Greenleaf, in his work on Evidence, volume 3, says: "If the first marriage is clearly proved and not controverted, then the person with whom the second marriage was had may be admitted as a witness to prove the second marriage, as well as to other facts not tending to defeat the first or legalize the second. There it is conceived she would not be admitted to prove a fact showing that the first marriage was void — such as relationship within the degrees, or the like — nor that the first wife was dead at the time of the second marriage, nor ought she to be admitted at all if the first marriage is in controversy."

The result of the authorities is that as long as the fact of the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence to the satisfaction of the court, the second may be admitted to prove the second marriage but not the first, and the jury should have been so instructed.

In this case the injunction of the law of Utah that the wife should not be a witness for or against her husband was practically ignored by the court. After some evidence tending to show the marriage of plaintiff in error with Emily Spencer, but that fact being still in controversy, Caroline Owens, the second wife, was put upon the stand and allowed to testify to the

first marriage, and the jury were in effect told by the court that if from her evidence and that of other witnesses in the case they were satisfied of the fact of the first marriage, then they might consider the evidence of Caroline Owens to prove the first marriage.

In other words, the evidence of a witness *prima facie* incompetent, and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue and at the same time to establish the competency of the witness. In this we think the court erred.

It is made clear by the record that polygamous marriages are so celebrated in Utah as to make the proof of polygamy very difficult. They are conducted in secret, and the persons by whom they are solemnized are under such obligations of secrecy that it is almost impossible to extract the facts from them when placed upon the witness stand. If both wives are excluded from testifying to the first marriage, as we think they should be under the existing rules of evidence, testimony sufficient to convict in a prosecution for polygamy in the Territory of Utah is hardly attainable. But this is not a consideration by which we can be influenced. We must administer the law as we find it. The remedy is with Congress, by enacting such a change in the law of evidence in the Territory of Utah as to make both wives witnesses on indictments for bigamy.

For the error indicated the judgment of the Supreme Court of the Territory of Utah must be reversed and the cause remanded to that court, to be by it remanded to the District Court, with directions to set aside the verdict and judgment and award a *venire facias de novo*.

VALIDITY OF FOREIGN DIVORCE.

ENGLISH COURT OF APPEAL, DECEMBER 20, 1880.

HARVEY V. FARNIE, 43 L. T. Rep. (N. S.) 737.

A, a domiciled Scotchman, married, in 1861, in England, B, an English woman. After their marriage A and B lived in Scotland until 1863, when B got a divorce from a Scotch court dissolving the marriage by reason of A's adultery. In 1863, B being still alive, A married C, an Englishwoman, in London. On petition by C for declaration of nullity of marriage on the ground that a Scotch divorce was not valid in England, *held*, that the English courts recognize as valid the decree of a Scotch court dissolving the marriage of domiciled Scotch persons, though the marriage was solemnized in England and the woman was English prior to her marriage.

Lolley's case (Russ. & Ry. Cr. Cas. 287; 2 Cl. & F. 567) distinguished.

THIS was an appeal from a decision of Sir J. Hannen, president of the Probate, Divorce, and Admiralty Division, refusing a petition for declaration of nullity of marriage. The respondent, H. B. Farnie, a domiciled Scotchman, married, on the 18th August, 1861, in England, an Englishwoman. After their marriage they lived in Scotland until 1863, when the wife obtained a decree from a Scotch court for dissolution of the marriage by reason of his adultery. On the 31st May, 1865, his former wife being still alive, he married Miss Harvey, the petitioner, at All Souls Church, Marylebone.

The president held that the decree of the Scotch court was valid, and therefore decided in favor of the respondent.

The case below is reported 43 L. T. Rep. (N. S.) 463. The petitioner appealed.

Fooks, Q. C., Benjamin, Q. C., Horace Dacey, Q. C., and W. C. Fooks, Jr., for appellant.

Dr. Deane, Q. C., Winch and Alexander Ward, for respondents.

JAMES, L. J. In this case I am unable to entertain any doubt whatever as to the correctness of the decision of the learned president of the Probate Division. The question is whether a decree by a Scotch court between Scotch parties has the effect of dissolving a marriage which had been contracted between those parties. It is said that the decree has no operation and ought not to be recognized in England, because the marriage was solemnized in England, and because in *Lolley's case* it was held, according to one report, that an English marriage could not be dissolved by a Scotch court or any foreign court except for reasons for which it would have been capable of being dissolved in England, and according to another report that the words "English marriage" have been construed by somebody, nobody knows when or how, into a marriage solemnized in England. Now we know very little of *Lolley's case* (R. & Ry. 287; 2 Cl. & F. 567), except the facts which are stated in Russell & Ryan's Reports, and the decision. Of course, every judgment of any court must be construed with reference to the facts that were before the court for determination at the time when that judgment was made by the learned judges, who were consulted, rather than sitting as a tribunal of appeal. There the judges were consulted upon the Crown case reserved. Whatever may have been the habit, referred to by Mr. Benjamin, of judges, in the time of Lord Coke, as to the laying down of abstract general propositions going far beyond the necessities of the particular case or cases before them—whatever may have been the habit of former judges in this respect—it certainly was not, in the year 1819, or whatever the time was when *Lolley's case* was decided, the habit of judges then, any more than it is the habit of judges at this day, to express general propositions or articles of a Code beyond what was required by the particular circumstances of the case. The particular circumstances of that case were a marriage between English persons, that is to say, a marriage in England between persons domiciled in England; and an appeal to a Scotch court by one of those persons as against the other during a temporary residence in Scotland, it being beyond all question that they were neither of them domiciled in Scotland at the time; and it was held in that case that the decision of a Scotch court affecting the status of English domiciled persons, domiciled in England at the time when the status was originally constituted, and domiciled in England at the time when the status was sought to be removed, was invalid; that according to English notions of law the court ought not to entertain a suit affecting the status of English people. That clearly was the whole of the decision. I do not know that there are cases actually following that decision, but it has at all events been admitted to be good law. I do not think it has ever been questioned, and I do not feel myself disposed to say that that case is now capable of being questioned. But the application of that case to the circumstances of the present case has certainly been very much questioned, and questioned by the very highest authorities. It is impossible to read the judgment of Dr. Lushington in the case of *Conway v. Beasley*, 3 Hagg. Eccl. 639, without seeing that he did not consider that case established any such universal rule, that he did not consider it was binding upon him or upon any court in this country, beyond the actual facts of that case; that is to say, that it was to be confined to a case where there was a fictitious domicile, as Dr. Deane called it, or a domicile where there was no domicile really attached to it, where there was merely a temporary residence in the country, the courts of which were appealed to. But more than that, we have the expressions of many learned lords,

evidently expressing exactly the same view of that case—that it was to be considered as applying only to the circumstances of that case—and then we have the Lord Chancellor of Ireland, Lord Blackburne, in a case exactly applicable to the facts before the court, the very point being raised, with the sole distinction that you must substitute England for Ireland, and substitute the Irish court for the English court as the place in which the question came to be decided. Under these circumstances there is no authority, although at first I was pressed with this, that there was an English authority following *Lolley's* case, in the case of *McCarthy v. De Caix*, 2 Russ. & Myl. 614. That is a decision of Lord Brougham, and it puts one back to consider to what extent one is bound, upon a question of law arising in the Probate Division, by the decision of a lord chancellor sitting in a court of equity, and whether his decision would be a binding authority at all. But upon a careful investigation of the facts of that case, however the point came to arise in Lord Brougham's mind and to find its way into his judgment, that case really was not and could not have been any authority upon the point, because the point was neither raised in the pleadings, nor was it sustained by evidence capable of being made the subject of available argument for that purpose. He seems to have taken it himself and evolved the whole thing from some passages in a letter as to the man being a naturalized Dane. But independently of that, the fact upon which so much reliance was placed—that he applied *Lolley's* case to the case of a marriage by a domiciled Dane in England, and the case of a person a domiciled Dane at the time of the proceedings in Denmark—these facts which raised that litigation never had appeared in any way in which the courts could take judicial notice of them. The only question in that case was, whether the husband, who had taken out administration to his wife as surviving husband, who had an apparent interest in a gift as surviving husband by certain letters which are set out in the proceedings—whether the husband had by those letters, under the circumstances of the case, conclusively bound himself to the gift of that which he was supposed to have had, and the right to which, as the surviving husband, was not really in question; there being this thing further to be observed, that if the facts were as they seem to have been assumed in the note to that case furnished by Lord Brougham, to which I shall afterward refer—if the facts were that there had been a marriage in England by a domiciled Dane and an English lady, and that there had been a dissolution of that marriage in Denmark, the plaintiff, the husband, being still a domiciled Dane—and that dissolution was not recognized by the English law as being of any validity, the result would have been, not that the property would have been distributed according to the English law, but it would have been dealt with according to the Danish law, and the Danish law of course, in the distribution of the assets of a Danish wife, would have recognized its own divorce, and would not have been bound by any decision of this court in *Lolley's* case. Evidently the point could not have been properly before the court or determined by the court, and therefore fully warranted what was said of it in the case of *McCarthy v. De Caix*, as something which fell from the learned judge *per incuriam*. The whole thing probably emanated from the application of *Lolley's* case to the case before him. That disposes of the only authority at all that in any way conflicts with the decision of the learned lord president, and upon principle I cannot bring myself to doubt that what the lord president has said is right, that if a foreigner comes into this country, if a domiciled foreigner comes into this country for the purpose of taking a wife from this country, the moment the marriage is contracted, the moment the knot is tied, the moment the *vinculum* exists,

then the lady becomes, to all intents and purposes, of the same domicile with the husband, and all the rights and consequences of marriage, all the rights and consequences arising from the marriage, are to be determined by the law of that country which by the actual contract of marriage becomes the domicile of both parties, exactly to the same effect as if they had both been originally of a foreign country. It seems to me that there is no qualification of that rule. A wife's home is her husband's home, a wife's country is her husband's country, a wife's domicile is her husband's domicile, and any question arising with reference to the status of those persons is, according to my view, to be determined according to the law of the domicile of those persons, assuming always that the domicile is a *bona fide* domicile, really resorted to for purposes of domicile, and not a domicile either fictitious or resorted to for the sole purpose of altering the status. I am not prepared to say that an English husband could, by going for the sole purpose of domiciling himself there to a foreign country in which a marriage could be dissolved at pleasure, by his going and doing it, obtain such rights. That is not necessary for us to decide; but where the domicile is the real *bona fide* domicile of the husband and of the wife, consequently the court, the forum of the country of that domicile, is the forum which has got to administer the status, and has got to determine whether the status was originally well created, and whether any circumstances have occurred which justify that forum in deciding that the status has come to an end. I do not think it necessary myself to go further into the cases which have been cited, but I conceive the principle which has been laid down by the learned president to be a sound principle, not capable of being questioned, and that being so, there being originally a marriage where the marriage home was intended to be Scotch, it became in that case a Scotch marriage; that is to say, the union became a Scotch union from the moment of the marriage, and where there was that, where the parties were domiciled at the time the sentence of dissolution was pronounced, I think that that sentence of dissolution ought to be recognized in this country and by all other countries in the world.

COTTON, L. J. I am of the same opinion. I think a great deal of the difficulty in this case has arisen from the ambiguous use of the word "marriage." We have been told it is an English marriage, and that therefore, according to *Lolley's* case and to what was said by the judges in that case, it is indissoluble. To my mind the fallacy lies in this: the word "marriage" is used in two senses; it may mean the solemnity by which two persons are joined together in wedlock, or it may mean their status when they have been so joined. The two things are entirely different. Of course, when one comes to the solemnity by which they are united in marriage, that must depend upon the law of the place where the solemnity takes place; that is to say, the mode in which it is solemnized. The forms to be followed must depend upon the place where that is done. But when that is done in a country which is not the country of the domicile, the country of the domicile will reckon the persons as duly married, if they have followed the forms and ceremonies required by the country in which it is solemnized—of course I am speaking only of Christian countries—and that gets rid of what was put to us by Mr. Fooks, that we have here got to consider what will be the consequences of dealing with the law of the domicile, supposing it were Turkish. That rule, I apprehend, prevails universally, and where a marriage has been solemnized according to the form and in the manner required by the place where it is celebrated, that will be recognized in the country of the domicile. But that being recognized in the country of the domicile, the persons become

married, they become spouses. That is a question of status, and I take and adopt entirely what was said by Lord Westbury in *Shaw v. Gould*, 18 L. T. Rep. (N. S.) 833; L. R., 3 Eng. & Ir. App. 55: "But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the vice-chancellor in his judgment, namely, that where, by the *lex loci contractus*, the marriage is indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence, that is to say, with those rules which, for the sake of general convenience and by tacit consent, are received by Christian nations and observed in their tribunals. One of these rules certainly is, that questions of a person's status depend upon the law of the actual domicile." Now what was the actual domicile here? The husband was, at the time of the solemnization of the marriage in England, Scotch, and always so remained down to the time of the divorce, so that the domicile of the wife also, after she had been united in marriage to her then husband, became Scotch, in my opinion; and throughout the case of *Warrender v. Warrender*, 2 Cl. & F. 842, not a doubt was expressed as to the law which decided that case, that when a woman, domiciled in one country, marries in that country a man domiciled in another country, her domicile at once becomes that of her husband. That, I think, cannot be disputed or doubted. I know of no case which throws a doubt upon it. Here, when the lady married a Scotchman, she consented and agreed that her domicile from that time forth should be that of her husband. That, I take it, is well recognized. Then we come to consider whether this divorce is an incident of the contract and in any way to be governed by the place where the solemnity took place, or whether it is a question of status. In my opinion it is not a question in any way depending upon the rule that the *lex loci contractus* governs it. That applies to the forms and solemnities by which the marriage is celebrated. Here what we have is this; it is not contracted for, when the parties unite themselves in marriage, that according to the laws of the country where that marriage takes place, they shall have the power, or not have the power, to dissolve the marriage, but it is really this; the country where the parties are, if that power is given by act of Parliament—which the courts are bound to recognize, as in *Niboyet v. Niboyet*, 39 L. T. Rep. (N. S.) 486; L. R., 4 P. D.—or as a general rule, the tribunal of the domicile of the parties, deals with the status. Any act done in violation of the duties incident to that status is a matter which concerns the country of the domicile, and in my opinion, the question of divorce is not in any way an incident of the solemnity of the contract so as to be governed by the law of the country where that takes place, but an incident of the status to be disposed of by the law of the domicile of the parties if they are subject to the tribunals of that country. That being so, here we have a real domicile throughout in Scotland, and in my opinion, the courts of that country, not only for the purpose of status in that country, but for the purpose of status everywhere, have the power to entertain this question, and if they think fit to decree a divorce. Is there any authority contrary to that? It is said that *Lolley's* case is against it. We have not any report which purports to give the exact words of it; but no doubt we have an English marriage spoken of, and that is translated in one report as a marriage in England. But we must remember that in that case—and we must regard what was said by the judges in reference to the case—the marriage was in both senses an English one, because it was solemnized in England and the parties to the contract were English people. Their status was English and the marriage was solemnized in England, and we must, in my opinion, notwithstanding the expressions which were used,

and the ambiguity of the expression "English marriage," look at the facts of the case for the purpose of seeing what was intended to be decided by the judges. In my opinion that case in no way stands in our way in deciding this case, nor ought we in my opinion to be deterred from giving a judgment in accordance with our opinions by any thing that was said in *Lolley's* case. As to the case of *McCarthy v. De Caix*, I quite agree with what James, L. J., has said. It is remarkable that in *Shaw v. Gould*, Lord Westbury says, at page 85 of the report: "The position that the tribunal of a foreign country having jurisdiction to dissolve the marriages of its own subjects is competent to pronounce a similar decree between English subjects who were married in England, but who before and at the time of the suit are permanently domiciled within the jurisdiction of such foreign tribunal, such decree being made in a *bona fide* suit without collusion or concert, is a position consistent with all the English decisions, although it may not be consistent with the resolution commonly stated as the resolution of the judges in *Lolley's* case." Lord Westbury mentioned *McCarthy v. De Caix*, but he does not consider that that was a decision which prevented him from laying down a principle independently of *Lolley's* case. Therefore I think that that strengthens what has already been said by James, L. J., as to that case in reference to the present case. We ought to notice what has been said as to *Niboyet v. Niboyet*. It may be said that our decision there was in some way at variance with what we are laying down in this case. What was said by Brett, L. J., was in favor of the respondent to the appeal, and he was in a minority, but the decision of the other members of the court turned entirely upon the construction of an English Act of Parliament, and they said: "Whatever might have been the consequences independently of these words, this Act of Parliament gives to us, an English court, jurisdiction in the matter, and says what is to be the consequence if certain facts are proved in a suit and brought before us under the act." That was the *ratio decidendi* in *Niboyet v. Niboyet*. I cannot look upon *Warrender v. Warrender* as a decision on the present question, because although there are principles laid down consistently with and leading to our decision, yet in my opinion the Lords carefully guarded themselves by saying that they were deciding the matter as a Scotch Court of Appeal, and not dealing with it as an English court or saying what its effect might have been in England. If we could have relied upon *Warrender v. Warrender* as decisive, of course there would have been an end of the matter; and therefore without going into any reasons for that decision, in my opinion we cannot look upon *Warrender v. Warrender* as in any way decisive of the case before us.

LUSH, L. J. I am of the same opinion. It is obvious to me that the whole difficulty in this case arises from a mistaken use of a phrase in *Lolley's* case, in which the marriage in question was called an English marriage. The phrase "an English marriage" may refer to the place where a marriage was solemnized, or it may refer to the nationality and domicile of the parties between whom it was solemnized—the place where the union so created was to have been enjoyed. In *Lolley's* case the parties were English subjects domiciled in England and married in England; they went to Scotland for a temporary purpose, and while there the one party sued the other for a divorce and obtained it. In this case the words must be taken in reference only to one of those meanings, namely the place where the marriage was solemnized, because this was a marriage between a Scotchman, domiciled in Scotland, and an English lady, whose domicile, immediately the marriage was solemnized, became the same as that of her husband. The marriage took place in England, and therefore the words "English marriage," as ap-

plied to this case, meant only the place where the marriage was solemnized. That being so, the conclusion at which we have arrived is a logical sequence from the decision of the House of Lords in *Warrender v. Warrender*. The point was not decided there, because it was not before the court; but it seems to me that having regard to general convenience and propriety, it follows naturally from the decision in *Warrender v. Warrender*, because what the court decided there was that in a case like this, where a domiciled Scotchman was married in England to an English lady but whose domicile remained in Scotland and the domicile of whose wife was therefore Scotch, he might lawfully sue for a divorce in the Court of Session in Scotland. The court held therefore that a Scotch court could dissolve, in Scotland, a marriage which had been created in England. To hold that the consequence of that is confined to Scotland, and to hold that a Scotchman who was released by the law of his own country from the marriage tie in the country where his home was, should as soon as ever he came over the border into England be liable to be indicted for bigamy, is something that shocks all one's notions of morality and public convenience. No doubt that consequence follows in a case exactly like *Lolley's* case so long as that decision stands; but we are asked to extend it very considerably; and whatever we may say of *Lolley's* case, I think we shall be agreed in this, that it is not one the principle of which ought to be extended. There are anomalies enough already arising out of the marriage laws, and we ought to be very careful not to create another. In this case we should be creating another of a very serious kind if we were to hold that a man may be free in Scotland, by the law of his own country, of his own home, to marry a woman there and yet to be liable to be indicted for that very act as a bigamous act if he came over the border into this country. That is what we are asked to do. I confess there is something about that which shocks all one's notions of what is right and just and convenient; and if there were no other authority I should have no hesitation myself in saying that *Warrender v. Warrender* virtually decides the question, because I hold it to be a logical and natural inference from the decision there that the union which was created in England could be dissolved by the Scotch court, and being dissolved can no longer exist anywhere, and wherever the parties may happen to be the status is permanently altered. As Mr. Fooks has referred to what is called marriage in a country where polygamy is lawful, I must take the opportunity also of saying, in accordance with what has fallen from Cotton, L. J., that there is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed and the union of a man and woman in a Christian country. Marriage, in the contemplation of every Christian community, is the union of one man with one woman to the exclusion of all others. No such provision is made, no such relation is created in a country where polygamy is allowed, and if one of the numerous wives of any Mohammedan were to come to this country and marry in this country, she could not be indicted for bigamy because our laws do not recognize a union, falsely called a marriage, taking place in a country where polygamy is allowed as a marriage, to be recognized in our Christian country. If there were no decision at all and no authority on the subject, I should conclude, irrespective of *Warrender v. Warrender*, that our decision should be in accordance with what I have stated; but we have authority — we have two authorities — and unfortunately we have one on each side, because Lord Brougham's decision in *McCarthy v. De Caux* decides that in such a case as this the effect of it is confined to the country. Observations have been already made on that case, and I need not repeat them to show that it is not really an authority at all. The

point which the learned Lord undertook to decide did not arise in the case. What he said on the question with which we are now concerned was only an *obiter dictum*, and contrary, I think, to all analogy and all principles. Another case was decided some years afterward by the Lord Chancellor of Ireland (Lord Blackburne) in which the facts were exactly similar, and that learned judge took an entirely different view from that taken by Lord Brougham. The decision of Lord Blackburne is an authority which commends itself to my judgment, and one which I am very glad to be able to follow. Therefore, viewing the case on every side, whether upon principle or reliable authority, I come without hesitation to the conclusion that the judgment of the learned President was entirely right, and that this appeal ought to be dismissed.

PATENT RIGHT MAY BE REACHED BY CREDITOR'S BILL.

DISTRICT OF COLUMBIA SUPREME COURT, JANUARY TERM, 1881.

MURRAY V. AGER.

The interest of the owner of a patent right for an invention is liable for the payment of his debts, and may be reached and applied to that purpose by a creditor's bill.

BILL filed by creditor to have patent right of debtor applied to payment of a judgment. The facts appear in the opinion.

Hine & Thomas, for plaintiff.

T. T. Crittenden and Warrick Martin, for defendant.

HAGNER, J. The bill in this case is filed by Talbot C. Murray, alleging the recovery by him of a judgment on the law side of this court against the defendant Wilson Ager and others for \$2,164.66. It avers that an execution was duly issued upon the judgment, which was returned *nulla bona* by the marshal; that the defendant Wilson Ager is the inventor and owner of certain inventions secured to him by letters-patent from the United States, which are described in the bill, "for improvement in machines and processes for decorticating grain;" that the complainant is without any means of realizing his judgment, except by the subjection of the patent right to its payment, and the bill prays that his rights as patentee may be sold under the decree of the court and the proceeds applied to the payment of the judgment; that an injunction may be granted to restrain the defendant Wilson Ager from selling or assigning the patents during the pendency of the suit; and that the defendant, after sale has been made, may be compelled to execute such assignment of the patents to the purchaser as may be necessary to vest the title in conformity with the patent laws of the United States.

The defendant's answer admits the rendition of the judgment, the return unsatisfied of the execution issued thereon, and that he is the owner of the patent rights described in the bill; but he claims that these are not subject to seizure and sale under the proceedings instituted by the complainant.

The court below passed a decree dismissing the bill, and the complainant appealed to this court.

The question involved in the case is one of great interest and novelty so far as we have been able to discover.

It is insisted upon the part of the patentee that the rights secured to him by his patent cannot be made the subject of sale by any process at law or in equity against his consent.

The Constitution, by article 1st, section 8, declares that Congress shall have power to promote the pro-

gress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. In conformity with this provision a careful system of laws has been devised regulating the issue of patents and directing the mode in which they may be assigned. Section 4896 of the Revised Statutes declares that every such patent, or interest therein, shall be assignable in law by an instrument in writing, and that such assignment or conveyance shall be void as against any subsequent purchaser or mortgagee, for valuable consideration without notice, unless recorded in the patent office within three months from its date. Section 4896 prescribes the mode in which a patent may be issued to an executor or administrator of an inventor, in trust for his heirs at law or devisees, in case of the death of the patentee before the issue of the patent, and declares that the patent shall be enjoyed by his representatives or devisees in as full manner and on the same terms and conditions as it might have been enjoyed by the original patentee. Similar provisions exist in the statutes with reference to copyrights, which are declared to be assignable by an instrument in its prescribed form recorded in the office of the librarian of Congress.

It is insisted upon the part of the patentee that it is well settled upon authority that the patent right in the hand of the inventor cannot be made the subject of sale under an execution at law, and the case in 14 Howard, 528, *Stevens v. Cady*, is relied upon as establishing this proposition. It is to be observed that the case refers to a copyright and not to a patent right, and although it is intimated in the case of *Stevens v. Gladding*, in 17 How. 454, that there is no common-law copyright in this country, it is well settled that there existed at the common law a marked distinction between the right of an author to his writings and those of an inventor to his invention. The authorities declare that independent of statute or of grant from the government, an author had a right to the exclusive publication of his writings, while no such exclusive right existed, independent of statute, in an inventor. This last position is asserted by Judge Taney in 10 Howard, *Gaylor v. Wilder*, who declares that an inventor has no exclusive right to his invention until he obtains a patent, and that no action could be maintained by an inventor against any one for using it before the issuing of the patent. The text writers explain this distinction upon the idea that the writer creates something which had no existence until produced by himself, as the "Paradise Lost" could never have been written unless Milton had composed it. Whereas an inventor, like a discoverer in astronomy or geography, only brings to light matters which had existed long previously, as the propulsive power of steam must have been discovered sooner or later if the attention of Watts had never been turned to the subject.

But conceding that patent rights and copyrights stand on the same footing, let us examine how the decision in 14 Howard controls the present inquiry. The facts of that case are that the complainant took out a copyright of a map of the State of Rhode Island; that while engaged in publishing and selling the map, by virtue of the copyright, a judgment was recovered against him by a creditor, execution issued and the copper plate upon which the map in question was engraved was seized and sold by the sheriff to the defendant, who thereupon proceeded to strike from the plate copies of the map; and the prayer of the bill was that an injunction might be granted to restrain its printing and publishing in violation of the complainant's copyright.

The single question in the case, say the court, is whether or not the property acquired by the defendant in the copper plate at the sheriff's sale carried with it, as an incident, the right to print and publish the map engraved upon its face. The Supreme Court de-

clare that all that was sold by the sheriff was the piece of copper upon which the map was engraved; that the sheriff did not attempt to sell, and had no right to sell under the execution, the copyright. "The copyright is the exclusive right to the multiplication of the copies for the benefit of the author or his assignees, disconnected from the plate or any other physical existence. It is an incorporeal right to print and publish the map, or as said by Lord Mansfield in *Miller v. Taylor*, 4 Burr. 2396, a property in notion and has no corporeal, tangible substance." The court proceeds: "The copperplate engraving like any other tangible personal property is the subject of seizure and sale on execution, and the title passes to the purchaser the same as if made at a private sale; but the incorporeal right, secured by the statute to the author, to multiply copies of the map by the use of the plate, being intangible and resting altogether in grant, is not the subject of seizure or sale by means of this process, certainly not at common law."

So far as this applies to copyrights, it seems explicit enough. But the court proceeds:

"No doubt the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors. But in case of such remedy we suppose it would be necessary for the court to compel a transfer to the purchaser in conformity with the requirement of the copyright act, in order to invest him with a complete title to the property. * * * An assignment therefore that would invest the assignee with the property of the copyright according to the act of Congress, must be in writing and signed in the presence of two witnesses, and it may be well doubted whether a transfer even by a sale under a decree of a Court of Chancery would pass the title so as to protect the purchaser unless by a conveyance in conformity with this requirement."

The bill in the present case is evidently framed in conformity with the suggestion in the opinion of the Supreme Court, and as we understand, it is warranted by the deliberate judgment of that tribunal.

It is insisted, however, upon the part of the patentee that so much of the opinion as asserts that the copyright may be subjected to a decree in equity is *obiter dictum*, and that it is overruled in the subsequent case of *Stevens v. Gladding*, 17 How. 450. That case arose under the same state of facts and involved the same controversy which was determined in 14 Howard. It appears that under the opinion in 14 Howard the case was remanded to the Circuit Court for the district of Rhode Island. When the mandate arrived, the judge who heard the case below had died, and when the case of *Stevens v. Gladding* was called, the counsel for the respondent desired to be heard, "though," as the judge states, "he frankly avowed that the question passed on in the former case was the only one which could now be raised."

We have examined that decision with care, and we can see nothing in it that can be considered as reversing the ruling in 14 Howard, which asserts, as we understand, the right to maintain such a bill as the present one. Judge Curtis, in his opinion, states that the positions assumed by the counsel of the judgment creditor are, that copy and patent rights are subject to seizure and sale on execution; that whenever the owner of the copyright of a map causes a plate to be made which is capable of no beneficial use except to print his map, he thereby annexes to the plate the right to use it for printing the map, and also the right to publish and sell the copies and print it, and that when the plate is sold on execution these rights pass with the plate as incidents or accessories thereto, though no mention is made of them in the sale.

It is in reference to this contention that Judge Curtis uses the language which has been relied upon in behalf

of the patentee in this case. He declares that there would be "great difficulty in assenting to the proposition that patent and copyrights held under the laws of the United States are subject to seizure and sale on execution." Not to repeat what he said on this subject in 14th Howard, 531, it may be added that these incorporeal rights do not subsist in any particular State or district; they are co-extensive with the United States. There is nothing in any act of Congress, or in the nature of the rights themselves to give them locality anywhere so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts; that an execution out of the Court of Common Pleas for the county of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended; that by the *levy of such an execution* the entire right could be divided, and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty.

It thus appears that the question alluded to by Judge Curtis is that which had been urged in argument by counsel, viz., the right to subject the copy and patent right to sale by execution at law, and that the difficulties suggested by the judge have reference only to the sale under such an execution. But the Supreme Court in the next sentence show that they do not design to decide even this point. Judge Curtis adds: "These are important questions on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was attempted to be sold." And the judge proceeds to show that the only thing attempted to be sold by the sheriff was the right to the copper plate on which the map had been engraved.

In a later part of the opinion the judge says: "For these reasons, as well as those stated in 14 Howard, our conclusion is that the mere ownership of the copper plate of a map by the owner of the copyright does not attach to the plate that exclusive right of printing and publishing the map held under the act of Congress or any part thereof, but the incorporeal right subsists wholly separate from and independent of the plate and does not pass with it by a sale thereof on execution."

The only questions beyond this which are discussed by the court are, whether the prayer of the bill, that the penalties imposed by the act of Congress shall be decreed against the purchaser, and whether there should be an account of the profits. We see nothing in the decision which in any way can be held as a withdrawal by the Supreme Court of the distinct assertion in 14 Howard, that an interest under a copy or patent right can be subjected to the payment of the debts of the patentee by a proceeding in equity.

The argument *ab inconvenienti* urged by Judge Curtis as a reason why such rights should not be considered as liable to seizure under an execution at law, is invoked in the present case. It is insisted that the Constitution and laws passed are designed to secure to the inventor and author the rights to their inventions and writings, and that this provision would be nullified if those rights were subject to seizure in any way by creditors. But it is plain that the benefit designed by the constitutional provision would be no more destroyed by their sale for the payment of the inventor's creditors than by the voluntary sale by himself. If sold to pay his debts, he has already obtained the benefit of the grant as much as if sold of his own motion. It is clear that he would have the right voluntarily to sell his entire right in any, the remotest portion of the country. Notwithstanding that those rights are co-extensive with the Union, they would pass to his personal representative or legatee, and could be subjected to the payment of the debts of such heir or devisee in any part of the country.

It was long ago settled, as far back as the case in 3 Bos. & Pul., 777, *Hesse v. Stevenson*, decided in 1803, that independent of any provision in the English bankrupt law, the right of the patentee in an invention would pass as assets to his assignee in bankruptcy. Lord Alvanley, in delivering the opinion in the case, says: "But if the inventor avail himself of his knowledge and skill, and thereby acquire a beneficial interest which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass in the same manner as any other property acquired by his personal industry. * * * We are therefore clearly of the opinion that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners in bankruptcy."

And by the last bankrupt law, R. S. U. S., section 5046, patent rights and copyrights, with the other classes of property therein enumerated, are expressly declared to be vested in assignee of the bankrupt. By section 5062 the assignee is required to sell all the estate of the bankrupt upon such terms as he thinks most for the interest of the creditors.

It cannot be denied that under this authority the assignee could make sale of the interest of a bankrupt patentee in the most valuable patents in the remotest corner of the country, in Alaska, or at the Dry Tortugas, and unless his discretion in this respect was restrained by a court, upon the ground that its exercise was manifestly injurious to the interest or the estate. If the fact that the operation of the patent is co-extensive with the Union, is sufficient to infer the absence of the power of sale under a decree, as suggested in 14 Howard, it is not easy to see why the same difficulty should not prevent the exercise by the assignee in bankruptcy of what would be his unquestioned right of the disposition of the patent right.

If the contention on the part of the patentee in this case is correct, then it results that there may be a class of property in this country, yielding great revenues from the royalties, which would be exonerated by this special exemption from the responsibility which attaches to all other classes of property — payment of the honest debts of the debtor, and that one possessed of such patent rights, by skillfully refusing to invest his revenues in any other description of property, may successfully baffle his creditors, though they may have supplied him with the very means which enabled him to achieve the success of his patent.

We have been referred to two decisions alleged to have been made in this court; one by Justice Wylie and the other by Justice MacArthur, in which it is stated that the position contended for by the patentee in this case was sustained, but an inquiry from those judges has satisfied us that the cases went off on other points.

We have been referred to some decisions which it is alleged are at variance with the conclusions at which we have arrived, but a careful examination of them has satisfied us that such is not the case. The case in 1 Holmes, 152, which decides that the trustee in insolvency, under the Massachusetts statute, has no title to a patent right, proceeds upon the express words of the statute, which declares that only those species of property which can be seized by execution at law pass to the assignee; and as it is settled that a patent right cannot be taken under an execution at law, the statute necessarily excluded it as assets from the trustee in insolvency. The case in 1 Gallison, 485, simply declares that a sheriff, who had sold under execution a number of patented machines for a debt due by the patentee, could not be held liable under that provision of the patent law which declares that the sale of patented machines without the consent of the patentee should subject the vendor to suit for damages.

In the case in 4 B. Mour. 593, *Cooper v. Gunn*, it is

decided that where an author had conveyed the copyright of a book to a trustee for the benefit of his wife in fraud of his creditors, a judgment recovered by the trustee against the purchaser of the patent right for part of the purchase-money, could be subjected in equity to the payment of a judgment recovered by a creditor against the patentee, and the remarks of that court, relied upon by the patentee's counsel in this case as sustaining their position, were not required in the case, and in our opinion, do not support their contention.

We have been appealed to with great earnestness to decide in favor of the inviolability of the right of the patentee, for the reason that patentees as a class, notwithstanding the benefits they confer upon the community, seldom participate in the profits which are derived from their inventions; that they live laborious lives and die poor; and it is urged that it would be an additional hardship to deprive them of the exemption supposed to be secured to them by their grant from the United States.

Assuming the correctness of this supposition, and that it is true that they seldom reap the benefit of their labors, it results that what is supposed to be the present state of the law exempting those interests from sale, does not operate very beneficially in their behalf. If, notwithstanding the assumed exemption, they receive such slender profits from their labor, a change in the law could not place them in a worse position. It may be that they might profit by a condition of things which would expose their interests at public sale to competition, and thus bring the merits of their inventions more prominently before the public.

For these reasons we are of opinion that the decree below should be reversed, and we will sign a decree directing the sale of the interest of the patentee for the payment of the judgment creditor, and directing him to execute the assignment required by the statute, and in default of such assignment within a limited time, appoint a trustee with authority to execute the same.

Wylie, J., dissented.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION—WHAT SUFFICIENT TO CONSTITUTE CAUSE OF—BY ADMINISTRATOR TO RECOVER MONEY PAID BY PERSON OF "UNSOUND MIND"—PARTIES.—(1) A complaint in an action by an administrator, in substance set forth that intestate in his life-time was of unsound mind, and while in that condition transferred to defendant by gift or contract several sums of money which defendant still holds and refuses to return. *Held*, upon demurrer, that there was sufficient to constitute a cause of action. See *Ex parte Barnsley*, 3 Atk. 168. The allegation that a person is of "unsound mind" is not a conclusion of law but a fact founded upon other facts. But at common law, in the practice of the courts and in the language of the Legislature these words signify and describe persons of certain condition which whenever called in question is to be ascertained like any other fact named or stated in pleading, the same as that a person is "an infant" or "a married woman." (2) *Held*, also, that the action to recover the moneys would lie against the one receiving them without joining other parties who were to be benefited by the contract under which they were received. Judgment affirmed. *Riggs v. American Tract Society*. Opinion by Danforth, J. [Decided March 1, 1881.]

APPEAL—ORDER AS TO PAYING MONEY TO RECEIVER IN FORECLOSURE DISCRETIONARY WITH SUPREME COURT, AND REFUSAL TO GRANT NOT APPEALABLE.—During the pendency of a motion for the appointment

of a receiver upon the foreclosure of a mortgage, but before the receiver was actually appointed, B., the owner of the equity of redemption, received rents from the mortgaged premises which he did not pay over to the receiver. *Held*, that the refusal of the Supreme Court to compel B. to pay over the rents to the receiver is not reviewable in this court. Plaintiff did not have a strict legal right to a receiver. It was discretionary in the Supreme Court to appoint a receiver (*Syracuse Bank v. Tallman*, 31 Barb. 201), and if it did appoint one and had power to compel B. to pay over rents received by him, it need not exercise that power. And until the receiver was appointed B. had the right to receive the rents, and could not be compelled to account for them. By the appointment of the receiver plaintiff obtained an equitable lien upon the unpaid rents and upon them only. *Lofsky v. Maujer*, 3 Sandf. Ch. 69; *Howell v. Ripley*, 10 Pal. 43; *Astor v. Turner*, 11 id. 436; *Mitchell v. Bartlett*, 51 N. Y. 447; *Argall v. Pitts*, 78 id. 242. Order affirmed. *Rider v. Bagley*. Opinion by Earl, J. [Decided March 8, 1881.]

NEGLIGENCE—BY RAILWAY COMPANY IN MAINTAINING STREET CROSSING IN SAFE CONDITION—CONTRIBUTORY NEGLIGENCE—OF DRIVER OF VEHICLE IN WHICH INJURED PERSON RIDES BY INVITATION, NEGLIGENCE OF THIRD PARTY.—(1) Plaintiff's intestate was allowed to ride home from his work by one Atfield who was driving a team, and did so. While Atfield was driving across defendant's railway crossing in the highway the wagon was jarred severely and luteslate thrown therefrom and killed. The jarring was caused by a hole in the highway six or eight inches deep between defendant's rails which was occasioned by an omission by defendant to restore a plank that was out. There was testimony that this crossing was a dangerous one and had been in bad condition for several days. The hole was between the rails of a street railway track which crossed the defendant's track at that point. There were a number of tracks at the place, a frequent passing of tracks, and a witness testified about 1,000 teams crossed in twenty-four hours. Defendant's track foreman had received notice before the accident to repair the hole in question. *Held*, that there was sufficient evidence of negligence on the part of defendant to go to the jury. (2) At the trial the court charged thus: "The facts do not show a condition of things that would warrant the jury in saying that the plaintiff cannot recover, even if they should find Atfield was negligent. They were not engaged in any joint employment, and whatever doubts may have existed as to what the law was years ago, it seems now to be settled that in a case of this character, assuming that Atfield was a competent driver and sober man, and no reason which deceased could discover why he should not ride with him, I do not think that although there might have been carelessness on the part of Atfield in driving in this particular, that would defeat a recovery unless you should consider there was a willful act upon the part of the driver, and the death was caused by his wrongful and willful act." *Held*, no error. *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Robinson v. New York Cent., etc., R. Co.*, 66 id. 11. The negligence of the driver consisted, it was said, in not driving elsewhere than he did. *Held*, that the omission to do so did not make his act the proximate cause of the jar in any such sense as excluded defendant's negligence from being also a proximate cause. The cases, *Congreve v. New York Cent., etc., R. Co.*, 13 Hun, 229, and *Barringer v. New York Cent., etc., R. Co.*, 18 id. 306, distinguished. (3) The court was asked by defendant to charge that "if the defect in the horse-railroad tracks and planking caused the injury, plaintiff cannot recover," and answered, "yes, if it is a defect in the horse-railroad, that these parties are in no

way responsible for." The court also charged that defendant must keep the crossing in such a way as not to impair or render dangerous crossing over these tracks, though it may be the crossing over the track of the horse and steam railroad at the same place. *Held*, no error. That the horse-railroad and the city also might have a duty to keep the crossing safe as well as defendant, would not absolve defendant from its duty and liability for not performing it. See *Storrs v. City of Utica*, 17 N. Y. 109; *Illidge v. Goodwin*, 5 C. & P. 190; *Linch v. Nurdin*, 1 A. & E. (N. S.) 422; *Chapman v. N. H. R. Co.*, 19 N. Y. 341; *Colegrove v. N. H. R. Co.*, 20 id. 492. Judgment affirmed. *Masterson v. New York Central Railroad Co.* Opinion by Dauforth, J. [Decided March 1, 1881.]

RENDITION OF CRIMINALS—REQUISITES TO AUTHORITY—JURISDICTION OF COURTS TO EXAMINE PROCEEDINGS—THEFT AND LARCENY—CONTENTS OF WARRANT OF EXTRADITION.—Under the Federal statute for the rendition of accused persons fleeing from one State to another (U. S. Const., art. 4, § 2, U. S. R. S., § 5278), every criminal offense is embraced and every act forbidden and made punishable by the law of the State where the crime is committed, whether by common law or legislative enactment. *Kentucky v. Dennison*, 24 How. (U. S.) 66. By the Federal statute three things are rendered necessary to precede and justify the warrant of extradition. There must be a demand from the governor of the State in which the crime has been committed, for the surrender of the fugitive; this demand must be accompanied by an indictment or an affidavit charging the commission of the offense, and such indictment or affidavit must be authenticated by the certificate of the executive making the requisition. These preliminary conditions are essential, and their presence or absence in a given case must of necessity become the subject of judicial investigation where the law is involved, and it is the duty of the court, in such case, to judge and determine whether the preliminaries are sufficient to justify the warrant. *People v. Brady*, 56 N. Y. 182. See, however, *Leary's case*, 6 Abb. New C. 44. When the papers upon which the warrant is founded are withheld by the executive, in the exercise of official discretion, the court can look only at the warrant itself and its recitals, for the evidence that the essential conditions of its issue have been fulfilled. *People v. Pinkerton*, 77 N. Y. 245. In the present case the warrant recited a representation by the governor of Connecticut that "J. stands charged with the crime of theft, committed in the county of Middlesex, in said State;" that the governor of Connecticut has demanded his arrest and extradition; that such representation and demand were accompanied "by affidavits, complaint and warrant, whereby the said J. is charged with the said crime and with having fled from the said State," and that said papers are "certified by the said governor of Connecticut to be duly authenticated." *Held*, sufficient to authorize the rendition of J. "Theft" is synonymous with "larceny." *Bouvier's Dict.*; 4 Bl. Com. 229, 230, 235, 237; *American Ins. Co. v. Bryand*, 26 Wend. 563; *Conn. Gen. Stat.* 503, 537, 538. The warrant need not state the facts constituting the offense. The rules governing ordinary warrants and indictments, to which a party must plead, do not apply. And at common law a criminal warrant need not recite the accusation. See 1 Chit. on Cr. Law, 41; 1 Archb. Cr. Pl. 107, n. 1; *Atchison v. Spencer*, 9 Wend. 62; *People v. McLeod*, 1 Hill, 398, n. e. There is no reason why the warrant of the executive, in a rendition case, should be required to go beyond a substantial statement of the existence of the conditions necessary to its issue. *In re Clark*, 9 Wend. 222. Order affirmed. *People ex rel. Jourdan v. Donohue*. Opinion by Finch, J. [Decided March 8, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

CONSTITUTIONAL LAW—ILLINOIS CONSTITUTION—SIGNING OF BILL BY EXECUTIVE AFTER ADJOURNMENT OF LEGISLATURE.—The Constitution of Illinois provides as follows: "Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it, with his objections, to the house in which it shall have originated, etc. If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the general assembly shall, by their adjournment, prevent its return; in which case the said bill shall be returned on the first day of the meeting of the general assembly after the expiration of said ten days, or be a law." *Held*, that a bill passed by both houses and presented to the governor before the Legislature adjourns, becomes a law when signed by the governor after the session of the Legislature has been terminated by an adjournment, but within ten days from its presentation to him. See *People v. Bowen*, 21 N. Y. 517; *State v. Fagan*, 22 La. Ann. 545; *Solomon v. Commissioners*, 41 Ga. 157. Judgment of United States Circ. Ct., S. D. Illinois, affirmed. *Town of Seven Hickory v. Ellery*. Opinion by Waite, C. J. [Decided March 14, 1881.]

MARRIED WOMEN—CHARACTER OF EVIDENCE NECESSARY TO IMPEACH ACKNOWLEDGMENT BY—IMPEACHMENT OF DEED BY, FOR FRAUD AND COMPULSION.—When a deed or mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attached, the evidence to impeach it should be clear and convincing. This rule applies to the execution of instruments by married women. In this case a married woman defended an action for the foreclosure of a mortgage, upon the ground that her signature to the mortgage was obtained by false representation and compulsion on the part of her husband, and the acknowledgment thereto in a like manner. It appeared that her husband was the only person present when her signature was made. She deposed, among other things, that he held her in a chair and guided her hand so as to write her name to the mortgage, and that when she acknowledged the instrument she said nothing, her husband, by motions, telling her to keep quiet, and that the acknowledging officer falsely represented the contents of the mortgage to her. At the time of making her deposition the husband and the acknowledging officer were both dead, there was no testimony of other witnesses sustaining defendant, and her signature bore no signs of constraint but was free and natural. *Held*, that the evidence was not sufficient to sustain the defense. In *Howland v. Blake*, 97 U. S. 624, this court said: "The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs were doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive testimony." See, also, *Shelbourn v. Inchiquin*, 1 Bro. Ch. 338, 341; *Henkle v. Royal Assur. Co.*, 1 Ves. Jr. 317; *Townshend v. Stungroom*, 6 id. 332, 333; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Lyman v. United Ins. Co.*, id. 630; *Graves v. Boston Marine Ins. Co.*, 2 Cranch, 444. The acknowledgment of a deed can only be impeached for fraud, and the evidence of fraud must be clear and

convincing. *Russell v. Baptist Theological Union*, 73 Ill. 337. Decree of United States Circ. Ct., Kansas, reversed. *North-western Mutual Life Insurance Co. v. Nelson*. Opinion by Woods, J. [Decided March 14, 1881.]

MUNICIPAL CORPORATION — NEGOTIABLE SECURITIES OF, WHEN SUBJECT TO EQUITIES IN BONA FIDE HOLDER'S HANDS.—Certain warrants were drawn by the clerk of the county of Monroe upon its treasurer, read as follows: "The treasurer of the county of Monroe will pay to Frank Gallagher or bearer the sum of fifty dollars out of any money in the treasury for general county purposes and not otherwise appropriated." They were renewal warrants, drawn in lieu of others which under the law of Arkansas had been called in by the county court for examination, registration and reissue. The called-in warrants having been found to be just and legal claims against the county, were cancelled by order of the court, and the clerk was directed to issue new warrants in lieu thereof to the original payee, Frank Gallagher. The new warrants were purchased by plaintiff in good faith for a valuable consideration, and payment of them having been refused upon demand upon the treasurer, he instituted this action. The answer set up that Gallagher was at the time the warrants were issued to him indebted to the county as surety on an official bond in a sum larger than the amount sued for; that since then, the county has recovered a judgment against the said Gallagher for a much larger amount than the warrants in suit; that the judgment was recovered before the transfer of the warrants to the plaintiff, and is still unsatisfied; and it asked that the judgment might be set off against the warrants. *Held*, upon demurrer, that defendant was not estopped by the reissue of the warrants to set up the defense although such defense was known to have been existing at the time they were reissued, and that such defense could be set up in a suit by a holder of them for value who had no notice of such defense when he acquired them. The warrants being in form negotiable, are transferable by delivery so far as to authorize the holder to demand payment of them and to maintain in his own name an action upon them. But they are not negotiable instruments in the sense of the law-merchant, so that when held by *bona fide* purchasers evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee. *Mayor v. Ray*, 19 Wall. 390; *Shirk v. Pulaski County*, 4 Dill. 209; *Dillon on Mun. Corp.*, ch. 14. Judgment of U. S. Circuit Court, E. D. Arkansas, affirmed. *Wall v. Monroe County*. Opinion by Field, J.

[Decided March 14, 1881.]

ILLINOIS SUPREME COURT ABSTRACT.

FEBRUARY, 1881.

ANIMALS—FERE NATURE BELONG TO STATE, WHICH MAY CONTROL, KILLING AND SALE OF—STATUTE FORBIDDING SALE OF WILD ANIMALS KILLED ELSEWHERE, CONSTITUTIONAL.—(1) The ownership of wild animals, wild fowl and birds being in the people of the State in trust for all its citizens, and no one having a property right in them to be affected, it results that the Legislature, as the representative of the people, may withhold or grant to individuals the right to hunt or kill game, or qualify and restrict it to certain times in the year, as it may consider will best subserve the public welfare. To hunt or kill game is a boon or privilege granted either expressly or impliedly by the sovereign authority. (2) And a provision in a State game law, making it unlawful to have possession of cer-

tain game for the purpose of sale, or the selling or attempting to sell the same, in the State, unlawful, though killed without the State and sent to a purchaser in the State, is not in contravention of the third clause of section 8 of article 1 of the Constitution of the United States, which confers upon Congress power to regulate inter-State commerce. When such game comes into the State and into the possession of a citizen of the State, the police power of the State attaches, and the sale may be prohibited, although it may discourage importations. *Magner v. People of Illinois*. Opinion by Scholfeld, J.

LUNATIC—NOT CHARGEABLE WITH LACHES—STATUTE OF LIMITATION.—A confirmed lunatic or idiot cannot be held accountable for any apparent negligence, laches or delay in seeking redress through the courts or otherwise, for any wrong or injustice that may have been done him or her with respect to property owned by such person; nor will such person be affected by any statutes of limitation that now or have heretofore existed in the State, which, but for the lunacy or idiocy, would have barred his or her rights. *Dodge v. Cole*. Opinion by Mulkey, J.

RECORDING LAW—CREDITOR MUST HAVE A LIEN TO AVOID AN UNRECORDED DEED.—The section of the conveyance act which declares that all deeds for land shall be void as to creditors and subsequent purchasers of the grantor without notice until they are recorded, does not embrace a creditor who has not reduced his debt to a judgment, or acquired a lien on the land in some other way. If the deed is recorded, or the grantee is put in possession before the acquisition of a lien by judgment or otherwise, it will pass the title as against creditors. *Crawford v. Logan*. Opinion by Craig, J.

MARRING OF INDEX OF RECORD WILL NOT AFFECT TITLE AS TO AN INNOCENT PURCHASER.—Where a former owner of land has conveyed the same by warranty deed, which is duly recorded, the fact that the index in the recorder's office has been marred so that a party taking a deed of trust from him failed to discover such prior conveyance, will in no way impair the title of those holding under such prior deed, who had nothing to do with making or marring of the index. *Dodd v. Doty*. Opinion by Dickey, J.

KENTUCKY COURT OF APPEALS ABSTRACT.

ANIMAL—WHEN OWNER OF UNRULY, LIABLE FOR INJURY BY.—Where the owner of a cow which is enraged, has servants driving the animal in the streets of a city, and they are aware of her enraged condition and take no measures to confine her, so as to render her incapable of mischief, and she attacks a person in the street, the owner is liable to the person injured, notwithstanding the animal was not vicious ordinarily, and he knew nothing of her condition at the time. *Villette v. Payne*. Opinion by Pryor, J. [Decided Feb. 23, 1881.]

CONSTITUTIONAL LAW—TIME OF PRESIDENTIAL ELECTION—WAGER.—An indictment charged that the accused bought a horse to be paid for if Garfield was elected president in 1880; otherwise it was not to be paid for. A demurrer to the indictment was sustained, which was placed on the ground that a president is not elected until the votes are counted by Congress. Sales on such a condition constitute a bet on the election, and are indictable as such. *Commonwealth v. Shouse*, 16 B. M. 323. A president of the United States is elected by the electors, in December, and not by the count by Congress, in February. The Electoral Commission proceedings in 1877 do not show the contrary. *Commonwealth of Kentucky v. Hunter*. Opinion by Hargis, J.

[Decided Feb. 8, 1881.]

FINANCIAL LAW.

BANK — ACCEPTANCE OF BENEFIT OF CONTRACT BY, RATIFIES IT. — The acceptance of the benefits of a contract made by the president of a bank for the bank is an implied ratification of such contract, and if money is received by its cashier for the bank under such contract, even when such receipt was unknown to the directors, it will be a confirmation of the contract, unless the money so received is returned when its receipt becomes known to the directors. *West Virginia Supreme Court of Appeals, April 24, 1880. First National Bank of Wheeling v. Kimberland.* Opinion by Green, J.

CHECK — WHAT DILIGENCE REQUIRED IN PRESENTATION. — A check drawn in Cincinnati, upon a banking-house there, Sunday, but post-dated as of the next day, was delivered on the day it was drawn, in payment for cattle purchased, with the understanding that the seller of the cattle was to take it the same night to Danville, Ky., where he resided; and it was accordingly taken and put in bank at Danville, Monday. The mail left Danville daily about noon, and was distributed in Cincinnati by nine the next morning, but the check was not mailed until Wednesday, and was not received by the bank in Cincinnati, to which it was sent for collection, until Thursday morning, when it was presented for payment and refused, the house upon which it was drawn having suspended at the close of business hours Wednesday. *Held*, that the presentment was in time, and the drawer not discharged. In this case the drawer may be presumed to have assented to the employment of the usual means of making presentment as between Cincinnati and Danville. The necessary delay would be included by the assent. *Alexander v. Burchfield, 7 M. & G. 1031.* The usual means of presentment for payment at a distant place consists in sending the check to a bank or agent there. This is usually done by mail, and unless there is evidence of a different understanding the parties may be held to have contemplated that course. But when the mail is employed, the holder has until the next day after receiving the check to send it, and the person to whom sent, until the next day, after it reaches him, to present it. *Werk v. Mad River Ry. Bank, 8 Ohio St. 301.* The delay contemplated must have been that which would occur, in procuring presentment from Danville according to the usual course. This would have been until Thursday, and since presentment was of no avail then, the question is not affected by the fact that the holder did not adopt the usual course. As was said, in the case last cited, "the drawer has no right to complain of a delay in presentment for payment which was contemplated by the parties, and either expressly or impliedly assented to by himself at the time of drawing the check." *Moule v. Brown, 4 Bing. (N. C.) 206; Smith v. Jones, 20 Wend. 192; Byles on Bills, 19, 20; Woodruff v. Plant, 41 Conn. 344; Pridcaux v. Criddle, L. R., 4 Q. B. 455; First Nat. Bk. N. Benn. v. Wood, 9 Rep. 191; Cox v. Boone, 8 W. Va. 500. Hamilton County, Ohio, District Court, January, 1881. Braun v. Kimberlin.* Opinion by Avery, J.

COLLECTION AGENCY — LIABILITY OF AGENT TO COLLECT FOR DEFAULT OF HIS CORRESPONDENT IN ANOTHER PLACE. — Defendant, who conducted a commercial agency in New York for the collection of past due claims, received from plaintiffs on account for collection from a debtor in Boston. Defendant transmitted the account to an attorney in Boston, who with plaintiffs' consent compromised the same and received payment upon the compromise, which the attorney failed to pay over. Plaintiffs, in reply to a letter from defendant before the payment keeping them informed

as to the negotiations of the attorney for compromise, directed defendant to tell the attorney "that he must make the most out of the matter that he can for us;" that "we must be satisfied with his judgment in the matter," etc. *Held*, that defendant was liable to plaintiffs for the neglect of the attorney to pay over. It is well settled in New York that when a bank, broker or other money agency receives upon a good consideration a note or bill for collection in a place where such bank, broker or agency carries on business or at a distant place, the parties receiving the same for collection are liable for the neglect, omission or misconduct of the bank or agent to whom the bill or note is sent, either in the negotiation, collection or paying over the money, by which the money is lost or other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary, express or implied. The principle is that where a collection agency receives a note for the purposes of collection, its position is that of an independent contractor, and that the parties employed in that agency in the business contemplated are its agents and not the subagents of the owner of the note. *Commercial Bank of Penn. v. Union Bank of N. Y., 11 N. Y. 208; Allen v. Merchants' Bank, 22 Wend. 215; Bradstreet v. Everson, 72 Penn. St. 124; Story on Agency, § 454, a. New York Superior Court, Sp. Term, Jan., 1861. Dunham v. Mower.* Opinion by Spier, J.

SAVINGS BANK — LIMITATION OF LIABILITY FOR ERRONEOUS PAYMENT BY RULE IN PASS-BOOK. — The rules of a savings bank, which were printed in depositors' pass-books, provided that "no person shall have the right to demand any part of his principal or interest without producing the original book, that the payments may be entered therein;" and further, that "all payments made to persons producing the deposit book shall be deemed good and valid payments to depositors respectively." *Held*, that these regulations did not absolve the bank officials from the exercise of ordinary care when making payment upon the faith of the depositors' books; and that upon a trial involving the validity of such payments brought by a depositor against the bank, it would be necessary for the plaintiff to give proof of facts tending to show a failure to exercise reasonable care and prudence in disbursing the money. If, for instance, the signature of the receiving person should present a marked and noticeable dissimilarity to that of the depositor upon the bank's books, the failure to discover it would be evidence of negligence to be passed upon by a jury. *See Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418; Appleby v. Erie County Sav. Bank, 63 id. 12. New York Court of Common Pleas, General Term, Feb. 7, 1881. In re v. Bowery Savings Bank.* Opinion by Beach, J.

RECENT ENGLISH DECISIONS.

GOOD WILL OF TRADE — SALE OF — RESTRAINT UPON FORMER OWNER EXERCISING TRADE. — B. and L., carrying on business as ironmongers in partnership, agreed that the partnership should be dissolved; that the stock and good will should be taken by L., who would continue the business on his own account; and that B. would retire from the business and not commence business as an ironmonger in Bradford or within ten miles thereof for ten years (except in Leeds, in which case he should not do business in Bradford directly or indirectly). The defendant, within the ten years, commenced business as an ironmonger at Leeds, and solicited customers of the old firm. *Held*, that an injunction ought to be granted only to restrain the defendant from soliciting the customers of the old firm, but not to restrain him from dealing with them. *Decision of*

Jessel, M. R., reversed. *Gineal v. Cooper*, 42 L. T. Rep. (N. S.) 751; L. Rep., 14 Ch. Div. 506, disapproved on this point. *Labouchere v. Dawson*, L. R., 13 Eq. 322; *Churton v. Douglas*, Johns. 174. Ct. of Appeal, July 27, 1880. *Leggott v. Barrett*. Opinions by James, Brett and Cotton, L. J.J., 43 L. T. Rep. (N. S.) 641.

LIBEL—TRADESMAN NOTIFYING CUSTOMER THAT HE WILL NOT ACCEPT CHECKS ON SPECIFIED BANK—INNUEENDO—PRIVILEGE.—The manager of a branch of the Capital and Counties Bank refused to cash checks drawn on other branches of the same bank when presented by representatives of the defendants not known to the manager. The defendants, who were brewers, thereupon had printed and sent to about 137 of their customers and tenants occupying public-houses the following circular: "Messrs. Henty & Sons" (the defendants) "hereby give notice that they will not receive in payment checks drawn on any of the branches of the Capital and Counties Bank, late the Hampshire and North Wilts. Westgate, Dec. 22, 1878." This caused a run on the bank. The plaintiffs (the Capital and Counties Bank) sued the defendants for libel, alleging by way of innuendo that the defendants meant (by the above circular) that the plaintiffs were not to be relied upon to meet the checks drawn upon them, and that their position was such that they were not to be trusted to cash the checks of their customers. *Held* (reversing the decision of the Common Pleas Division, Thesiger, L. J., dissentiente), first, that the primary meaning of the words in the circular would not support the innuendo, that the circumstances under which the circular was sent were no evidence of a meaning attaching to the words other than the primary meaning, and that consequently there was no evidence that the circular was a defamatory document; secondly, that even if defamatory it was sent on a privileged occasion, and there was no evidence of express malice. Ct. of Appeal, May 14, 1880. *Capital & Counties Bank v. Henty & Sons*. Opinions by Cotton, Brett and Thesiger, L. J.J., 43 L. T. Rep. (N. S.) 651.

STATUTE OF LIMITATION—BREACH OF TRUST BY TRUSTEE—BRIBE TO BANK DIRECTOR.—The statement of claim alleged that in 1872 H., a director of the plaintiff company, received a bribe of 250*l*. from D., a debtor of the bank, to induce H. to use his influence as a director with the other directors of the bank to obtain a favorable compromise of the bank's claim against D. In the same year, and more than six years before the commencement of the present action, the directors were made aware that H. was charged with having received the bribe and they investigated the matter but took no steps. It was not alleged that the other directors had acted collusively with H. *Held* (affirming the decision of Stephen, J.), that the claim of the bank to recover the amount of the alleged bribe in the present action was barred by the statute of limitations. Where a trustee receives money under such circumstances that the receipt is a fraud on his *cestui que trust*, the statute of limitations will run against the latter from the date of his discovery of the fraud. Ct. of Appeal, August 5, 1880. *Metropolitan Bank v. Hillson*. Opinions by James, Brett and Cotton, L. J.J., 43 L. T. Rep. (N. S.) 676.

SURETYSHIP—EQUITY BETWEEN INDORSER AND ACCEPTOR OF BILL OF EXCHANGE.—The equity between the indorser and the acceptor of a bill of exchange is the same as that between a surety and a principal debtor, when the creditor is not a party to the contract of suretyship, and consequently the rule as to a surety's right to securities extends to such a case. R., a member of the firm of R. & Co., deposited with a bank the title deeds of real estate to secure the floating balance due from the firm to the bank. Afterward R. & Co. bought goods of D. & Co., and gave bills accepted by

themselves in payment. D. & Co. indorsed the bills and paid them into the same bank, which discounted them. R. & Co. stopped payment before the bills became due. The bank was still the holder of the bills. *Held* (reversing the judgment of the court below), that D. & Co. were entitled to have the security of R. handed over to them on paying to the bank the amount of the bills and the floating balance due upon that security. *Owen v. Homan*, 3 Mac. & G. 378; *Newton v. Chorlton*, 10 Haro, 646; *Pearl v. Deacon*, 24 Beav. 186; 1 DeG. & J. 461; *Davies v. Stainbank*, 6 DeG., M. & G. 679; Ex parte *Hippins & Harrison*, 2 G. & J. 93; *Liquidators of Overend & Co. v. Liquidators of Oriental Fin. Corp.*, 7 H. L. 348; 31 L. T. Rep. (N. S.) 322; *Craythorn v. Swindon*, 14 Ves. 170; *Aldrich v. Cooper*, 8 id. 381; *Yonge v. Reynell*, 9 Haro, 809; *Tindal v. Brown*, 1 T. R. 168; Ex parte *Yonge*, 3 Ves. & B. 49; *Clarke v. Devlin*, 3 B. & P. 363; *English v. Darley*, 2 id. 61; *Præd v. Gardner*, 2 Cox, 86. House of Lords, Nov. 27, 1880. *Duncan, Fox & Co. v. North & South Wales Bank*. Opinion by Lord Chaucellor Selborne.

NEW BOOKS AND NEW EDITIONS.

XVII BLATCHFORD'S REPORTS.

THIS volume, published by Baker, Voorhis & Co., of New York, contains a large number of important decisions in admiralty, patent, bankruptcy and revenue law, and the following, among others, of general interest: *Connecticut Mutual Life Ins. Co. v. Home Ins. Co.*, p. 142—A life insurance policy providing that it shall be void if the insured shall become so intemperate as to impair his health, the company may maintain a suit in equity for its cancellation and surrender on payment of its surrender value. *Darby v. Stevens*, p. 259—A stockholder in a National bank cannot evade individual responsibility by a colorable transfer of his stock. *Muser v. Holland*, p. 412—A common carrier cannot exonerate himself from liability for his own negligence, but a stipulation in his receipt limiting such liability to \$50, unless the value in question is otherwise therein stated, is valid. *Wertheimer v. Penn. R. Co.*, p. 421—A railroad company stipulating for exemption from liability for loss of goods caused by fire unless caused by its own negligence, is not liable for fire caused by a mob in the absence of proof of its own negligence. *U. S. v. Aueroid*, p. 423—The obtaining of a child from its relatives in Italy for the purpose of employing him in the United States as a beggar or street musician, against the law of Italy, is an "inveigling" and "holding to involuntary service," within our statute, although the child consented to the employment.

RAPALJE'S REFERENCE DIGEST.

Digest of New York Decisions from July, 1878, to January, 1881. Comprising all the cases reported officially or otherwise during that period. Together with a table of cases affirmed, reversed, overruled and otherwise criticised, covering the same period. Being volume II of the New York Reference Digest. By Stewart Rapalje, of the New York Bar. Jersey City: F. D. Linn & Co., 1881. Pp. 658.

Many of our readers are acquainted with the peculiar convenience and excellence of the first volume of this work. Owing to the smaller period covered by the present volume, its plan is somewhat different. It comprises, first, a very full digest—not mere references—of the cases in thirty-six volumes of reports, namely, 4 to 8 Abbott's New Cases, inclusive, 7 and 8 Daly, 55 to 59 Howard's Practice, 18 to 21 Hun, 69 to 79 New York, 8 Redfield, 43 to 45 Superior, covering 464

double-columned pages; second, a table of cases criticised, etc., covering 83 pages; third, a table of cases digested; fourth, a general topical index. This is a work long needed and combining a great variety of good points. Mr. Rapalje's first volume was very favorably received, and we presume that this will be found equally accurate and useful. We have examined the digest sufficiently to see that it is well executed, and so far as we can judge by a cursory examination, the table of cases criticised is equally well done. The author is an indefatigable and careful worker, and his work is of the practical kind that commends itself to the perplexed seeker. This volume is admirably printed.

AMERICAN DECISIONS.

Volumes 22 and 23 of this series are at hand. They come down to the year 1832. They contain selections from a larger number of volumes of State reports than the several preceding volumes, the 22d containing selections from 23 and the 23d from 29 volumes. Doubtless the earlier volumes of the State reports need closer culling than the later, for with the growth of our jurisprudence repetition of principles became more frequent. The annotation is as good as usual. These volumes contain particularly important notes on meaning of "home;" proof of marriage; forgery; eminent domain; circumstances putting on inquiry; power of State to enact bankrupt and insolvent laws; specific performance; gift *causa mortis*; constitutionality of registration laws; power of corporations to mortgage or convey their realty.

ANCIENT CLASSICS FOR ENGLISH READERS.

In these 14 neat 12mo volumes, published by J. B. Lippincott & Co. of Philadelphia, are given the lives and a succinct account and criticism of the works of Lucretius, Plindar, Livy, Ovid, Aristotle, Thucydides, Virgil, Horace, Cæsar, Tacitus, Euripides, Aristophanes, Homer, Hesiod, Theognis, Juvenal, Plautus, Terence, Lucian, Plato, Xenophon, Herodotus, Cicero, Pliny, Æschylus, Sophocles, Catullus, Tibullus, Propertius, Demosthenes, and an account of the Greek Anthology. These are the works of the best modern English scholars, and we can say from actual perusal of the whole series that they are exceedingly well done. For a trifling sum one can here obtain a very competent view of all classic literature. These volumes will be found equally valuable and interesting whether the reader is acquainted with the originals or the original tongues or not, and we do not know of any source of information or review concerning these authors to be compared with this. Men in our busy profession, who generally pay too little attention to culture, should possess and read this series. It is especially recommended for families and schools. It has been before the public for several years and has received a patronage commensurate with its merits.

HINE AND NICHOLS' ASSIGNMENTS OF LIFE POLICIES.

Law of Assignments of Life Policies. Hine and Nichols. New York: Office of Insurance Monitor, 1881. Pp. 168.

In this neat little volume will be found the whole law on this much debated subject very intelligently arranged and treated. Mr. Hine is favorably known to our profession by his *Insurance Law Journal*, a most judicious and useful publication. The present monograph is well worth a place on every lawyer's shelves. It has the very latest cases, and is furnished with a table of cases and an index.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, April 19, 1881:

Judgment affirmed with costs—*Morse v. Morse*; *Hennessey v. Patterson*; *De Herques v. Marti*; *Sutherland v. Carr*; *Donovan v. Board of Education*; *Donovan v. McAlpin*; *People ex rel. Witherbee v. Supervisors of Essex County*; *Sherman v. Page*; *Metropolitan Life Insurance Company v. Meeker*; *Walker v. Henry*; *Kearney v. McKeon*; *Hoyt v. Hoyt*; *Caulfield v. Sullivan*; *Kelso v. Lorillard*.—Judgment reversed and new trial granted, costs to abide event—*Slater v. Jewett*.—Order of General term reversed and that of Special Term affirmed with costs—*In re Deering*, to vacate, etc.—Order of General Term modified so as to grant a new trial on all the issues, costs to abide event—*Goodwin v. Conklin*.—Order of General Term reversed and judgment of Special Term affirmed with costs—*Dunning v. Leavitt*.—Order of General Term reversed and judgment entered upon report of referee affirmed with costs—*Ackerman v. Hundicker*; *The Chemical National Bank v. Kohner*.—Order reversed and judgment absolute rendered on verdict, with costs—*Herman v. Adriatic Fire Insurance Company*.—Order of General Term modified so that the whole lot shall be sold, and from the avails the liens be paid in order of date, with costs to the plaintiff to be first paid out of the proceeds. No costs to other parties in any court—*Bernhardt v. Howard*.—Judgment affirmed and record remitted to court below, with directions to proceed as required by law—*Greenfield v. The People*. Motion denied with ten dollars costs—*Dowes v. Kidder*.

NOTES.

IN our notice of Mr. Snyder's "Great Speeches by Great Lawyers," last week, his name was misprinted "Nelson" in the last paragraph. A mortifying instance of "heterophemy." The great Nelson said England expected every man to do his duty; and recognizing how well Mr. Snyder had done his, in this interesting work, we inadvertently gave him the admiral's name.—The current number of the *Southern Law Review* contains the following articles: Power of usage or custom to control or alter rules of law, by John D. Lawson; Breach of promise of marriage, by James Schouler; Married women's statutes—wife's real estate, by Thomas W. Peires; Frauds in chattel mortgages, by Leonard A. Jones.

The *New York Times* says the number of volumes of State reports "increases at the rate of nearly 1,000 a year." This is truly alarming. We imagine the *Times* has been too lavish with its eiphers.—We have received the *Federal Reporter*, volumes 3 and 4, bringing down the decisions of the Federal Circuit and District Courts to December, 1880. We have often spoken of the merits of this series, edited by Mr. Peyton Boyle, and issued in numbers by the West Publishing Company of St. Paul. The numbers are of great interest to us in the preparation of this JOURNAL, and we esteem the bound volumes very highly, as the only complete record of the decisions of these courts. The editorial work is well done. It is to be hoped that the publication meets with the success it so fully deserves.—In the *American Law Register* for April, Mr. Channoy continues the article on Contempt of Court; and the cases of *Elphick v. Barnes*, on contract of sale or return, with note by Edmund H. Bennett; *Pennsylvania Co. v. Roy*, on responsibility of railroad companies in respect to sleeping cars, with note by John D. Lawson; and *Flaacke v. Mayor*, on costs of a lawyer who is a party to a suit and appears for himself, with note by John H. Stewart, are reported in full.

The Albany Law Journal.

ALBANY, APRIL 30, 1881.

CURRENT TOPICS.

THERE has been a hearing on the Field Code bill before the State judiciary committee. Mr. Field advocated the bill; Judge Shipman and Mr. Coudert opposed it. Specific objection was made to some sixty sections, we understand, to all of which Mr. Field is ready to yield, and promises to conform the bill in twenty-four hours. This narrows the question to one of codification or no codification. The opponents say codification is impracticable and chimerical; the common law is evolved from the brain of the particular judges in the particular case, in conformity, as nearly as may be, to the evolutions of other judicial brains in other cases, and tradition of those evolutions; it ought to be unhampered and elastic; it is useless to try to formulate a rule for all cases of a particular kind; or as Mr. Matthews finely (but vaguely) puts it: "The written law is the child of emergency, and grows by necessity, among a free people, only as circumstances call it forth." Well, now, all this fine talk simply amounts to this: it is impossible to make a rule beforehand that shall fit every possible, unprecedented, and unforeseen case. Let us grant this for the sake of argument. What objection is there to writing down all the unwritten law that is already ascertained? "Emergency" has had a very large family, and their biographies occupy a great many thousand volumes of scattered, confused, conflicting, obsolete, and absurd, as well as well-grounded and thoroughly-accepted principles. Let us at least write these latter down. The argument about "necessity" and the demands of "circumstances" is just as good against statutory enactments as it is against codification. We are continually passing statutes to meet strange "circumstances" and conform to new "necessity." We suppose we can go on doing so, and that we can add these new and necessary enactments to a Code, and call them "Code," just as well as we can christen them "statutes." But now we already have this vast body of formless, vague, shifting, uncertain tradition, which seems to be sufficient for present need, if we can only find it, and be sure of it when we find it, and have some confidence that some judge will not change it pending a suit, to meet his ideas of "emergency" and "necessity." Does any gentleman—does any metaphysician—say this cannot be written down? Surely not. All that is urged is that it may become necessary in "emergency" to abrogate these written rules, or modify them. Well, when that necessity arises let us bow to it, and abrogate or modify our written law by proper legislation. It is more difficult of course to abrogate or modify a written statute than an unwritten tradition, and it ought to be. We would fain put the law in such a condition that it cannot be changed

at the inconstant caprice of any judge, and so that lawyers and suitors can tell what it is for the time being, at least.

It is really difficult to understand the position of opponents of codification. They argue in one breath that codification is impracticable because the law is the creature of emergency and is evolved, only as fast as it is wanted, to meet the exigencies of the particular case; and yet in the next breath they are blaming Mr. Field for changing the fundamental rules of common law! How did they find out these rules unless from the books where they are written? Here are the common-law makers every year grinding out hundreds of volumes of records of the common law, and here are these learned gentlemen buying and studying these books most assiduously, to find out the law, and yet they tell us the common law is such a mysterious, vague, indefinite, variable, slippery sort of thing that it is impossible to put it into definite written words! There is not a principle of the common law that we know that has not been written down by judges in opinions published in books, for many years. These learned gentlemen are quoting these books to other judges every day as authority—actually reading these written rules to them—and yet they now gravely assure us that it is chimerical to think of formulating the rules of the common law! These gentlemen must either eat these words or they must eschew their precedents. Every one of them doubtless thinks that if he were a judge he could evolve law and utter it, after having had a sufficient number of these precedents read to him, but he cannot understand how any one off the bench can write down what he thus utters, and thus make it a rule for similar cases. This is the language which they hold to men whose office and occupation it is to write laws, in the form of statutes, and whose predecessors have thus actually written a good deal of the common law. Now it is well known that the so-called common law is not the same in all communities; that it differs in many points between England and this country, and between our different States. Our State has adopted certain views on all these mooted points. How do we ascertain what doctrine prevails in our State except by reading it written down somewhere? Even these gentlemen have to admit that Mr. Field has succeeded in accurately committing these oracular, fleeting, volatile ideas to paper, except in some sixty instances—and in most of these exceptions his error arises from his having changed the existing law—and yet forsooth the law cannot be written down! It is difficult to contemplate this sort of reasoning with gravity—we had almost said, with respect or patience. We do respect these very learned and eminent gentlemen, but we cannot respect nonsense even when they utter it. Philosophy has argued that there is no such thing as feeling, and the practical man has refuted the philosopher by pinching him. Philosophy has argued that there is no such thing as motion, and the practical man has

refuted the philosopher by getting up and walking. Lawyers once argued that it would be impracticable to state the "facts" in a pleading, and that nothing would answer but the "elastic" lying of the common-law system of pleading; but the Code of Procedure and the practice of a generation under it have refuted that argument. So lawyers may now argue that it is impossible to express rules of action in legible words, and they are refuting themselves every day by reading such rules to the judges. Very frequently each lawyer finds law on his own side of the particular case, for the books are full of these contradictions; and now we propose to make a choice and write it down, so that the learned gentlemen cannot go astray and advise their clients wrong in the next like case. The curse and reproach of the common law is its uncertainty. Let us make it as far certain as we can. Let us also, brethren, throw metaphysics to the dogs. Let us not believe that a thing cannot be done because it never has been done, or rather because it has been done. Let us not believe that we cannot act by a written rule when we are every day acting by the same rule both unwritten and written.

Mr. Justice Strong has an article in the *North American Review* on the relief of the Federal Supreme Court. He approves Attorney-General Devens' plan of constructing an intermediate appellate court, and of limiting appeals from that court to cases involving \$10,000, except in cases certified by the judges of that court. Our readers know our views about the Sangrado resource of limitation of appeals, and we need not reiterate them. We would contrive "how to do it," rather than "how not to do it." As to the certifying of appeals involving smaller amounts, we deem it a very impolitic and inadequate measure. It amounts to allowing a judge to sit in review of his own decision. Years ago in this State we abolished that objectionable feature of our General-Term system. To suffer a judge to say when his judgment shall be reviewed and when it shall not, is little less dangerous. In the operation of that provision in our own law concerning appeals to the Court of Appeals involving less than \$500, we have known great abuses, and these will exist as long as human nature continues what it is. But Mr. Justice Strong's plan has another and quite practical defect. He proposes that the intermediate appellate court shall consist of the circuit judge and the Supreme Court justice assigned to that circuit. The short answer to this is that both these judges already have, and in any possible modification always will have, all they can do in their present courts. The suggestion is also objectionable because it contemplates both of the judges sitting in review of their own decision. If there is to be an intermediate court, it should be composed of independent judges. Probably such a court would relieve the upper court to some extent. But it seems to us that Mr. Justice Strong dismisses quite too summarily the suggestion of increasing the number of appellate judges and dividing them

into sections, assigning particular branches to each. To one might be assigned constitutional and criminal law; to another patent, bankrupt, copyright, trade-mark, and admiralty; and to another the common and the ordinary statute law. Twenty-one judges, divided into three sections of seven each, would accomplish this. We have never heard any sufficient reason assigned against the practicability and efficiency of such a plan, although there has been plenty of skepticism and denial. For the present, probably, such a plan would obviate the necessity of an intermediate court. The judges of our present ultimate courts must get over their foolish aversion to being helped.

Mr. Astor has got his Good-Friday bill made law, and as he never has to give notes, it will not inconvenience him. If he really had held any religious sentiment about the day it would have been better shown by shutting up places of amusement on that day. As it is, the law simply inconveniences and defrauds the note-giving public, who do not happen to inherit ready-made fortunes, and gives the promoter of the bill a little cheap applause among a small portion of the religious members of the community. The Lowell (Mass.) *Vox Populi* says: "'Give us more holidays,' is the clamor of the grown-up children of the day, and the Legislature, now-and-then, weakly listens to it, to the impeding of the business of the community. Self-governing people ought to be content to regulate their own play-days; and when the law has compelled debtors to pay their notes a day in advance of Fast, Thanksgiving, Christmas, and July 4th, and lose the interest they have paid for the holiday, and when it has deprived the people of access to the public offices on those days, it has done about its share. What other holidays folks want, they can pretty generally arrange for themselves. The legal restrictions of an official holiday are often burdensome to business. We are led to say this by that very sound periodical, the ALBANY LAW JOURNAL, which declares that 'a multiplication of holidays is a sure indication of the decadence of a nation.' It also indicates that the public are getting slowly out of the old-fashioned unwillingness to have the government interfering with their daily life." On the other hand, the Albany *Evening Journal* quotes against us the old adage, "all work and no play makes Jack a dull boy." It would be better sense as well as better poetry to read, "all play and no work makes Jack a sad shirk."

Senator Robertson proposes to make county clerks liable in damages for loss, mutilation, or injury of the records or files through their default or neglect, and that they shall permit all proper persons to make searches on payment of the clerks' fees. — Senator Fowler proposes to have a State caterpillarist — entomologist — "charged with the study of insects injurious to agriculture and of methods for controlling and preventing their depredations" — and to give him \$2,000 a year for studying the caterpillars.

Assemblyman Murphy has introduced a bill to forbid courts or judges to require the filing of briefs or points before the commencement of trial or argument. This is intended to defeat the rule of the Supreme Court applicable to the First Department, on which a correspondent comments in another column. The bill is perfectly absurd, and there is nothing wrong about the rule except its limitation to the First Department, the law requiring the rules to be applicable everywhere.

NOTES OF CASES.

THE books now-a-days contain a great many cases of malicious prosecution. These generally do not announce any new principles, but in *White v. Carr*, 71 Me. 555, we find one apparently novel. It was there held that advice by an attorney interested in the action does not protect the party against the charge of malice. The court said: "A party who consults an attorney at law in regard to his legal right to bring an action against another, when the attorney is interested in the subject-matter of the suit, and known by him to be so interested when consulted, cannot show the opinion of the attorney as probable cause for bringing the suit, although the opinion is honestly given. We think the grounds upon which the opinion of an attorney can be shown as probable cause for bringing a suit are, that he is an officer of the court, held out to the public as one learned in the law; and that the client has a right to presume that he will give him a fair, unbiased, and well-grounded opinion as to his legal rights. But when the attorney is directly interested in the subject-matter of the suit, and his interest is known to the client, the client has no right to presume that he will give him an unbiased opinion; and if he takes it and acts upon it, and it turns out to be erroneous, it will afford him no justification. The client knows that he has not consulted a disinterested and unbiased attorney. Neither a judge nor juror thus interested would be competent to sit in the trial of the case; and if either should act, it would be good ground for a new trial, although he acted honestly. Why should the opinion of an attorney thus interested be entitled to greater respect than the decision of the judge? It might as well be held that when an attorney is defendant in an action for malicious prosecution he may justify, on the ground of probable cause, by satisfying the jury that as a lawyer he in good faith believed he had a good cause of action, although in fact he had none. We know of no authority to sustain such a proposition. The rule as established by the authorities has gone quite far enough in holding the opinion of an attorney to be sufficient probable cause, and should not be extended."

In *State v. Wilson*, 24 Kana. 189, it was held that under a statute forbidding any county attorney to receive any fee or reward from or on behalf of any prosecutor, it is not unlawful for such attorney to request and receive the assistance of counsel paid

by the persons interested in the prosecution. The court said: "Certainly such assistance is not in terms prohibited. Nothing in fact is said about it. Is it not an interpolation to read a prohibition? Again, full force is given to the statute without any such prohibition. The purpose of a public prosecution is to prevent the use of the criminal law to justify private malice or accomplish personal gain. This purpose is fully subserved when the control of the case is with the county attorney. As to the argument that if private counsel be permitted, the county attorney will be influenced by their wishes and defer to their views and thus in effect a private be substituted for a public prosecution, a satisfactory reply is, that if he is disposed to so yield and defer, he will be as apt to do it when those suggestions and wishes are made known to him outside the court-room, and that there is less danger of wrong by permitting private counsel to appear and act openly in the presence of the court, than by shutting them out from any open participation in the trial and leaving them to their private and secret suggestions to him in his office. Publicity prevents wrong, and the courts can always check undue zeal. Further, public justice sometimes requires that the public prosecutor shall have assistance, and that, too, when the assistance can only come from private sources. The county attorney may be crowded with business, and unable to give due attention to the preparation or trial of the case. He may be young and inexperienced, and the defendant, wealthy or with wealthy friends, confronts him with a long array of the ablest and most experienced counsel. Neither he nor the court nor both together can employ counsel at the public expense. No one is expected, or will be apt to waste time and labor without compensation. Parties interested in, or affected by the crime, may stand ready to furnish him the assistance he needs. Does not public justice require that he be permitted to avail himself of such offered assistance? If the argument of defendant were correct, the county attorney, although needing and wishing assistance, could neither employ it nor accept it when employed by others. We think the true construction is, to take the statute as it reads, as prohibiting the public prosecutor from accepting private compensation and giving him the control of all public prosecutions, leaving to him a discretion as to the matter of accepting offered assistance, subject to the power of the court to interfere and prevent any oppression of the defendant, and holding him personally responsible for any violation of the statute or malfeasance in office." One judge dissented. This is contrary to *Meister v. People*, 81 Mich. 99, but is supported by *Seale v. Bartlett*, 55 Me. 200. In the *Meister* case the court said: "We must conclude that the Legislature do not consider it proper to allow the course of the prosecuting officer during the trial to be exposed to the influence of the interests or passions of private prosecutors. His position is one involving a duty of impartiality not altogether unlike that of the judge himself. We have had occasion heretofore to refer to this duty in these officers of justice. That

position is a trying one, but the duty nevertheless exists." "The great scandals which have occurred from the abuse of criminal process to further purposes of gain or vindictiveness, have often demanded notice; and no better remedy has been suggested than the policy of our statute. It does not prevent any one from hunting up proofs, or furnishing every facility to the officers of the law. But it will be very inefficient, if it is possible to allow those who have a direct pecuniary interest in convicting a prisoner, to take an active part in his trial. Until the Legislature see fit to restore the common-law rule, and leave cases to private prosecution, it must be assumed that they regard it as unsafe, and opposed to even-handed justice."

In *Alamango v. Board of Supervisors*, decided recently by Justice Learned of the New York Supreme Court, at Special Term, the complaint charged that the plaintiff was a convict in the Albany penitentiary; that he had been directed to take sawdust away from a circular saw, and refusing because he deemed it dangerous, had been punished and compelled to do it, and in so doing, owing to the negligence of the persons in charge, had suffered the loss of a hand. The defendant demurred, and the demurrer was sustained. The court held, first, that the county is not in the full sense of the word a municipal corporation; second, that the penitentiary is, like the county jails, a part of the State means for punishing criminals, the persons confined there being prisoners of the State, and the officers not being agents or servants of the county, although the county has their appointment; and third, that the State or county cannot be said to be carrying on the penitentiary for profit. The court said on the latter point: "Nor does it alter the condition of affairs that these prisoners of the State or of the United States are required to work, and are thus compelled partially to recompense the wrong which they have done and the expense which they have caused to civil society." This case is clearly distinguishable from that of the town ram, *Moulton v. Town of Scarborough*, ante, 296, and the cases there cited.

REMOTE INJURY.

SOME recent decisions on this subject deserve remark. In *Pullman Palace Car Co. v. Barker*, 4 Col. 844; S. C., 34 Am. Rep. 89, owing to the defendants' negligence, their sleeping car, on which a woman was a passenger, caught fire, and she was compelled to leave the car, half clad, and took cold, which resulted in suppression of her menses and a long illness. It being shown that she was menstruating at the time of the accident, and that the illness was traceable to that condition, *held*, that the defendants were not liable in damages therefor. The court adopted the rule enunciated in *Milwaukee, etc., Ry. Co. v. Kellogg*, 4 Otto, 475, that "the question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the fact constitute a con-

tinuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?" They continue: "Independent of the fact that she was 'unwell' at the time, it cannot be said that the negligence of the appellant resulted in her long illness or any illness. Conceding that the appellee was compelled on account of the smoke and flames to leave the car in the half-clad condition she did, the exposure to the cold was the direct and necessary result of the appellant's negligence. Her subsequent illness, however, was not the result of the exposure, but the result of the exposure in her then condition. Here, then, intervenes an independent cause of her illness, a cause resting in her physical condition, appertaining exclusively to herself, with which the appellant had no concern, and to which it sustained no relation either by contract or by the general duty imposed by law upon carriers of passengers. Where physical weakness or disability is apparent to, or is brought to the attention of the carrier, undoubtedly that high degree of care which the law imposes upon him, would, under certain circumstances, involve duties in reference thereto. As that he shall allow an aged, infirm, or crippled person, a reasonable time in which to get on or off the coach or car, having reference to their crippled or infirm condition. *Colt v. Sixth Ave. R. R. Co.*, 38 N. Y. Sup. Court, 190. While this is the case it cannot be said that the law imposes any duty respecting the possible secret complaints and diseases of passengers affecting their fitness to travel. Where no duty is imposed, no liability can attach. Another passenger might have suffered equally serious consequences from the effect of the cold upon a wound in the foot, superinducing inflammation, and possibly necessitating amputation. Can it be said that the law imposed upon the carrier an enlarged duty having reference to the wound, and that the added risk of travelling in this condition must be assumed by him and not by the passenger from whose personal condition it springs? We think not. While it is true that menstruation is a law of health, it is also true that it is a condition requiring greater care and prudence to avoid exposure."

The court cited *Hobbs v. London, etc., Ry. Co.*, L. R., 10 Q. B. 111. In that case the plaintiff, with his wife and two children, took tickets to H. on the defendant's railway. They were set down at E. It being late at night, the plaintiff could not get a wagon nor accommodation at an inn. They had therefore to walk five or six miles on a rainy night, and the wife took cold, was laid up in bed for some time and was unable to assist her husband. The jury found £8 for inconvenience in having to walk home, and £20 for the wife's illness and its consequences. The court held the £8 recoverable, but not the £20.

The circumstances in *Indianapolis, etc., Ry. Co. v. Birney*, 71 Ill. 391, were very similar to those in the *Hobbs* case, except that in the former the plaintiff "had the option to remain five or six hours and take the next train, or procure a horse or a horse

and carriage;" and the opinion is based on the ground that his exposure was voluntary and unnecessary.

See 1 Sedgw. on Meas. of Dam. (7th ed.) 218, note a; Wood's Mayne on Dam. 67, note 2; Thomp. Carriers of Passengers, 565.

Mr. Thompson (Carriers of Passengers, 566), says of the *Hobbs* case: "The rule seems to have been applied with unnecessary vigor." He also cites *Francis v. St. Louis Transfer Co.*, 5 Mo. App. 7, where a passenger carrier contracted to carry a young lady from a railway station to her house, but set her down in the city, a mile from her residence, on the sidewalk of a frequented street, along which ran a line of street cars passing within a square of her house. The day was very cold but dry; the young lady was delicate but not ill. Being warmly clad, she walked home with a friend, and in so doing took a cold which permanently impaired her health. It was held that this injury was too remote to warrant a recovery against the defendant.

But where the defendant contracted to carry the plaintiff from New York to San Francisco *via* Nicaragua, but in consequence of the wreck of the connecting vessel on the Pacific coast he was detained several weeks on the Isthmus, where he contracted a local fever, which disabled him for a long time after his return to New York, this injury was held a ground of recovery. *Williams v. Vanderbilt*, 28 N. Y. 217.

The *Hobbs* case was very recently followed, but criticised, by Fry, J., in *McMahon v. Field*, Ch. Div., 44 L. T. (N. S.) 175. There the plaintiff hired stables of the defendant in order to put some horses there which he wished to dispose of at a fair held in the town. Soon after the horses arrived they were turned out of the stables in consequence of the defendant having also let them to some other person, and as he did not supply the plaintiff with other accommodation for the horses, he was compelled to obtain it elsewhere. The plaintiff claimed damages for injury sustained by the horses by being thus suddenly turned out of the stables and exposed to the weather while he was seeking other stables for them. Held, not recoverable. The court said: "If there had been no decision on the point I should hold a person who breaks a contract must take the consequences of that breach, and the fact that something which coincides with the breach produces the result does not relieve him from the consequences. But that does not appear to be the law. The case of *Hobbs v. London and South-western Railway*, L. R., 10 Q. B. 111, has been pressed upon me, and I am unable to find any distinction between that case and the present. There the illness of the plaintiff's wife was the result in the first place of the breach of contract; secondly, of the physical condition of the wife; and thirdly, the physical state of the weather on the night in question, on which she was obliged to take a walk. Here the injury to the horses was the result, first, of the breach of contract; secondly, of the physical condition of the horses; and thirdly, of the state of the weather on the afternoon in question. In giving

judgment in that case Cockburn, C. J., after stating two hypothetical cases, said (L. R., 10 Q. B. 119): 'In either of those cases the injury is too remote, and I think that is the case here; it is not the necessary consequence, it is not even the probable consequence of a person being put down at an improper place, and having to walk home, that he should sustain either personal injury or catch a cold.' If that is a correct statement of the law, I am bound to find that it is not the necessary and probable consequence of the horses being turned out of the stable on a May afternoon, that in going to a neighboring stable they should catch cold. Horses are moved, and there is nothing to show that these horses were more susceptible to cold than other horses. Archibald, J., said (L. R., 10 Q. B. 124) that 'in the case of breach of contract, the party breaking the contract must be held liable for the proximate and probable consequences of such breach; that is, such as might have been fairly in the contemplation of the parties at the time the contract was entered into.' If that be a sound view of the law, I must hold that neither the particular condition of the horses, nor of the weather, on that afternoon, was in the contemplation of the parties to the contract when they entered into it. I follow that case because it is an authority of the Court of Appeal, and not because it is to my mind a satisfactory decision."

The *Hobbs* case and the *Barker* case seem to us to strain the law to its extreme. Railways are not provided for the conveyance of the healthy and robust alone. Sick and delicate people have a right to carriage, and are every day transported, as well as those who are strong and in health. It is not the fault of the passenger that he is sick, or delicate, or is made sick by the exposure consequent upon the railway company's negligence. Especially is it not the fault of the woman that she is menstruating. Loss of business from such illness may not be recoverable; but why is not the illness the direct and easily-foreseen result of the negligent exposure? Suppose, for example, there is a railway collision and wreck, and the cars take fire and are consumed. All the passengers easily escape, except one, who is sick or has a wooden leg, and perishes in the attempt. Here is an "intervening, independent cause"—the sickness or the wooden leg. That was not the fault of the railway company. It "appertained exclusively" to the passenger. But will any one deny the liability of the company? The law of the cases cited will bear revision.

ADMISSION TO THE BAR.

REFERRING to your recent article on this topic, I find an inaccuracy respecting the *modus operandi* for admission to the English bar. This error is, however, perfectly excusable in an American lawyer, for such I presume to be the writer of the article in question. Accurate in other respects, he has assumed the amalgamation of the two branches of the profession, barristers and solicitors, to exist in England as it does in this country. When, therefore, he presumes that "it is no doubt generally known to the members of the legal profession that the whole matter of admission to

the English bar is vested in the Incorporated Law Society," he, for the moment, forgets that there are four Inns, viz.: Lincoln's Inn, Gray's Inn, and the Inner and the Middle Temple, which have for centuries possessed the exclusive privilege of admitting and educating students—licensing them as conveyancers, special pleaders or equity draughtsmen, after a certain period of probation, or of calling them to the bar after a more lengthened period. These societies are not incorporated, but voluntary associations, to whom the judges have delegated their powers, retaining, however, their right as visitors, and acting as a court of appellate jurisdiction. As none but "barristers" can be promoted to judgeships or even hold such inferior judicial offices as those of stipendiary police magistrates or revisers of the lists of voters at parliamentary elections, to say nothing of recorder-ships, masterships, in the High Court of Justice, county court judgeships, or even judicial appointments in the Crown colonies, it is obvious that these voluntary societies have assumed a serious responsibility. The number of barristers owing allegiance to these societies averages about five thousand, and they are entirely distinct from the solicitors, who owe their training, as your correspondent has truly said, to a "system only recently perfected, and due mainly to the exertions of the Incorporated Law Society," which he has, so far as solicitors are concerned, so lucidly and accurately described. I will not therefore weaken that description by recapitulation. Suffice it to say that its very germs are little more than half a century old, and its full development, as the writer of your article shows, was perfected so recently as 1877; whereas the associations to which I refer, as regulating the education and admission of barristers, have a much more ancient origin. As comparisons are proverbially odious, I am not about to institute any such between the two systems, simply remarking that as the duties and requirements of barristers are different from those of attorneys, or as they are now universally styled under the enactment of an act of Parliament, "solicitors," and as students of the Inns of Court generally enter upon their legal studies at a more advanced age than students' clerks, and as a rule are graduates of some well known university, the course of training for the two departments of the profession is adapted to these different circumstances.

The attendance at the *tutor's* readings and the moots and exercises of bygone days, which had degenerated into a perfunctory requirement and into convivial scenes of revelry and almost riot, have long since died a natural death, and a more healthful and vigorous system has sprung out of the ruins of the past—a system doubtless stimulated by the exertions made, somewhat in advance, by the other branch of the profession, which without begetting unseemly rivalry or competition has had the effect of stimulating both, each within its own sphere, to approve themselves fit and competent to discharge the duties respectively devolving upon them. Although the Inns of Court do not forget to cultivate social relations by requiring of students, when keeping terms, a certain attendance at hall at the dinner hour (and a good dinner at a moderate figure is no very severe infliction), the "eating your terms" is now more a figure of speech than the grand desideratum, as of yore, and although it must ever remain in some shape or other a *sine qua non* to mundane existence, the attendance at lectures, examinations, and the hope of substantial rewards in the shape of valuable law studentships, not to speak of the all-but-assured prospect of ultimate success in the profession to the earnest, ambitious and diligent student, have tended to create a spirit of youthful emulation which is far from conflicting with the separate utility of the two orders of the profession.

No enforced clerkship is required of the students

for the bar or for students for practice under the bar, i. e., for certificated conveyancers, special pleaders or equity draughtsmen, but those who can afford it, generally spend two or three years in the chambers or offices of such practitioners, and possibly also attend the courts with a view of picking up points of practice. Private tutors, however, are furnished by the Inns of Court, upon very moderate terms, for those who desire such assistance, or who, for any reason, do not avail themselves of the course just indicated.

Although considerable expense is attached to attendance as a private pupil in the office of any of the practitioners before mentioned, including a practicing barrister, it should be borne in mind that a considerable outlay is required in the shape of premium and stamp duty in the enforced clerkship, by articles of agreement, of those destined for solicitors. As an acquaintance with the routine stereotyped duties of an attorney's or solicitor's office is not essential to practice at the bar, the student for the latter is left to himself to supplement in any way he finds convenient the instruction afforded by his Inn of Court, but he cannot play at both games at the same time. He cannot be, at the same time, a clerk, articled or otherwise, in a solicitor's office, and a student of an Inn of Court.

It will thus be seen that in England the legal profession is pursued upon the principle of a division of labor. The solicitor, though having a general knowledge of most branches, has the advantage and opportunity of consulting and availing himself of the services of those who may be termed specialists—whether as pure conveyancers (and it should be remembered that the English law of real property is still very recondite and intricate), as special pleaders, where careful, astute and scientific pleading is required—as equity draughtsmen—and more especially as experienced advocates. No one man, as a rule, is supposed capable of being *au fait* at every branch of the profession. However, let the system of the Inns of Court speak for itself.

The Council of Legal Education, established by the four Inns of Court, to superintend the education of students far the bar, is at present as follows: Right Honorable Spencer H. Walpole, Q. C., chairman; Right Honorable Sir G. Jessel, master of the rolls, vice-chairman; Right Honorable Sir H. Cotton (lord justice); Hon. Sir N. Lindley; Hon. Sir James Fitz Stephen, K. C., S. J., a justice of the Exchequer Division of the High Court of Justice; B. S. Follett, Q. C.; James Anderson, Q. C., LL. D.; Charles Day, Q. C.; John B. Maule, Q. C.; John Pearson, Q. C.; James Dickinson, Q. C.; J. A. Russell, Q. C.; Sir H. Sumner Maine, K. C., S. J., LL. D.; Wm. C. Fooka, Q. C.; Alfred Wills, Q. C.; S. B. Bristowe, Q. C.; Fredk Waller, Q. C.; A. G. Marten, Q. C.; W. St. James Wheelhouse, Q. C.; A. J. H. Collins, Q. C.; W. P. Joliffe, Esq. Such names of themselves are a sufficient guaranty of *bona fides* and practical utility, but in addition we append the subjects of study and examination, with the names of the professors for the education of students for the bar, or for practice under the bar.

Jurisprudence, including International Law, Public and Private, Roman Law, and Constitutional Law and Legal History—Professors Frederic Harrison, James Bryce, D. C. L.

Common Law—Professor J. D. Mayne.

Equity—Professor A. S. Eddis, Q. C.

Law of Real and Personal Property—Professors Joshua Williams, Q. C.; William Barber, Esq.

Board of Examiners on Jurisprudence, International Law, and Constitutional Law and Legal History—W. A. Hunter, M. A., and Charles Shadwell, B. C. L.

On Equity—W. H. G. Bagshawe, Q. C.

Common Law—Hugh Cowie.

Real and Personal Property Law—Thomas Cooke Wright.

In addition, a joint board of examiners is annually appointed by the four Inns of Court, for conducting the examination of students previous to admission to an Inn of Court. This examination is simply a test of the general scholastic acquirements which every one seeking admission into the higher walks of a liberal profession ought to possess.

The four Inns of Court possess valuable property; those of the two Temples have succeeded to a large portion of the forfeited property of the former Knights Templar, which it is needless to say they have greatly improved, and they still maintain, at a great expense, the ancient most interesting church of the crusaders within their precincts. The others have been principally endowed by private individuals, royalty being included in the term *private*, as distinguished from National endowment. They all maintain their chapels, libraries and halls, for the accommodation of members, and do not forget St. Paul's injunction even to bishops (for they are extra-parochial and are their own bishops) to be "given to hospitality," as many distinguished foreigners, Americans included, can testify. That in times past they have not fulfilled their self-imposed trust according to the standard of modern ideas, is quite true, but yet they have succeeded in establishing an imperishable reputation for the English bar. By neglecting their own interests they have lost much of their property, and so far have deservedly suffered, if they have also neglected the interests of the profession. But for the last thirty years they have entered upon a new system to meet the requirements of the age, probably stimulated by the praiseworthy example of the solicitors, and deferring also to public opinion. At all events their efforts have been, in one sense, voluntary, though tardy. Whilst according all praise to the Incorporated Law Society, it is almost inconceivable that in the article in question the very existence of these ancient and honorable communities should have been so thoroughly ignored, especially as in them, and not to the Incorporated Law Society, "the whole matter of admission to the English bar is vested."

It would be invidious, under existing circumstances, to inquire what might be the fate of these voluntary associations should they fail to fulfill their self-imposed duties. Suffice it to say, the judges have ever been and are still satisfied to delegate to them all the powers and privileges which they themselves possess for regulating the admission and education of students who contemplate practicing at the English bar, and who after their "call" still remain subject to the jurisdiction of the Benchers of their respective Inns, with a right of appeal, as before mentioned. It may be added that the Inns of Court are not neglectful of the means of recreation so much prized in the present day. They maintain at a great expense extensive and beautiful gardens in the heart of London. These form also parade grounds for the drilling and exercise of the Inns of Court Rifle Corps, known by the flattering cognomen of "The Devil's Own," composed of students, barristers and judges, and esteemed to be the smartest corps of England's volunteer army. These grounds are at stated times thrown open to the public, and form most healthful and desirable playgrounds for the poor children of the neighborhood.

Included in the term "students" are all those who practice under the bar, viz., special pleaders, conveyancers and equity draughtsmen, and at one time, perhaps not much more than fifty years ago, attorneys were admitted in that capacity. In fact these societies at one time had a general control over the training of the whole profession, providing lecturers, and even board and lodging, at a moderate tariff, for all engaged in the study of the law. They had numerous Inns,

called Inns of Chancery, affiliated to them, all of which, through neglect, and perhaps worse, through sale, they have lost. Thus at length the attorneys got left out in the cold, and their modern voluntary efforts to increase their own importance and secure the public interest and approval by advancing their standard of professional education, unendowed and apparently helpless as they were, only enhances the credit due to the movement, and has certainly had the effect of stimulating the Inns of Court to put their house in order, that at all events, they may not be distanced in the "struggle for the mastery."

All honor, then, be to the "Incorporated Law Society!" It should be mentioned, in addition, that even the most distinguished graduates of Oxford and Cambridge enjoy no privileges or immunities respecting admission to the bar. They must undergo the same curriculum as their less fortunate competitors, although in the case of solicitors such graduates, and those of some other universities, are entitled to two years' abatement of the five years' clerkship otherwise required, the object being to induce them to seek the advantages of a university education. The Inns of Court, in addition to their other regulations, profess to provide chambers or offices in flats, where a bachelor may reside and even luxuriate, for their own members alone at moderate rents, uninfluenced by outside competition. Offices or resident chambers to suit all incomes are thus offered at a fixed and it is said unremunerative tariff to the governing body, for the benefit of the whole of the fraternity. Such is the system for "Admission to the Bar" in England, but that of admission of solicitors to practice is probably the system which alone can be practically followed in this country, and as the writer of your article truly says, that "system is due to the lawyers themselves acting through the Incorporated Law Society." May the profession in America, where the different spheres of legal labor are consolidated and amalgamated, succeed in the endeavor to rival the English prototype, who can but encourage them with the hopeful injunction, "Go, and do likewise."

Although the cultivation of aesthetics may not appear, in this utilitarian age, to be an essential part of a legal education, they nevertheless may tend to shed a halo of romance around the stern realities of even a lawyer's life, and "one touch of nature" may at least "make the whole (professional) world," for a time, "kin." So at least seemed to think the late Rufus Choate, who, in his "Letters and Journal" of a visit to England, says: "The Temple is a most sweet spot—a sort of college, inclosing a beautiful garden, which runs to and along the Thames, secluded and still in the heart of the greatest city on earth. There Nigel was before returning to Alsatia."

It was also a favorite remark of the late Lord Macaulay that chambers in the Temple with £500 a year was worth the best government appointment in India, and he spoke from experience, having held for years an Indian appointment of £10,000 a year.

HUGH WRIGHTMAN.

NEW YORK, April 8, 1881.

TAXATION OF CHURCH PROPERTY.

NEW HAMPSHIRE SUPREME COURT, MARCH 18, 1881.

FRANKLIN STREET CONGREGATIONAL CHURCH v. MANCHESTER.

Under a constitutional provision authorizing the Legislature "to impose and levy taxes upon all the inhabitants of and residents within the State, and upon all the estates within the same," a tax upon houses used exclusively for religious worship is valid, and exemption from taxation could not be claimed on the ground that the property was de-

under a public power, that a corporation, such as a church or religious society, is not a corporation for the purpose of taxation. The court held that the power of taxation is a public power, and that a corporation, such as a church or religious society, is not a corporation for the purpose of taxation. The court held that the power of taxation is a public power, and that a corporation, such as a church or religious society, is not a corporation for the purpose of taxation.

PETITION for an abatement of tax. The opinion states the case.

Article 3, Chapter 50 of the Laws of 1879 provides that all property, whether real or personal, owned by any church, association or corporation, used exclusively for a place of worship, not exceeding \$10,000 in value, shall be exempt from taxation; and all such associations or corporations owning church property, whether real or personal, in excess of \$10,000 in value, shall be taxed at the same rates as other property for the same valuation of such excess.

Under this act the plaintiff society was taxed in 1880 for the excess over \$10,000 in value of its house of worship. It now petitions for the abatement of the tax on the ground of the unconstitutionality of the law under which the assessment was made. No other question is raised by the petition.

The power of taxation, as a part of the supreme power of the State, is recognized and defined in the Constitution. "Every member of the community has a right to be protected by it in the enjoyment of his life, liberty and property. He is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent." Bill of Rights, art. 12.

"Full power and authority are hereby given and granted to the said General Court, from time to time, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution, as they may judge for the benefit and welfare of this State, and for the governing and ordering thereof, and of the subjects of the same, for the necessary support and defense of the government thereof; * * * and to impose and levy proportional and reasonable assessments, rates and taxes upon all the inhabitants of and residents within the State, and upon all estates within the same." Const., art. 5.

"And while the public charges of government or any part thereof shall be assessed on polls and estates, in the manner that has heretofore been practiced, in order that such assessments may be made with equality, there shall be a valuation of the estates within the State taken anew once in every five years at least, and as much oftener as the General Court shall order." Const., art. 6.

In these provisions the framers of the Constitution not only recognized the necessity of the sovereign power of taxation in the State, but lodged that power in the representative body of the people and limited it to reasonably equal and proportional assessments upon all the inhabitants and all the estates within the State. The supreme power existing, it was left to be exercised in as full and free a manner as was consistent with the grant, limited only to equality and proportion in assessment, and to the Constitution and laws of the United States. Opinion of the Justices, 4 N. H. 535.

No exclusion of any individuals, classes or property of any kind was made, but it was explicitly set forth that "every member of the community" "is bound to contribute his share," and that the Legislature had "full power and authority" to impose the "proportional and reasonable assessments" upon "all the inhabitants and residents" and "all the estates" within the State.

Under such a grant of power, every species of property within the State is taxable. So far as exercising

the mere power to tax is in question, even public property, whether of the State or municipality, falls under its authority from the nature of things and by necessary implication such property is exempt from taxes which if imposed would render necessary an increase in the public burden equal to the imposition.

The public worship of God and public instruction in morality and religion were recognized in the Bill of Rights in the Constitutions of 1784, 1792 and 1876 as "giving the best and greatest security to government;" and to promote these the Legislature is empowered "to authorize, from time to time, the several towns, parishes, bodies corporate or religious societies within this State, to make adequate provision at their own expense for the support of public Protestant teachers of piety, religion and morality." Bill of Rights, art. 6.

Prior to and at the time of the adoption of the Constitutions of 1784 and 1792, public religious worship was very generally supported by a tax laid by the several towns. The town, in fact, was the parish or religious society which by authority of legislative acts furnished the meeting-house and contracted with and paid the minister. The provincial statute of 1714 empowered towns to choose ministers and raise money by tax for their support, subject to the right and liberty of conscience. The same power of enabling towns to support public worship by means of a tax was fully set forth in section 10 of the act of February 5, 1791, entitled "An act for regulating towns and the choice of town officers," and which provided that the legal voters, at any regular meeting of the town, might, agreeably to the Constitution, "grant and vote such sum or sums of money as they should judge necessary for the settlement, maintenance and support of the ministry, schools, meeting-houses, the maintenance of the poor, for laying out and repairing highways, for building and repairing bridges, and for all the necessary charges arising within the said town, to be assessed on the polls and estates in the same town as the law directs."

The support of the ministry and of houses of public worship was then on the same footing as that of schools, highways and the support of the poor. With a gradual change arising from the multiplying of religious sects and the larger exercise of freedom of opinion, the system of supporting religious worship through the parochial functions of towns was by degrees abandoned, though authorized by law, until the act of 1819 repealed section 10 of the act of 1791, and empowered religious societies of every Christian sect "to raise money by taxes upon the polls and ratable estate of the members" for maintaining houses of public worship and supporting the ministry. By the act of July, 1827, entitled "An act empowering religious associations to assume and exercise corporate powers," religious societies, regularly organized with a name, clerk, records and public notice, were granted full corporate powers, with the right of perpetual succession and the enjoyment of all privileges and immunities, and the subjection to all liabilities incident to corporations of a similar nature.

After the act of 1819, the town no longer, by tax, built the meeting-house or supported the minister except in the performance of some contract before made. The religious society was or might be the parish, but the town was no longer the parish or the society. The Legislature, acting under the authority and carrying out the provisions of article 6 of the Bill of Rights, empowered the religious societies to support religious worship by taxation of their members, but did not empower towns to, nor has it ever done so since.

Giving to words their natural and ordinary significance, and gathering the intent of the framers of the Constitution and of the people who adopted it from the instrument itself, no language appears restraining the Legislature from taxing property devoted to the uses of public worship. That every member of the

community should contribute his share of the expenses of that protection to life, liberty and property which the Bill of Rights guarantees, is not a statement of the right of any person or of any property to exemption from taxation. The power of the Legislature "to levy and impose proportional and reasonable assessments, rates and taxes upon all the inhabitants and residents within the State and upon all the estates within the same," cannot mean a restriction of the legislative power to a part of the "inhabitants and residents" and a part of the "estates" or property within the State. The language is too plain and explicit to need the aid of construction, and too certain to require extrinsic evidence of the intent of those who used it. The sixth article of the Bill of Rights, empowering the Legislature to authorize towns to tax themselves for the support of public religious worship, contains no hint of exempting church property from taxation, and no language from which an intention to exempt it can be inferred. So long as towns, under the act of 1791, exercised parochial functions and raised taxes for supporting and maintaining houses of public worship, those places of worship were exempt from taxation as public property by the nature of things and not by the Constitution or by statute.

After the act of 1819, when towns were no longer subject to church rates and the whole management of public worship, including its support, was left to the religious societies authorized and organized for that purpose, the natural reason for exempting this property from taxation ceased. The custom of treating it as free from any public burden continued, though houses of public worship were not named among tax-free property nor enumerated in any list of ratable property in any statute until 1842, when, by the Revised Statutes, meeting-houses were exempted by name from taxation. The same exemption is found in the General Statutes of 1867, and in the General Laws of 1878.

The argument from the long-continued custom of exempting property devoted to public religious worship from taxation, as a practical construction of the Constitution, would have weight if the question whether the exemption was enjoyed as a constitutional right or a legislative privilege subject to repeal, had till now been considered. So long as the privilege was enjoyed, the question of holding it by right or by grace was not thought of. The express exemptions by statute since 1842 show that the Legislature may have supposed that meeting-houses were taxable property unless exempted by express statute. Besides, where the language of the Constitution, as in this case, is unambiguous, to suffer a practical construction to prevail would be to defeat the manifest intention of the people who framed its provisions. Story on Const., § 407; Cooley on Const. Lim. 84; Evans v. Myers, 26 Penn. St. 118; Barnes v. First Parish in Falmouth, 6 Mass. 417; Union Pacific R. R. v. United States, 91 U. S. 72.

An exemption not founded on a grant in the Constitution or on any contract in any charter or legislative act is not prescriptively established by enjoyment, however long continued. No prescription runs against the sovereign, nor does the State, by omission to use, waive or lose the right to exercise its supreme power, and the citizen can have no vested right in the continuance of any statute of general exemptions. Com. v. Bird, 12 Mass. 443; Bragg v. People, 78 Ill. 339; Moore v. Case, 10 Kan. 236; Murphy v. People, 87 Ill. 447; State v. Miller, 7 Blatchf. 35; State v. Quinby, 51 Me. 385; State v. Wright, 53 Id. 338; People v. Roper, 35 N. Y. 439; Com. of Excheq. v. Boice, 84 Id. 697; Brick Church v. Mayor, 5 Cow. 588; Christ's Church v. Philadelphia, 24 How. 30; E. Saginaw Man. Co. v. N. Saginaw, 13 Wall. 373.

The plaintiff claims the right to exemption from the tax, and consequent abatement, on the ground that the right of exemption rests in a contract either in the

Constitution or in subsequent legislation or in both, and inviolate by the Constitution of the United States. It is unquestionable that an agreement by a State, for a consideration received or supposed to be received, that certain property rights or franchises shall be exempt from taxation, is a contract protected by the provision of the Federal Constitution forbidding a State to pass any law impairing the obligation of contracts. *New Jersey v. Wilson*, 7 Cr. 164; *Gordon v. Appeal Tax Court*, 3 How. 123; *Piqua Bank v. Knoop*, 16 Id. 389; *Horn of the Friendless v. Rouse*, 8 Wall. 430; *Hardy v. Waltham*, 7 Pick. 108; *Attwater v. Woodbridge*, 8 Conn. 223; *Osborn v. Humphrey*, 7 Id. 335; *Armington v. Barne*, 15 Vt. 751; *Railroad v. Parker*, 14 Me. 297; Opinion of Justices, N. H. Laws, 1879, 424; *Cooley on Const. Lim.* 342, 343.

But to give a law of general exemption from taxation the character of an irrevocable contract, there must be a consideration received by the State; for an exemption made as a privilege merely may be revoked at any time (*Christ's Church v. Philadelphia*, supra; *Brainerd v. Colchester*, 31 Conn. 410) and the intention to relinquish the sovereign prerogative of taxation must be distinctly manifested. *Providence Bank v. Billings*, 4 Pet. 581; *Herrick v. Randolph*, 13 Vt. 651; *People v. Com. of Taxes*, 47 N. Y. 501; *Lord v. Litchfield*, 36 Conn.

Neither in the sixth article of the Bill of Rights nor elsewhere in the Constitution nor in the acts of 1791, 1819 and 1827 is there any express contract of exemption from taxation or any manifest intention on the part of the Legislature to make such a contract. Nor do the statutes of 1842, 1867 and 1878, expressly exempting meeting-houses from taxation, indicate any design to make a contract irrevocable and inviolable. In language and by relation they are general exemptions of a particular class of property, which the Legislature has made and which it may unmake by repeal. In these exemptions there is no vested right which can support the idea of a contract binding on succeeding Legislatures and irrevocable. *Hospital v. Philadelphia*, 24 Penn. St. 229; *Christ's Church v. Philadelphia*, 24 How. 300; *Cooley on Taxation*, 53, 54, 145, 146.

We decide that the Constitution does not exempt church property from taxation. Whether exemption of church property is constitutional is a question we do not decide, because it is not raised by the case. The plaintiff is not in a situation to object to exemption. It cannot claim that it shall not pay any tax because \$10,000 of its property is not taxed.

Case discharged.

ELECTION TO PUBLIC OFFICE—JURISDICTION OF COURT—INFORMALITIES DO NOT INVALIDATE.

MAINE SUPREME JUDICIAL COURT, AUGUST 19, 1900.

PRISON V. SKILLIN.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the Legislature. There is, with this exception, no vested right in an office or its salary.

The court is bound to take judicial notice of the doings of the executive and legislative departments of the government, and of historical facts of public notoriety passing in our midst.

The decision of the governor and council as a canvassing board does not constitute an estoppel upon other branches of the government.

The real title to an elective office depends upon the votes cast. The underlying principle is that the election and not the return is the foundation of the right to such an office.

Where by the decision of the canvassing board, 6,511 votes were disfranchised because two ballots were returned as "scattered," which if added to the number received by

any of the persons voted for would not change the result, and which from an amended return were shown to have been thrown for William B. Skillings, held, that such decision was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest.

ACTION to determine title to office. The opinion states the case.

Ardon W. Coombs, for petitioner.

Bton Bradbury, L. D. M. Sweat and Clifford & Clifford, for respondent.

APPLETON, C. J. The plaintiff, claiming to have been duly elected county commissioner for the county of Cumberland, brings this bill against the defendant whom he alleges to have been wrongfully declared elected to that office, when in fact he was not so elected.

This proceeding is under and by virtue of chapter 198 of the Acts of 1880, entitled "An act providing for the trials of causes involving the rights of parties to hold public offices."

The processes by which rights are to be established and wrongs redressed are within and subject to legislative control. Old forms and modes of procedure may be abolished and new ones established.

All offices, except when legislative authority is limited or restricted by constitutional provisions, are subject to the will of the Legislature. There is, with the above exception, no vested right in an office or its salary. The office may be abolished. The mode of appointment may be changed. The length of time of official existence may be shortened. The compensation for official services may be diminished. *Farwell v. Rockland*, 62 Me. 298; *Butler v. Pennsylvania*, 10 How. (U. S.) 408; *Barker v. Pittsburgh*, 4 Barr. 51; *Conner v. New York*, 1 Seld. 291; *Taft v. Adams*, 3 Gray, 128.

The act, chapter 198 of the Acts of 1880, was passed to enable parties duly elected to office but not declared to be so elected, to contest their rights before a judicial tribunal. The defendant was declared elected to the office in controversy by the canvassing board of the State. The allegations in the bill are that errors occurred in the doings and proceedings of the board, and that upon a fair and honest count the plaintiff was duly elected, but that the defendant has usurped the office to which he was so elected. "When one is charged with usurping an office in the Commonwealth, there must be," remarks the court in *Com. v. Fowler*, 10 Mass. 290, "authority in this court to inquire into the truth of the charge." This act gives a remedy in case of an erroneous or fraudulent count by the canvassing board. It will hardly be contended that if by errors of computation, throwing out legal returns or counting illegal ones, a candidate not duly elected is wrongfully declared to be elected, there should not be some remedy provided for the party actually elected, by which the wrong done may be corrected. If the error is not subject to correction, then the canvassing board in the exercise of irresponsible power have full and absolute control of the government and may effectually stifle the voice of the people according to their sovereign will and pleasure.

Before the passage of the act under consideration, the only existing process by which right of one unlawfully holding an office could be inquired into, was by *quo warranto*. This writ issues in behalf of the State against one who claims or usurps an office to which he is not entitled, to inquire by what authority he supports his claim or sustains his right. The proceeding is instituted by the attorney-general on his own motion or at the relation of any person, but on his official responsibility. It lies against an officer appointed by the governor and counsel or elected by the people. It removes the illegal incumbent of an office, but it does

not put the legal officer in his place. It is insufficient to redress the wrongs of one whose rights have been violated.

To restore a person to an office from which he has been unjustly removed or unlawfully excluded, the proper process is by *mandamus*. By this, the rights of one lawfully entitled to an office, which has been illegally withheld, may be enforced. *Strong, petitioner*, 20 Pick. 497.

By *quo warranto* the intruder is ejected. By *mandamus* the legal officer is put in his place. The act, chapter 198, accomplishes by one and the same process the objects contemplated by both these results. It ousts the unlawful incumbent. It gives the rightful claimant the office to which he is entitled. It affords a speedy and effectual remedy instead of the tedious and dilatory proceedings of the common law.

It is insisted that this bill for various reasons cannot be sustained. The grounds of objection to its maintenance we propose to examine.

1. The respondent contended "that the Legislature which passed the act authorizing this and the governor approving it, could not rightfully do so because there was a prior *de facto* Legislature with a *de facto* governor, as set forth in the respondent's answer, not ousted by any competent tribunal."

The act in question was passed by an organized and acting Legislature, approved by the governor and comes before us with all the *indicia* of validity by which any act of any past Legislature is or can be evidenced.

When there are two conflicting Legislatures, each claiming of right to exercise legislative functions, it is for the court to determine by which body legislative authority can lawfully exercised. In answer to inquiries made by certain gentlemen claiming official position under date of January 23, 1880 (70 Me. 582), this court used the following language: "When different bodies of men, each claiming to be and to exercise the functions of the legislative department of the State, appear, each asserting their titles to be regarded as the law-givers for the people, it is the obvious duty of the judicial department, who must inevitably at no distant day be called to pass upon the validity of the laws that may be enacted by the respective claimants to legislative authority, to inquire and ascertain for themselves, with or without questions presented by the claimants, which of those bodies lawfully represents the people from whom they derive their power. There can be but one lawful Legislature. The court must know for itself whose enactments it will recognize as laws of binding force, whose levies of taxes it will enforce when brought judicially before it, whose choice of a prosecuting officer before the court it will respect. In a thousand ways it becomes essential that the court should forthwith ascertain and take judicial cognizance of the question: Which is the true Legislature?"

We are bound to take judicial notice of the doings of the executive and legislative departments of the government when called upon by proper authorities to pass upon their validity. We are bound to take judicial notice of historical facts, matters of public notoriety and interest passing in our midst. These views are in full accord with the decisions of our highest tribunals. In *Swinerton v. Columbian Ins. Co.*, 37 N. Y. 188, it was objected that there was no evidence of a civil war. "This objection," observes Hunt, J., "I do not consider a sound one. The rule I take to be this: That matters of public history affecting the whole people are judicially taken notice of by the courts; that no evidence need be produced to establish them; that the court in ascertaining them resort to such documents of reference as may be at hand and as may be worthy of confidence. Thus in the prize cases already cited (2 Black, 667) the court use this language: 'The actual existence of civil war is a fact in our domestic

history which the court is bound to notice and to know.' There the general facts connected with the history of the case seem to have been assumed as within the judicial cognizance of the court. Greenleaf, in his work on Evidence, volume 1, section 6, says courts 'will also judicially recognize the political constitution or frame of their own government; its essential political agents or public officers sharing in its regular administration; and its essential and regular political operations, powers and actions. Thus notice is taken by all tribunals of the accession of the chief executive of the Nation or State, under what authority they act; his powers and privileges, etc. * * * the sittings of the Legislature and its established and usual course of proceedings. * * * In fine, courts will take notice of whatever ought to be generally known within the limits of their jurisdiction. In all these and the like cases, when the memory of the judge is at fault he resorts to such documents of reference as may be at hand, and he may deem worthy of confidence.' It is the duty of the court to know county officers. *Farley v. McConnell*, 7 Laus. 428. Much more the governor and Legislature. *State v. Minnick*, 15 Iowa, 123."

After a careful consideration of the grave and important questions proposed by the governor, the rightful Legislature and a body of gentlemen claiming, but without right, to be a Legislature, this court, in its several answers of January last, announced the result to which it had arrived; that the Legislature by which the act under discussion was passed was the Legislature to whose acts the obedience of the people is due. In the correctness of the conclusions which were then reached, and in the principles and reasons upon which those conclusions are based, we rest in perfect confidence.

To the same general effect are the cases of *Woods v. Wilder*, 43 N. Y. 164; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169; *Rice v. Shook*, 27 Ark. 137; *Killebrew v. Murphy*, 3 Heisk. (Tenn.) 546; *Division of Howard Co.*, 15 Kan. 194; *Turner v. Patton*, 49 Ala. 406; *Ashley v. Martin*, 50 id. 537; *Smith v. Speed*, id. 276; *Andrews v. Knox Co.*, 70 Ill. 65; *Douthitt v. Sinson*, 63 Mo. 268; *Foscue v. Lyon*, 55 Ala. 440.

The body of men which the counsel for the defendant terms by courtesy a *de facto* Legislature, though its house was composed of men who were and who were not elected, both classes not constituting a quorum, and of a senate a part of whom, less than a quorum, were duly elected, and a part were not elected, could not legally act as legislative bodies. While this condition of affairs remained there was no legal Legislature. The greater portion of the members of the bodies thus illegally constituted subsequently took their seats respectively in the rightful house and senate—a house and senate composed of members unquestionably elected. They participated in its legislative action until its final adjournment. They received and acknowledged the receipt of the compensation to which by law they were entitled as members of the Legislature. There was no other body claiming to exercise legislative functions. What the counsel calls the *de facto* Legislature became merged into the rightful Legislature, by which a governor was chosen in the accustomed manner, who entered upon and is now discharging, without interference or obstruction, the duties of that office. All this is well known as matter of current history, as well as by the legislative journals.

The offered proof was properly excluded. It is immaterial whether or not at some past time there was a *de facto* Legislature or a *de facto* governor—inasmuch as neither was such *de jure*—and as the rightful Legislature was not interfered with in the exercise of its legitimate powers, and the rightful governor is not disturbed in the discharge of his official duties. The

acting Legislature and the acting governor are both *de facto* and *de jure* the Legislature and governor of the State and to be recognized as such.

2. It is claimed that the decision of the governor and council acted as a final canvassing board, and that their final action constitutes an estoppel upon all other branches of the government, except the houses of the Legislature in regard to the membership of those bodies.

This is not so. The object of all investigations is to arrive at true results. The canvassing board, so far as relates to county commissioners, are limited and restricted to what appears by the returns, except that by Revised Statutes, chapter 78, section 5, and chapter 212 of the acts of 1877, "they may receive testimony on oath to prove that the return from any town does not agree with the record of the votes of such town or the number of votes or the names of the persons voted for and to prove which of them is correct; and the return when found to be erroneous may be corrected by the record," and the governor and council are required to count and declare for any person all votes intentionally cast for such person, although his name on the ballot is misspelled or written with only the initial or initials of his Christian name or names; and they may hear testimony upon oath in relation to such votes in order to get at the intention of the electors and decide accordingly." But they are nowhere authorized to extend their inquiries beyond these limits—to inquire into the validity of meetings—whether or not votes were cast by aliens or minors or any of the various questions involving the validity of the result. Their judgment is not made conclusive. In case of senators and representatives, the final determination rests with the senate and house. So in reference to county officers, the courts in the last resort must determine the rights of the parties. If it were not so, if the canvassing board erred in their computations—if they should willfully or ignorantly disregard the law—rejecting legal and valid returns and receiving and acting upon illegal and invalid returns, there would be no remedy for the party duly elected. "If," say the court, in their opinion, 25 Maine, 570, "the Legislature had deemed it expedient, and had actually intended to constitute the governor and council judges generally of the election of county officers, it would have been easy for them to have been explicit to that effect; not having done so, it must be presumed that nothing of the kind was intended." It is abundantly obvious this must be so, since the right of full investigation is withheld from them.

County commissioners hold their office by popular election. If one not legally elected is erroneously declared to be elected, the will of the people is disregarded. An usurper holds an office to which he has no right. "The usurpation of an office is not an invasion of executive prerogative," observes Nott, J., in *State v. Dellesseline*, 1 McCord, 52, "but of the rights of the people; and the only method by which these rights can be protected, is through the instrumentality of the courts of justice."

In accordance with these views it has been uniformly held by this and all other courts where the question has arisen, that the decision of the canvassing board is only *prima facie* evidence, that the real title to an office depends upon the votes cast, and that the tribunal before which the question arises, will investigate the facts of the election, the votes cast, and the legality of the action of the canvassing board. *People v. Cook*, 8 N. Y. 67; *People v. Vall*, 20 Wend. 12; *State v. Governor*, 1 Dutch. 345; *People v. Thatcher*, 55 N. Y. 525. The series of opinions of this court from that of 25 Maine, 568, to the present time, concur in the conclusion that the action of the governor and council, so far as relates to all matters pertaining to the case under consideration, in canvassing the returns, is purely

ministerial, and is to be confined strictly within the bounds of the Constitution and the statutes enacted in furtherance of the Constitution.

The underlying principle is that the election and not the return is the foundation of the right to an elective office, and hence it has been held competent to go behind the ballot box, and purge the returns by proof that votes were received and counted, which were cast by persons not qualified to vote. *People v. Pease*, 27 N. Y. 45. "Freedom of inquiry in investigating the title to office," observes Andrews, J., in *People v. Judson*, 55 N. Y. 531, "tends to secure fairness in the conduct of elections, faithfulness and integrity on the part of returning officers, and it weakens the motive to fraud or violence by diminishing the chances that they may prove successful in effecting the objects for which they are usually employed."

8. The ground is taken "that the vote of the city of Portland was rightly rejected as illegal by the governor and council, the return thereof not being in accordance with the statute, in that it did not contain the names of all the candidates voted for with the number of votes set against them."

It is conceded that if the vote of Portland is to be counted, the plaintiff was duly elected. The whole number of votes cast was six thousand three hundred and thirteen, of which two were returned as scattering.

None of the votes of the city of Portland were counted. They were all thrown out. Why? Because the ward meetings were not regularly notified? Because the ward meetings were not legally organized? Because those not qualified electors were permitted to vote? Because there was fraud or intimidation at the meeting? Because the votes of qualified voters were rejected? Because the votes were not receive, sorted, counted and declared in open ward meeting? Because a fair record of the result was not seasonably made? Because the returns duly sealed and attested were not transmitted to the secretary of State within the time required? Because of any informality, great or small? No. None of these causes were pretended—much less proved, but because of the number of votes cast, two were returned as scattering, that is, because two wrote "scattering" on their ballots or because two voted for candidates not voted for by anybody else, and the clerk returned them as scattering instead of giving the names of persons for whom the votes were cast. Thus, and for such cause, 8,311 voters, being over a third of the voters of the county of Cumberland, were disfranchised—for they were equally disfranchised whether they voted for one candidate or the other. This disfranchisement was for no neglect or omission of theirs.

This is a government of the people. Their will as expressed by the ballot is what is to be ascertained and declared. To disfranchise six thousand three hundred and eleven voters because two ballots were returned as scattering, is a novel mode of giving expression to the popular will. If the citizens voting can have their votes nullified for such cause, any voter by writing "scattering" on his ballot, or any clerk by returning a vote or votes under this head, may annihilate a majority however large. No man can be sure his vote will be effective.

The word "scattering," written on a ballot, indicates the name of an individual or it does not. If a name, then it should be counted. If it is not the name of an individual, then perhaps it may be regarded as a blank vote. It is, at any rate, a ballot. It is provided by Revised Statutes, chapter 4, section 32, as amended by chapter 212 of the acts of 1877, that "in order to determine the result of any election by ballot, the number of persons who voted at such election, shall first be ascertained by counting the whole number of ballots given in, which shall be distinctly stated and re-

corded." The whole number of ballots counted, including the votes returned "scattering," the petitioner was most assuredly elected; for in the case under consideration, these votes, however added or subtracted, would not have changed the result.

The office of county commissioner is one created by the statute, not by the Constitution. As a canvassing board, the governor and council act in relation to this office under Revised Statutes, chapter 78, section 5, as amended by chapter 212 of the acts of 1877, and by that act the whole number of ballots given should have been counted. Had they been so counted the plaintiff's election was assured.

The rule obtains in every State, that an election is not to be set aside and declared void, merely because certain illegal votes were received, which do not change the result of the election. *People v. Tuttle*, 81 N. Y. 550; *Judkins v. Hill*, 50 N. H. 140; *School District v. Gibbs*, 2 Cush. 39. In *Ex parte Murphy*, 7 Cow. 153, two ballots were put in the box on the names of two persons who were formerly voters, but who had died some weeks before the election. "To warrant the setting aside the election," the court observes, "it must appear affirmatively, that the successful ticket received a number of improper votes, which, if rejected, would have brought it down to a minority. The mere circumstance that improper votes were received will not vitiate an election." The extra vote should never be rejected, when it is possible to ascertain the fraudulent vote. *Mann v. Cassidy*, 1 Brewster (Penn.), 32. In an action to determine the right to an office, the court may look beyond the returns and even the ballot-boxes, if necessary, to ascertain the truth. *People v. Cook*, 14 Barb. 259.

Now there is no allegation whatever that illegal or fraudulent votes were cast. Whether the votes returned as scattering were cast by persons not authorized to vote, or fraudulently cast, or for a candidate ineligible, or erroneously returned as scattering by mistake or fraud, is immaterial, inasmuch as they did not change the result, the petitioner having a plurality of over six hundred votes should have been declared elected.

It is proper to add that the amended return shows the names for whom the votes counted as scattering were given—to wit: William B. Skillings. So that, in truth, there remains no conceivable ground upon which the respondent can claim to hold over.

The decision of the canvassing board was at war with the law of the land, the rights of parties, the will of the people and the principles upon which alone a republican government can rest.

Judgment for the petitioner.

STATUTE OF LIMITATIONS AND NEW PROMISE.

MAINE SUPREME JUDICIAL COURT, AUGUST 4, 1880.

MATTOCKS V. CHADWICK.*

When a new promise is relied on to take a debt out of the operation of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of promise only is not sufficient.

A promise to settle a demand "when I was [am] able" is not sufficient to take the case out of the operations of the statute of limitations without proof of the defendant's ability to pay.

ACTION upon a promissory note. Defendant, in addition to the general issue, pleaded the statute of limitations. Plaintiff claimed that the debt was taken out of the operation of the statute by a promise in writing to pay the same which was contained in a let-

* To appear in 71 Maine Reports.

ter written to plaintiff by defendant in answer to a demand for payment. The alleged promise was as follows:

"DEAR SIR — I received a notice from you Saturday, stating that a demand against me had been left in your office. I presume it is Mr. Ward's claim. I would say now, as I did before, and also told Mr. Ward, that when I was able I should most certainly settle the demand. I am not now, nor have I been, in a condition to settle it. It will be a great satisfaction to myself when I find my business will permit me to liquidate the demand, for being in debt with me is not at all agreeable, and to be free from such embarrassments is equally pleasant."

The trial court ruled that defendant was liable upon the note, to which defendant took exception.

C. P. Matlocks, for plaintiff.

Josiah H. Drummond, for defendant.

WALTON, J. When a new promise is relied on to take a debt out of the operation of the statute of limitations, and the new promise is a conditional one, the plaintiff cannot recover unless he proves performance of the condition. Proof of the promise only is not sufficient. Thus a promise to pay "as soon as I can" (*Tanner v. Smart*, 6 B. & C. 602; 9 D. & R. 549); or "when able" (*Davies v. Smith*, 4 Esp. 36); or "I shall be most happy to pay you both interest and principal as soon as convenient" (*Edmunds v. Downes*, 2 C. & M. 459; 4 Tyr. 173); or "when of ability" (*Scales v. Jacob*, 3 Bing. 648; 11 Moore, 553); or "I will pay as soon as it is in my power to do so" (*Haydon v. Williams*, 4 M. & P. 811); or "I should be happy to pay it if I could" (*Ayton v. Bolt*, 12 Moore, 305; 4 Bing. 105); or "I am going to H. in the course of the week, and will help you to 5l. if I can" (*Gould v. Shirley*, 2 M. & P. 581); or "if E. will say I had the timber I will pay for it," or "prove it by E. and I will pay for it" (*Robbins v. Otis*, 1 Pick. 368; 3 id. 63); or "I have not the means now, but will pay as soon as I can" (*Tompkins v. Brown*, 1 Denio, 247); will not take a case out of the statute except upon proof of performance of the condition. Proof of the promise only is not sufficient. *Read v. Wilkinson*, 2 Wash. C. C. 514; *Lonsdale v. Brown*, 3 id. 404; *Kampshall v. Goodman*, 6 McL. 189.

In the case now before us, the defendant's promise was conditional. He said: "I would say now as I said before, and also told Mr. Ward, that when I was able I should most certainly settle the demand; but I am not now, nor have I been, in a condition to settle it." Such a promise is not sufficient to take a case out of the operation of the statute of limitations, without proof of the defendant's ability to pay. There was no such proof, and the determination of the justice of the Superior Court, that the evidence was sufficient to entitle the plaintiff to recover, was erroneous.

NEW YORK COURT OF APPEALS ABSTRACT.

CRIMINAL LAW — INDICTMENT FOR SEVERAL OFFENSES, CONVICTION ON ONE — FORMER CONVICTION OR ACQUITTAL — WAIVER — EVIDENCE — CONVERSATIONS — RES GESTÆ — VENUE — RECEIVING GOODS STOLEN FROM RAILROAD TRAIN. — (1) An indictment charged defendant with receiving stolen goods and also charged that defendant, with an intent to commit a larceny, broke and entered; and further charged that he did commit the larceny. Upon the trial defendant's counsel asked the court to strike out the count for burglary, which motion the court granted. The counsel thereupon asked that the count for larceny be quashed, which was denied, and defendant was tried and a verdict of guilty of larceny rendered. Defendant brought a writ of error to review a judgment of conviction against him upon such verdict. The General Term reversed the judgment and gave a new trial. *Held*,

that the count in the indictment was one for burglary and larceny and the offenses were not separate. The action of the court in striking out the count for burglary had no effect upon the indictment. The verdict was equivalent to a verdict of acquittal on the count for receiving and of the charge of burglary. *Guenther v. People*, 24 N. Y. 100. The verdict of conviction for larceny would have been a bar to a further prosecution, but defendant having brought a writ of error and the General Term having reversed the conviction and given a new trial (which decision the Court of Appeals affirms) upon defendant's own motion, the former trial and conviction are no longer a bar to a new trial. *United States v. Kean*, 1 McLean, 435. But the reversal of the conviction does not disturb the verdict of acquittal. It is like a case of several defendants some of whom are acquitted and some found guilty on the trial. The court may grant a new trial as to those convicted without being forced to set aside the entire verdict. *Field's Pr.* 820; *Rex v. Mawbry*, 6 T. R. 627. In asking for a correction of errors made at the first trial the accused waives his constitutional protection against a second trial. But this waiver goes no further than he extends it. Here he asks a correction of so much of the judgment as convicted him of guilt; he is not to be supposed to ask correction or reversal of so much as acquitted him. He waives his privilege as to one and keeps it as to the other. See *Campbell v. State*, 9 Yerg. 333; *State v. Kettle*, 2 Tyler, 471. Upon the new trial that is ordered defendant cannot be tried save for the offense of larceny. (2) Defendant offered to prove what was said as to the mode of obtaining the property stolen by men of whom he alleged that he purchased the same at the time of the alleged purchase. *Held*, that the testimony was competent, not as evidence to prove how the alleged vendors came by the property but as relevant as to how defendant came by the property. *Rex v. Whitehead*, 1 C. & P. 67; *Powell v. Harper*, 5 id. 590; *Hayslep v. Gymer*, 1 Ad. & El. 162. The cases to the contrary (*Willis v. People*, 3 Park. Cr. 473, and *People v. Rando*, id. 335) were doubtfully decided. It is the rule, generally speaking, that declarations accompanying acts are admissible as showing the nature, character and objects of such acts. See *Reg. v. Wood*, 1 F. & F. 497. (3) The indictment, one count of which was for receiving stolen goods, was found in Schenectady county and the trial was had there. The goods were stolen from a freight car on a railroad and were found on the premises of the prisoner in Albany county. *Held*, that under the statute providing that when any offense shall have been committed in respect to any portion of the freight of any railroad train, etc., an indictment may be found in any county through which such train shall have passed (*Laws 1877*, ch. 167), the facts bringing the case within the provision, the indictment and trial could be had in Schenectady county. It was in the power of the Legislature to pass such an act. Judgment affirmed. *People of New York v. Dowling*. Opinion by Folger, C. J.

[Decided March 15, 1881.]

EXECUTOR — CARE TO BE EXERCISED BY, IN REGARD TO TRUST SECURITIES — WHAT IS NOT NEGLIGENCE BY. — An executor or trustee is not a guarantor for the safety of the securities committed to his charge and does not warrant such safety under any and all circumstances, and against all contingencies, accidents or misfortunes. The rule which should govern his conduct is that he is bound to employ such prudence and such diligence in the care and management of the estate or property as in general prudent men of discretion and intelligence employ in their own like affairs. *King v. Talbot*, 40 N. Y. 78. While this rule requires him to avoid all extraordinary risks in the investment of the moneys of the estate and to keep the same safely, it does not demand that he shall be made liable for

contingencies which under ordinary circumstances could not have been anticipated. In this case a testator had deposited for safe-keeping government bonds with his nephew. He died in 1862, leaving a will, in which his widow was nominated as executrix, and F. as executor. F. qualified and acted as executor, and the widow did not. The bonds were left in the hands of the nephew, who was at that time a man of responsibility, good character and business habits. The bonds were converted into another class of bonds in 1867, the new bonds remaining in the hands of the nephew, who transmitted the interest to F., as he had previously done. F. died in 1871, and thereafter, upon the advice given to his personal representative, who consulted the surrogate as to what he should do, the widow of testator filed an oath as executrix, and though letters testamentary were not issued to her, assumed to act as such until the death of the nephew, in 1875, at which time it was discovered that the bonds had been hypothecated for a debt of the nephew and that his estate was irresponsible. *Held*, that F. was not guilty of negligence in leaving the bonds with the nephew, and that his estate was not liable to the beneficiaries of testator for their loss. The case, *Walton v. Walton*, 1 Keyes, 18, distinguished. Judgment affirmed. *McCabe v. Fowler*. Opinion by Miller, J.; Folger, C. J., and Earl, J., concur in result. [Decided March 1, 1881.]

PRACTICE — BILL OF PARTICULARS — COURT MAY REQUIRE IN ACTIONS NOT ON MONEY DEMAND FROM DEFENDANT — OF DEFENSE IN ACTION UPON INSURANCE POLICIES — AFFIDAVIT. — (1) Bills of particulars were ordered to be furnished by the defendant in an action upon a life insurance policy, in which the defense was misrepresentation and breach of warranty on the part of the insured in procuring the insurance. *Held*, that the Supreme Court had power to order such bill, and that there was not an abuse of its discretion. The power of the Supreme Court to order bills of particulars is not confined to actions upon demands for money made up of various items. It extends to all descriptions of actions, when justice demands that a party should be apprised of the matters for which he is to be put for trial, with more particularity than required by the rules of pleading. *Tilton v. Beecher*, 59 N. Y. 176. Defendant as well as plaintiff may be required to furnish a bill. Upon a plea of fraud and consequent repudiation by the defendant, he has been compelled to give instances of fraud and repudiation. *McCreight v. Stevens*, 1 H. & C. 454; *Pitt v. Chambers*, 1 F. & F. 684; on a plea of undue influence, particulars of those exerting the influence, *West v. West*, 4 S. & T. 22; *Jackson v. Hillar*, 4 Irish Rep. (Eq.) 60; on a plea of justification to an action for libel, particulars of the matters of justification, *Jones v. Renwick*, L. R. 5 C. P. 32; in ejectment, *Doc v. Newcastle*, 7 T. R. 328, note; in a criminal case, from the criminal in an indictment for libel, *Com. v. Snelling*, 15 Pick. 321. The 531st section of the Code, which provides that the court may in any case direct a bill of particulars, "if the claim of either party" does not limit the power to order such bill to cases where the plea demands affirmative relief. The courts have, by the Code, power to order such a bill and to affix as a penalty to a failure to produce it, that evidence shall not be given of matters not specified in the bill. (2) In this case plaintiff's affidavits upon a motion for an order for a bill of particulars, stated that they did not know to what instances the averment of defendant's pleadings referred, but did not state that they did not know of instances of the same kind with those averred. *Held*, that there was a sufficient case for the discretion of the court to order the bill. *Snelling v. Chennels*, 5 Dowl. 88. (3) The order directed that the bill state the particular times and places at which deceased had bronchitis and *spitting of blood*, it being alleged in the answer that

he had these complaints. *Held*, that upon a proper construction of the requirement there was nothing unreasonable in the direction. See *Millwood v. Walter*, 2 Taunt. 224; *Hurst v. Watkit*, 1 Camp. 69, note; *Lovelock v. Chevely*, 1 Holt (N. P.) 552. Appeal dismissed. *Dwight v. Germania Life Insurance Co.* Opinion by Folger, C. J. [Decided March 15, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

JUDGMENT — BINDS PARTIES ACQUIRING TITLE PENDENTE LITE — CREDITOR OBTAINING JUDGMENT IN COLLATERAL ACTION. — Previous to and on December 29, 1875, a National bank held a mortgage upon which a default had been made, upon premises in Ohio, belonging to L. On that day a firm to whom L. was indebted, sued L. in the United States Circuit Court. The process was served January 3, 1876, the first term of that court thereafter commenced January 4, 1876. On the 31st of January the firm recovered judgment for the full amount of their claim and costs, and on the same day caused an execution to be issued, which was on February 1st duly levied on the lands covered by the bank mortgage. The effect of the judgment, under the Ohio statute, without this levy, was to bind the lands of the defendant for the satisfaction thereof from the first day of the term of the court at which it was rendered, January 4. Pending this suit, on the 15th of January, 1876, the bank commenced suit against L. in an Ohio State court, to foreclose its mortgage. Process was served on L. in that action January 20. The firm were not made parties, the bank having then no actual notice of the pendency of their suit in the Circuit Court. On the 23d of February, 1876, the firm commenced the action at bar against the bank, in the United States Circuit Court, to set aside the mortgage. The subpoena was served February 25 and was returnable April 1. The term of the State court in which the action to foreclose the mortgage was pending, commenced February 7, and on the 7th of March, during that term, judgment of foreclosure and sale was rendered. *Held*, that the firm was bound by such judgment. There cannot be a doubt that the State court had jurisdiction of the suit instituted by the bank, and as was said in *Peck v. Jenness*, 7 How. 624, "it is a doctrine of law too long established to require the citation of authorities, that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court; and that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." The mere fact, therefore, that the firm commenced this suit in the Circuit Court before judgment was rendered in the State court in favor of the bank is of no importance. The point is whether the judgment in the State court binds the firm, they not having been parties to the suit in which it was rendered. The rule is, that where suits between the same parties in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the others. It is also an elementary rule that "if, pending a suit by a mortgagee to foreclose the equity of redemption, the mortgagor makes a second mortgage, or assigns the equity of redemption, an absolute decree of foreclosure against the mortgagor will bind the second mortgagee, or assignee of the equity redemption." *Mitford's Pl.*, p. 73; *Story's Ex. Pl.*, § 351; *Eyster v. Gaff*, 91 U. S. 521. Before the judgment in their favor, the firm were only creditors at large, power-

less to affect the foreclosure proceedings. In the State court the mortgagor represented all who, pending the suit, acquired any interest through him in the property about which the controversy arose, and those parties were bound by the judgment therein. See *Cromwell v. County of Sac*, 94 U. S. 362. Decree of U. S. Circ. Ct. N. D. Ohio, affirmed. *Stout v. Lye*. Opinion by Waite, C. J.

[Decided March 21, 1881.]

MORTGAGE - TO NATIONAL BANK TO SECURE SUBSEQUENTLY ACCRUING INDEBTEDNESS. — Defendant executed a mortgage, on the 12th of January, 1871, to a National bank as security for the payment of \$5,000 one year from its date with interest, but which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared that his indebtedness at the date of the mortgage was \$3,200 and that this was paid before September 18, 1872. On the day last named defendant executed two other mortgages to B. and M., which were recorded the same day, as security for future liabilities that might be incurred by the mortgagees respectively in his account. The one to B., who had notice of the bank mortgage, was first recorded and after that the one to M., who had no notice of the bank mortgage. In a controversy as to the application of surplus moneys to the discharge of these three mortgages, *held*, that the validity of the mortgage to the bank could not be impeached under the statute forbidding National banks from loaning upon real estate security. *National Bank v. Matthews*, U. S. Sup. Ct., Oct., 1878. That mortgage, so far as the subsequent incumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the government. *Fleekner v. United States Bank*, 8 Wheat. 338-355. *Held*, also, that the surplus should be applied first to the payment of the mortgage to M., and that B. could not claim any of the balance until the mortgage to the bank was discharged. Decree of New York Supreme Court reversed. *National Bank of Geneva v. Whitney*. Opinion by Field, J. [Decided March 21, 1881.]

PRACTICE - WRIT OF ERROR - NOT IN FORM PRESCRIBED, NOT EFFECTIVE TO GIVE JURISDICTION TO THIS COURT. — A writ of error by which it was sought to have reviewed a decision of the Supreme Court of Louisiana was in the name of the chief justice of the Supreme Court of the State of Louisiana. It bore the teste of that chief justice and was signed by the clerk and sealed with the seal of that court. *Held*, that this did not give this court jurisdiction to hear the case. *Massena v. Canzosa*, 6 Wall. 638. The writ did not bear a single requisite of a writ of this court. By the ninth section of the act of May 8, 1792 (1 Stat. 278, chap. 36), it was made the duty of the clerk of this court to transmit to the clerks of the several courts the form of a writ of error approved by two of the justices of this court. This was done, and the form adopted required the writ to be issued in the name of the President of the United States and have the teste of the chief justice of this court. Suit dismissed. *Bondurant v. Watson*. Opinion by Waite, C. J. [Decided March 21, 1881.]

PENNSYLVANIA SUPREME COURT ABSTRACT.

DAMAGES - MEASURE OF, IN ACTION BY LESSEE FOR EVICTION. — Where a lessee for a term is evicted by a paramount title, he is entitled to recover damages for

such eviction from his lessor, and the measure of damages, in the absence of fraud or bad faith on the part of the lessor, is the consideration paid and such mesne profits as the lessee has paid or may be liable for. The lessor is not liable for the improvements made by the lessee on the property. It is settled that the word *concessit* or *demisit* in a lease implies a covenant for quiet enjoyment during the term. *Hemphill v. Eckfeldt*, 5 Whart. 274; *Maule v. Ashmead*, 8 Harr. 482; *Schuyk & Dauph. Impr. & R. Co. v. Schmoels*, 7 P. F. S. 271; *Noke's case*, 4 Rep. 80, b; *Line v. Stephenson*, 35 Eng. Com. Law, 77; *Smith's Land. & Ten* 263; *Rawle's Cov. Tit.* (4th ed.) 464. It is settled law in England that the measure of damages for the breach of an express covenant for quiet enjoyment is the value of the property at the time of the eviction. *Williams v. Burrell*, 50 Eng. Com. Law, 401; *Lock v. Furze*, 115 Id. 94; *Rolph v. Crouch*, L. R., 3 Exch. 44. These cases hold that the rule in *Flureau v. Thornhill*, 2 W. Black. 1078, that where a contract of sale of real estate goes off in consequence of a defect in the vendor's title, the vendee is not entitled to damages for the loss of the bargain, does not apply to the case of a lease granted by one who has no title to grant it. In Pennsylvania it is settled that, as between vendor and vendee, the measure of damages is the consideration paid. *Bender v. Fromberger*, 4 Dal. 441. This rule has been followed in other States. See *Rawle's Cov. Tit.* 236. A similar rule should apply between lessor and lessee. See *Mack v. Patchin*, 42 N. Y. 167; *McClowry v. Croghan's Adms.*, 1 Grant, 307. *Lanigan v. Kille*. Opinion by Paxson, J.

[Decided Feb. 21, 1881.]

ESTOPPEL - ONE DEALING WITH CORPORATION AS SUCH MAY NOT DENY CORPORATE EXISTENCE. — A bank organized in an irregular manner did business as such with S. who dealt with it in its corporate character. In an action by the bank against S. upon indorsements of notes held by the bank, *held*, that S. could not set up as a defense that the corporation had no legal existence and therefore no right to sue. A corporation is the mere creature of the law. It can exercise no powers which are not expressly conferred or necessarily implied in furtherance of the object of its creation. *Diligent Fire Co. v. Com'th*, 25 P. F. Smith, 296. When, however, a charter has actually been granted to certain persons to act as a corporation, and they are actually in the possession and enjoyment of the corporate rights granted, such possession and enjoyment will be valid against one who has dealt with them in their corporate character. *Ang. & Ames on Corp.*, § 80. He cannot be permitted to prove in a collateral proceeding that a condition precedent to its full corporate existence has not been complied with. As against him, the charter and a user of rights claimed to have been conferred by it are sufficient. When there is a *de facto* corporation and the State does not interfere, its corporate existence and its ability to contract cannot be questioned in a suit brought upon an evidence of a debt given to it. *Commissioners v. Bolles*, 4 Otto, 104. It is well settled that although a charter may be declared null and void by the proper authority, yet the violation thereof cannot be determined in a collateral suit. *Irvine v. Lumberman's Bank*, 2 W. & S. 190. *Spake v. Farmers' Bank, Carlisle*. Opinion by Mercur, J. [Decided May 24, 1880.]

STATUTE OF LIMITATION - IN ACTION AGAINST RECORDER OF DEEDS FOR FALSE SEARCH. — In an action against a recorder of deeds for damages resulting from a false certificate of search issued by him, no fraud being charged, *held*, that the statute of limitations began to run at the time the search was paid for by plaintiff, notwithstanding the special damages claimed resulted thereafter. Special damage is a result, not a

cause (Howell v. Young, 5 B. & C. 250), the gist of the action being the misconduct of the defendant. In the case cited it was held that special damages resulting from a breach of duty do not constitute a fresh ground of action, but are merely the measure of the injury resulting from the original cause. This doctrine was held in Wilcox v. Plummer's Exrs., 4 Pet. 172, which was an action for a loss resulting from the neglect or unskillful conduct of an attorney; in Bank of Utica v. Childs, 6 Cow. 245, where the action was founded on the default of a notary in not giving notice of the non-payment of a promissory note; in Miller v. Adams, 16 Mass. 456, where the suit was against a deputy sheriff for a breach of official duty in making a defective return to an original writ; in Moore v. Juvenal, 8 W. N. C. 411, which was a suit brought to recover damages arising from the negligence of an attorney in prosecuting a claim. To the same purpose are Campbell's Executors v. Boggs, 12 Wr. 524; Downey v. Garard, and Miller v. Wilson, 12 Harr. 52. All these authorities only serve to illustrate that the commencement of the limitation is contemporaneous with the origin of the cause of action. *Owen v. Western Saving Fund*. Opinion by Gordon, J. [Decided Jan. 31, 1881.]

NEW JERSEY SUPREME COURT ABSTRACT.

NOVEMBER TERM, 1880.*

ATTORNEY—LIEN OF—RELEASE—OF JUDGMENT FOR LESS THAN AMOUNT DUE.—(1) The right of lien for an attorney's costs exists only where he has received money upon the judgment in the cause, or he has arrested it *in transitu*, or where the defendant has paid the judgment after receiving notice of the attorney's claim. 1 Tidd. Pr. 338; Welsh v. Hole, Doug. 238; Chapman v. Haw, 1 Taunt. 341; Lake v. Ingham, 3 Vt. 158; Heart v. Chipman, 2 Aik. 162; Martin v. Hawks, 15 Johns. 406; Berry v. Berry, 2 Har. 440. (2) A release under seal of a judgment, although it appears that the consideration paid for such release is less than the judgment, is a satisfaction of the judgment. Coke Litt. 212 b. *Braden v. Ward*. Opinion by Reed, J.

CARRIER—EXPULSION OF RAILWAY PASSENGER FROM TRAIN.—The plaintiff was riding in the cars, by virtue of a ticket that did not give him the right to a discontinuous passage. Having stopped at an intermediate point, and having entered another train, he claimed the right to continue his journey on such ticket under permission given by a conductor of the first train. Refusing to pay his fare, he was put off, it appearing that only train agents had the power to modify the force of such tickets. *Held*, such expulsion was justifiable, although at the trial the plaintiff testified that it was, in point of fact, a train agent and not a conductor that had given him the privilege claimed. *Petrie v. Pennsylvania Railroad Co.* Opinion by Beasley, C. J.

EVIDENCE—SECONDARY EVIDENCE—IF PUBLIC RECORDS NOT FOUND WHERE THEY SHOULD BE KEPT, COPIES MAY BE INTRODUCED WITHOUT FURTHER SEARCH.—In an action for a malicious prosecution, in causing the arrest of the plaintiff on a criminal charge, it appearing that the justice before whom the complaint was made had transmitted the original complaint and his warrant issued thereon to the prosecutor of the pleas, unsuccessful search in the clerk's office and among the papers of the prosecutor is sufficient to justify secondary evidence of the contents of the original complaint and warrant, though it be shown that these papers were last seen when they were before the grand jury on its investigation of the charge, and no search was made for the papers in the grand jury room. To justify the admission of secondary evidence of the contents of

a paper, on an allegation of the loss or destruction of the original, as a general rule, the party is expected to show that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. If any suspicion hangs over the instrument or there are circumstances tending to excite a suspicion that it is designedly withheld, the most rigid inquiry should be made into the reasons for its non-production; but where there is no such suspicion, all that ought to be required is reasonable diligence in the effort to obtain the original. The degree of diligence which shall be considered necessary in any case will depend on the circumstances of the particular case—the character and importance of the paper, the purposes for which it is proposed to use it, and the place where a paper of that kind may naturally be supposed to be likely to be found. If the document be one of public concern and there be by law a place where such instruments, in due course of law, should be deposited and be found, search in that place is all that will be required, and in the absence of grounds of suspicion that the original is fraudulently withheld, will justify the admission of secondary evidence without calling persons who have had access to the paper, and might have the original in their possession. 1 Whart. on Ev., § 141; 1 Tayl. on Ev., § 399; 1 Greenl. on Ev., § 558; Sampson v. Dall, 3 Wall. 460; Minor v. Tillotson, 7 Pet. 99; Hart v. Hart, 1 Hare, 1; McGahey v. Alston, 2 M. & W. 206; King v. Inhabitants of Morton, 1 M. & S. 48; Clark v. Hornbeck, 2 C. E. Green, 430; Reg. v. Overseers of Hinckley, 3 B. & S. 885; Smith v. Axtel, Saxt. 494; Kingwood v. Bethlehem, 1 Green, 221; Reg. v. Inhabitants of Stourbridge, 8 B. & C. 96; Reg. v. Saffron Hill, 1 El. & Bl. 93; Fernley v. Worthington, 1 M. & G. 491; Jackson v. Russell, 4 Wend. 543; Teall v. Van Wyck, 10 Barb. 376; Francis v. Ocean Ins. Co., 6 Cow. 404; Proprietors v. Battles, 6 Vt. 395; Winshall v. Lloyd, 2 M. & W. 450; Freeman v. Arkell, 2 B. & C. 494. *Johnson v. Arnoine*. Opinion by Depue, J.

MAINE SUPREME JUDICIAL COURT ABSTRACT.*

ASSAULT—ABUSE OF SPECIAL AUTHORITY NOT OF LEGAL RIGHT MAKES ONE TRESPASSER AB INITIO—SELF-DEFENSE.—It is the abuse of some special and particular authority given by law, and not of a legal right which is common to all, which will make a man a trespasser *ab initio* and so responsible for all his acts in the transaction, and liable to make compensation to the injured party for all the damage he has suffered, whether it arose from acts which would have been justifiable if the legal right had not been exceeded, or otherwise. Where the legal right of self-defense has been exceeded, the party so offending is liable only for the excess of force, and not for any damage which his opponent may have suffered from acts that were within the proper line of self-defense. Rogers v. Waite, 44 Me. 276; Jewell v. Mahood, 44 N. H. 474; Dingley v. Buffum, 57 Me. 379; Brown v. Gordon, 1 Gray, 185; Esty v. Wilmot, 15 id. 168; Coleman v. New York, & N. H. R. Co., 106 Mass. 164; Bagshaw v. Gaward, Yelv. 97. *Turner v. Footman*. Opinion by Barrows, J.

NEGLIGENCE—DRIVING ON HIGHWAY—EVIDENCE—REPUTATION OF DRIVER.—(1) It is the right of every one to travel on any part of a highway that may suit his taste or convenience not occupied by another, provided no one is meeting him with teams and carriages having occasion or a desire to pass. Palmer v. Baker, 11 Me. 339; Brooks v. Hart, 14 N. H. 310; Angell on

* Appearing in 18 Vroom's (48 N. J. Law) Reports.

* To appear in 71 Maine Reports.

Highw., § 222; *Foster v. Goddard*, 40 Me. 66. (2) The reputation of the driver of a horse and carriage is inadmissible in an action by the owner of another horse killed by a collision therewith, to recover its value. *Hays v. Millar*, 77 Penn. St. 238. *Dunham v. Rackliff*. Opinion by Appleton, C. J.

SALE OF PERSONAL PROPERTY—CONDITIONAL SALE—TITLE TO GOODS SOLD IN COURSE OF TRADE.—Goods bought by a retail trader upon a condition that the property shall not vest in him until they are paid for, but with an understanding between him and his vendor that they are to go into his store and be sold by him in the regular course of trade, will not pass to his assignee in insolvency, or for the benefit of creditors, although the original vendor would be estopped to deny the title to those who might purchase portions of them of the retailer in the regular course of his business. It is not essential to the existence and validity of such a condition that the conditional vendor should have no right to sell to others. His assignee takes only such right as he himself could assert in the goods against his vendor, and if he has agreed that the property in the goods shall remain in the vendor until they are paid for, the vendor may replevy them from his assignee although such vendor could not dispute the title of those who had purchased portions of them in good faith and in the regular course of trade from his vendor. *Pickering v. Burk*, 15 East, 38; *Goss v. Coffin*, 66 Me. 432; *Hersey v. Elliot*, 67 id. 527; *Whitney v. Eaton*, 15 Gray, 226; *Burbank v. Crocker*, 7 id. 158; *Stone v. Perry*, 60 Me. 48; *Hussey v. Thornton*, 4 Mass. 407; *Hill v. Freeman*, 3 Cush. 269; *Tibbette v. Towle*, 12 Me. 341. *Rogers v. Whitehouse*. Opinion by Barrows, J.

VIRGINIA SUPREME COURT OF APPEALS ABSTRACT.*

EQUITABLE ACTION—RECEIVERSHIP IN FORECLOSURE UPON RAILROAD—PREFERENCE—CLAIMS FOR SERVICES AND MATERIALS.—Where a railroad has been taken possession of by a court of equity, and a receiver to manage the road has been appointed, if at the time the receiver was appointed the railroad company was indebted for services rendered or materials furnished them, these creditors are entitled to be paid out of the net revenues of the road in preference to the mortgage bondholders; and if said net revenues have been applied to pay interest to these bondholders, or to the repair, improvement, or the extending of the road, upon a sale of the road the proceeds of the sale of the road to the extent of the said net revenues are to be applied to the payment of these creditors. *Fosdick v. Schall*, 9 Otto, 236; *Hale v. Frost*, id. 369; *Atkins v. Petersburg R. Co.*, 3 Hughes, 313; *Owen v. Eoman*, L. R., 4 H. L. 997; *Syracuse City Bk. v. Tallman*, 31 Barb. 201; *Douglas v. Gline*, 12 Bush, 608; *Duncan v. Chesapeake & Ohio R. Co.*, 3 Cent. L. J. 579; *Ellis v. Bost.*, Hart. & E. R. Co., 107 Mass. 1. See also *Tyler v. Salmon*, 4 Myl. & C. 137; *Mare v. Mullany*, 1 id. 559; *Redf. on Railw.* 447. *Williamson's Administrators v. Washington City, Virginia Midland & Great Southern Railroad Co.* Opinion by Staples, J. [Decided Jan. 13, 1881.]

OFFICE—OFFICER DE FACTO—ACTS OF, VALID—THAT OFFICER DE JURE DOES NOT OUST, NO SURRENDER.—(1) A. was elected in January, 1880, judge of the county court of Halifax and commissioned by the governor; and believing that his term commenced immediately he proceeded to hold the court and transact business. His term did not, however, commence until the first of January, 1881. Held, that during the year 1880 he was a judge *de facto*; and his judgments were

valid and binding as if he had been a judge *de jure*. See *Griffin's ex'or v. Cunningham*, 20 Gratt. 31; *Quinn v. Commonwealth*, id. 138; *Bolling v. Lerner*, 26 id. 36; *Blackw. on Tax Tit.* 92; *State v. Bloom*, 17 Wis. 521; *People v. White*, 24 Wend. 520. (2) During the year 1880 B. was entitled to the office in question. Held, that the fact that he did not immediately proceed to oust A., but practiced as an attorney in his court, would not operate either as a surrender or forfeiture of his office. *McCraw v. Williams*. Opinion by Christian, J.

[Decided Sept. 24, 1880.]

STATUTE OF LIMITATIONS—CLAIM SECURED BY MORTGAGE.—In the case of a claim secured by a mortgage, although the remedy by an action at law for the claim may be barred by the statute of limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Hauna v. Wilson*, 3 Gratt. 242; *Coles v. Withers*, 33 id. 186; *Elkins v. Edwards*, 8 Ga. 325; *Thayer v. Mann*, 19 Pick. 535; *Pratt v. Huggins*, 29 Barb. 277; *Borst v. Corey*, 15 N. Y. 505; *Belknap v. Gleason*, 11 Conn. 100; *Miller v. Trustees of Jeff. Coll.*, 5 Sm. & M. 651; *Trotter v. Erwin*, 27 Miss. 772; *Nevitt v. Bacon*, 32 id. 212; *Joy v. Adams*, 26 Me. 530; *Wiswell v. Baxter*, 20 Wis. 713; *Cookes v. Culbertson*, 9 Nev. 190; *Angell on Limit.* 73, 74; 3 Pars. on Cont. 99, 100. *Smith's Executrix v. Washington City, Virginia Midland & Great Southern Railroad Co.* Opinion by Burks, J.

[Decided Dec. 17, 1880.]

SURETYSHIP—RIGHTS BETWEEN SURETIES.—If there are two parties bound as principal and surety for a debt, and a party afterward, at the request of the principal, bind himself as surety for the debt, the two sureties, in the absence of any agreement to the contrary, become co-sureties of the same principal, and this relation may be established by implication from circumstances as well as by express agreement. But where there is a judgment against a principal and his surety, and a third party at the instance of the principal, and for his sole benefit and without the assent of the surety, enters as surety for the principal in an obligation the effect of which is to suspend the execution of the judgment, and thus prejudice the rights of the first surety, the equity of the first surety is superior, and the second would not be entitled to contribution from the first; and according to some authorities the first would be entitled to indemnity from the second. *Deering v. Earl of Winchelsea*, 2 Bos. & Pul. 270; *Langford v. Perrin*, 5 Leigh, 552; *Douglas v. Fagg*, 8 id. 588; *Givens v. Nelson's ex'or*, 10 id. 382; *Stout v. Vause*, 1 Rob. 169; *Robinson v. Sherman*, 2 Gratt. 178; *Bently v. Harris' admr.*, id. 357; *Leake v. Ferguson*, id. 419; *Preston v. Preston*, 4 id. 86; *Hartwell v. Smith*, 15 Ohio St. 200. *Harnaberger v. Yancey*. Opinion by Burks, J.

[Decided Sept. 25, 1880.]

CRIMINAL LAW.

CONSTITUTIONAL LAW—STATUTE ALLOWING INDICTMENT IN COUNTY WHERE OFFENSE NOT COMMITTED, INVALID IN MISSOURI.—The Constitution of Missouri declares that "no person shall, for a felony, be proceeded against criminally, otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia," etc. A statute of that State provides that "whenever a felony has been committed in any county, and the grand jury of the county has considered the matter, and failed to find an indictment, etc., and the same is certified to the judge of the same Circuit, from the foreman of the grand jury or the clerk of the Circuit Court, etc., and the judge,

* Appearing in 23 Gratian's Reports.

etc., is satisfied that an impartial grand jury cannot be had in the county where the offense was committed, he shall order the examination of the offense to be had in some county adjacent to the said county, where he believes no such cause exists." A prisoner confined upon an indictment found under this statute, by the grand jury of Scotland county, charging him with having committed murder in Clark county, sued out a *habeas corpus*. *Held*, that he was illegally confined, because the statute was unconstitutional. The word "indictment," as used in the Constitution, has a well-defined meaning and must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law. It is thus defined: "An accusation at the suit of the king (or State) by the oaths of 12 men (at the least, and not more than 33) of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true." 5 Bac. Abr. 48; see, also, id. 52, 61; 2 Hawk. Pl. Cr. 313, § 34; 1 Bish. Cr. Proc., § 65. Reading the constitutional provision mentioned, in the light of this definition, it would stand thus: "No person shall, for a felony, be proceeded against criminally otherwise than by an indictment, that is, otherwise than by an accusation at the suit of the State, by the oaths of (the proper member of) men of the same county, wherein the offense was committed, returned to inquire," etc. * * * We are of opinion that this statutory provision is utterly null and void, for the reason that it undertakes to deprive a person of the constitutional right conferred upon him, which gives to every person charged with a felony, before he can be tried, the right to have the charge preferred in an indictment found by a grand jury of the county where the offense was committed. Missouri Sup. Ct., Oct. term, 1880. *Ex parte Stater*. Opinion by Norton, J. (To appear in 72 Mo. Rep.)

TRIAL—EFFECT ON VERDICT OF PRESENCE OF BAILIFF WITH JURY IN CAPITAL CASE.—The presence of a bailiff in charge of a jury in a capital case, in the jury room during a part of their deliberations, is a grave irregularity and breach of duty on the part of the officer, which will or will not vitiate the verdict, depending on the circumstances in each particular case. When it affirmatively appears that the officer was not influenced by improper motives, and that his conduct outside of the mere fact of being in the presence of the jury is unexceptionable, and the court is unable to discover after due inquiry any thing connected with the transaction from which it may reasonably be inferred the jury were improperly influenced, or the rights of the accused prejudiced, there will be no sufficient reason for setting aside the verdict. When a bailiff in charge of a jury in a capital case, who has given material evidence against the accused upon controverted points, is present with the jury while considering of their verdict, this will vitiate their verdict when the jury find the defendant guilty, as tending to prevent that free discussion of his testimony which the ends of justice demand. Illinois Sup. Ct., Feb. 3, 1881. *Gayney v. People of Illinois*. Opinion by Mulkey, J.

—RIGHT OF DEFENDANT TO BE INFORMED OF VERDICT BY COURT AND TO BE HEARD BEFORE SENTENCE.—Where a defendant is charged on information with committing murder in the first degree, and "the jury find the defendant guilty in manner and form as charged in the information," without otherwise stating the degree of the offense of which they find the defendant guilty, and no motion for a new trial is made, and the court sentences the defendant as for murder in the first degree, and the record of the case does not show that the defendant was informed by the

court of the verdict of the jury, and asked whether he had any legal cause to show why judgment should not be pronounced against him, *held*, that the judgment of the court below must be set aside, and the cause remanded with the order that the defendant be again taken before the court below for sentence and judgment, and for such other and further proceedings as may be properly had in the case, and that before sentence or judgment shall be again pronounced against him, he shall "be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him." See *Dodge v. People*, 4 Neb. 221; *Keech v. State*, 15 Fla. 592; *James v. State*, 45 Miss. 572; *Perry v. State*, 43 Ala. 21; *Safford v. People*, 1 Park. Cr. 474; *Messner v. People*, 45 N. Y. 1; *Hamilton v. Commonwealth*, 16 Penn. St. 129; *Dougherty v. Commonwealth*, 69 id. 286. Kansas Sup. Ct., Jan. term, 1881. *State of Kansas v. Jennings*. Opinion by Valentine, J. (To appear in 24 Kans. Rep.)

RECENT ENGLISH DECISIONS.

ATTORNEY—LIEN OF, UPON CLIENT'S TITLE DEEDS.—A solicitor who was employed by and held the title deeds for the mortgagees subsequently acted for the mortgagor. Upon the bankruptcy of the mortgagor the solicitor claimed a lien upon the deeds in his possession belonging to the mortgagees for costs incurred by him on behalf of the mortgagor. *Held*, that the solicitor had no lien upon the deeds as against the trustees of the mortgagor. Ct. of Bankruptcy, Feb. 7, 1881. *Ex parte Fuller, Re Long*. Opinion by the Chief Judge, 44 L. T. Rep. (N. S.) 64.

INSURANCE—MARINE POLICY—FALSE DECLARATIONS OF VALUE AUTHORIZE RESCISSION WITHOUT RE-PAYMENT OF PREMIUM.—In marine insurance it is not sufficient to disclose the facts material to the risks considered in their own nature, but all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters in practice act. Defendants effected two open policies of insurance on goods to arrive, and declared goods on these policies, after arrival, at less than the true value. Defendants afterward effected two more open policies to follow the previous policies. In an action by an underwriter to set aside the two later policies on the ground of fraud, the jury found that the declarations of value made on the earlier policies were false and fraudulent, and were material to the subscription of the later policies; that plaintiff was induced by these declarations to subscribe the later policies; that defendants concealed the amounts which had been on risk and insured by the earlier policies, and that the matters so concealed were material. *Held*, that there was evidence to support the findings of the jury; that plaintiff was entitled to have the policies set aside, and defendants were not entitled to a return of the premium which they had paid. Judgments of Field, J., and of the Queen's Bench Division affirmed. *Sibbald v. Hill*, 2 Dow. 263; *Phillips on Ins.*, § 531; 1 *Parsons on Ins.* 496; *Iouides v. Pender*, L. R., 9 Q. B. 531. Ct. Appeal, Nov. 19, 1880. *Rivas v. Geruss*. Opinions by Baggallay, Brett and Cotton, L. J.J., 44 L. T. Rep. (N. S.) 79.

MARITIME LAW—AGENCY OF MASTER OF VESSEL FOR SALE OF CARGO.—The master of a general ship becomes agent for the sale of the cargo—that is, has an authority to sell so as to bind the owners of the goods intrusted to him for carriage to their port of destination—only where there is a necessity for that course; and it lies on those who claim title to the cargo as purchasers from the master to prove that he, before selling, used all reasonable efforts to have the goods conveyed to

their destination, and that he could not by any means available to him carry the goods or procure the goods to be carried to their destination as merchantable articles, or could not do so without an expenditure clearly exceeding their value after their arrival. The *Jupiter T.*, an Austrian general ship, was on a voyage from Singapore to New York wrecked on a rock off Cape Padrone about 800 yards from the mainland and about 50 miles in a direct line from Port Elizabeth, the nearest place of importance. She contained a cargo consisting partly of pepper and partly of slabs of tin. The master and crew got ashore the next day. A survey of the ship was made from the shore only, after which the master, acting *bona fide* and on the advice of the Austrian consul at Port Elizabeth, who with other persons had come to Cape Padrone, sold the ship and cargo as they stood jammed on the rock, by auction. Neither the owner of the ship nor the owner of the cargo had an agent at Port Elizabeth, the master had no money at his command wherewith to hire men or vessels for salving the cargo, and he never went to Port Elizabeth or made any effort to procure funds to enable him, or attempted to induce others, to save the cargo. The evidence was conflicting as to whether tenders would have been made for salving the cargo if the master had advertised for such tenders. *Held* (affirming the decision of Jessel, M. R.), that no such necessity was shown for the sale as to authorize the master to sell or make him the agent of the owners of the cargo for that purpose. See *Idle v. Royal Exch. Assur. Co.*, 8 Taunt. 75; *Read v. Bonham*, 3 Brod. & Bing. 151; *Transtun v. Dent*, 3 Moore's P. C. Cas. 419; *Acatos v. Burns*, L. R., 3 Exch. Div. 282. Ct. of Appeal, Nov. 30, 1880. *Atlantic Mutual Insurance Co. v. Huth*. Opinion by Cotton, L. J., 44 L. T. Rep. (N. S.), 67.

NEW BOOKS AND NEW EDITIONS.

THOMPSON ON HIGHWAYS.

Thompson's Treatise on the Law of Highways, including Ways, Bridges, Tunnels, Strays, Turnpikes and Plank roads. With an Appendix of Forms. By Charles H. Mills, Esq., of the Albany Bar. Third edition. Albany: Weare C. Little & Co., 1881.

THE legal writings of Mr. Thompson were marked by clearness and conciseness in style and accuracy in the statement of principles. The fault of some authors of considerable reputation is that when they descend to detail they use language that does not quite express what the particular doctrine is and that is sometimes capable of two meanings. This is the result either of an indistinct idea in the author's mind of the principle treated, or of a timidity in making a statement so precise that if wrong there will be no chance of explanation. We have more than once in consulting elementary treatises found expressions that were as double-faced as the responses of the ancient oracles and which would fit almost any ruling that the courts might make in regard to the point treated. In Mr. Thompson's works nothing of this kind ever appears. He would not indite a statement until he was fully satisfied what was the correct rule; and where there was doubt by reason of conflicting authority he would set forth the existence of such doubt, and usually his own opinion of what was the better rule. The consequence was that his works met a ready recognition as practical expositions of the topics they treated, valuable alike to the lawyers, the students, public officers and all who had occasion to make use of them.

The first edition of the book before us was among the earlier of the productions of the author named, but it possessed all the characteristics of his later writings and became as soon as it was published a standard authority in relation to the highway law of New York.

This place it has kept ever since, although after its issue another work containing many excellencies in common with it made its appearance. (We refer to Cook on Highways, a new edition of which we understand will soon be issued.) The present edition has been prepared by a gentleman of ability, and the additions and changes made necessary by legislation and late adjudications have been interspersed through the text in a skillful manner that leaves unaffected the arrangement and to a great extent the language of the author.

The present edition contains the statutes passed as late as 1880 and the decisions of the courts of this State including 79 N. Y., 21 Hun, and contemporaneous reports. The book is well-printed and bound, but the matter is not as compact as it ought to be. Law books are a source of great expense to the practitioner, and no publisher is justified in increasing that expense in any degree by resort to padding. Large margins, double-leaded type and other methods by which a little reading is made to cover much space ought not to be tolerated in law publications, and we believe that publishers will find that such a method of increasing their profits will in the end entail loss.

XXIV KANSAS REPORTS.

This well-printed volume contains a good many cases of local importance, but only few of general interest. Among the latter we note the following: *Turner v. Webster*, p. 38—Where work has been done under a contract, the parties disagreeing in their understanding as to what the compensation was to be, the law awards reasonable compensation. *Smith v. Rogers*, p. 140—Where a step-father voluntarily assumes the care and support of his step-child, he cannot recover compensation for its board. *Werner v. Edmiston*, p. 147—A verdict arrived at in pursuance of an agreement that each juror should name an amount and that the aggregate divided by twelve should stand as the verdict is illegal. *State v. Wilson*, p. 180—To render dying declarations admissible in evidence it need not be shown that the declarant stated that he expected shortly to die, but it is sufficient if this expectation appeared from the circumstances. *Switzer v. Wilvers*, p. 384—An authority to an agent to sell personal property does not imply authority to mortgage it. *Herriman v. Shoman*, p. 387—An attorney to collect has implied authority to receive nothing but money in payment. *Fraker v. Little*, p. 598—Where the accommodation maker of a note pays it in ignorance that it has been materially altered, he may recover the money so paid.

CORRESPONDENCE.

FILING POINTS.

Editor of the Albany Law Journal:

In the new rules there appears an addition to Rule 41 requiring the appellant to file his points eight days before the commencement of the term in the Supreme Court, First Department. This may be inconvenient, as the printed papers on appeal are not required to be served till the same day. Is there any good reason for the rule? And secondly, is the rule lawful? Section 17 of the Code of Civil Procedure declares that the convention of judges must establish rules of practice which shall be binding upon all courts of record except the court for the trial of impeachments and the Court of Appeals.

Respectfully yours,

LA ROY S. GOVW.

NEW YORK, April 16, 1881.

ADMISSION TO THE BAR.

Editor of the Albany Law Journal.

Will you be kind enough to answer this question for me and a great many other students? I am a student in a law office and have been for a year; but as yet I have not filed my certificate as provided by the rules of the Court of Appeals. Now, will it be sufficient for me to apply for admission to the bar if at the end of three years I make an affidavit that I have been clerking three years, or will it be necessary for me to file my certificate right away; if so, will my clerkship commence now or at the time when I entered the office? By answering same in LAW JOURNAL you will confer a great favor on a

STUDENT.

NEW YORK, April 22, 1881.

[The rules are perfectly explicit, that the attorneys shall file the certificate, and that "the clerkship shall be deemed commenced from the time of such filing, and a certified copy of the certificate and of the filing shall be produced at the time of the application for examination." — ED. ALB. L. J.]

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, April 25, 1881:

Judgment affirmed with costs — *Clark v. Howland*; *Conley v. Meeker*; *Van Riper v. Baldwin*; *Pennsylvania Coal Co. v. Blake*; *Van Dyck v. McQuade*. — Judgment reversed and new trial granted, costs to abide event — *Murray v. The New York Life Insurance Co.*; *Burdett v. Lowe*. — Judgment and order of General Term reversed and order of Special Term affirmed without costs — *Fredenburgh v. Biddlecomb*. Order affirmed and judgment absolute for respondent on stipulation with costs — *The Susquehanna Valley Bank v. Loomis*. — Judgment and order reversed and new trial ordered, costs to abide event — *Ockenbein v. Shopley*. — Motion denied with \$10 costs — *Raymond v. Richmond*. — Motion denied without costs — *Beisinger v. Chapman*; *Vincent v. Newhouse*; *Richardson v. Draper*. — Motion granted without costs — *Ireland v. Ireland*. — Motion for reargument denied with \$10 costs — *Briggs v. Waldron*; *People ex rel. Jourdan v. Donohue*; *Mitchell v. Read*. — Orders of General Term and Special Term reversed, attachment of plaintiff in first suit vacated and motion of plaintiff in second suit granted with costs — *Jacobs v. Hogan*; *Whitman v. Hogan*.

NOTES.

SOME strictures which we recently made on the typography of a western law book have roused the indignation of some of our Ohio friends, who have connected it with our opposition to the nomination of Mr. Stanley Matthews for the Supreme Court bench, and inferred that we hate all things western. This is an entire mistake. We have occasionally seen a well-printed law book from other parts of the west than St. Louis, but our judgment is that generally they are not so well printed as they ought to be. We are quite willing to acknowledge that we do not know so much law as our western contemporaries, but on this point of printing we will not give in, for we have received a practical printer's education, and know all about the art. We know when a book is ill-printed, and why it is so. If there is clay in the paper, or the stereotype plates are executed with inferior materials, or the ink

is bad, or the press work uneven, or the register imperfect, or the type battered, we are quite apt to recognize it. If these imperfections exist why should we not speak of them? Indeed, is it not our duty to do so? And why should such speaking be called a "ding at our western publishers?" It is quite true that we "cannot afford to be unjust to the people of the west," but we think we can "afford" to tell the truth about their law books when they ask the profession to buy them, and we are going to do it whether we can "afford" it or not. It is no part of our purpose to recommend any eastern rivals at the expense of the publishers of Cincinnati and Chicago. We would only recommend the latter to have their printing done in St. Louis, or do it better themselves than they are in the habit of doing. And when these western friends say they can do as good printing as is done in the east, we are not prepared to deny it, but we simply say, then do some of it.

In *Loeb v. Peters*, 63 Ala. 243, the court exhibited an exact knowledge of book-keeping. Holding that the transfer of a bill of lading as mere collateral security for a pre-existing debt does not make the transferee a purchaser for value, they said: "Appellants, having only credited Munter & Brother on a debt previously due from them, with the price of the tobacco, have nothing more to do, in order to get even, than to debit them with the same sum, for the non-delivery of the goods in consequence of the defect in Munter & Brother's title."

The will of the late Mr. Baron Cleasby is another instance of the fatality which seems to attend the wills of eminent judges and lawyers. The testator, it appears, had only given the trustees power to retain "securities," which it was considered would not extend to certain investments of the testator. It is certainly most strange how exceedingly unfortunate lawyers have been in their testamentary dispositions. Mr. Serjeant Hill's will was so confused, that but for the respect due to the learned serjeant, it might not unreasonably have been declared void for uncertainty. The will of Sir Samuel Romilly was badly drawn. The wills of Chief Baron Thomson, Chief Justice Holt, Chief Justice Eyre, Serjeant Maynard, Baron Wood, Mr. Justice Vaughan, Francis Vesey, Jr., Mr. Preston, the eminent conveyancer, and Lord Chancellor Westbury, all became the subject of chancery proceedings. Chief Justice Saunders made a devise which puzzled his executors, who were all excellent lawyers. The will of Bradley, an eminent conveyancer, was set aside for uncertainty. The difficulty which arose from the loss of Lord St. Leonards' will is too recent to have been forgotten. But probably the most glaring mistake was made by a late master in chancery, who directed the proceeds of his estate to be invested in consols in his own name. — *London Law Times*.

The long lecture delivered by Mr. Justice Hawkins to Mrs. Fletcher when passing sentence in what is known as the *Spiritualist* case, may have a salutary effect upon public morality; we, however, are disposed to doubt it, and we heartily deprecate judicial discourses of this nature. Such discourses are the more to be deprecated where jocularity has been the prevailing characteristic of the trial, the jokes not being by any means monopolized by the bar or the witnesses. A prisoner incurs a well-defined punishment by committing specific crimes. This is all that he ever contemplates. To be scolded and discoursed upon by the judge may in some cases be a severe addition to the statutory punishment, and where the prisoner is a woman the severity of this additional punishment may be very great. — *London Law Times*.

The Albany Law Journal.

ALBANY, MAY 7, 1881.

CURRENT TOPICS.

MR. TROLLOPPE, in his recent *Life of Cicero*, in speaking of the "little white lies" with which Cicero advises the forensic orator to garnish his narration, says: "As an advocate he was about as false and about as true as an advocate of our own day. That he was not paid, and that our barristers are paid for the work they do, makes, I think, no difference either in the innocency or the falseness of the practice. I cannot but believe that hereafter an improved tone of general feeling will forbid a man of honor to use arguments which he thinks to be untrue, or to make others believe that which he does not believe himself. Such is not the state of things now in London, nor was it at Rome in Cicero's time." This state of things will never be any different until we all arrive in heaven. The advocate however does not deal insincerely. An advocate very rarely, in London, or anywhere else, uses an argument which he believes untrue, for the simple reason that he believes his client's case and the arguments that he makes for it are right. The test of this assertion is the fact that after the heat of the strife is over, an advocate can seldom be found who is willing to admit that his defeat was just. He thinks that the opposite witnesses lied or were mistaken, or that the judge was mistaken in his view of the law, or that the law is wrong in itself. Advocacy blinds an advocate to the truth. The advocate generally shares the fervor, the zeal, the prejudices, the animosities, the want of candor of his client. As to arguments in respect to facts, the advocate is not understood as speaking his own convictions, even if he really is, or even if he says he is, but he is understood as speaking with his client's tongue, for him, and in his place. As to arguments based on law and precedent, it would be hard to discover a question in regard to which an advocate could not discover a respectable authority on his side, in one community or another, and even if he cannot, he is not to be censured for saying "the law is thus and so," which simply means, "I believe this is what the law really is and ought to be laid down." That the gravest, coolest, and most intelligent men, not lawyers, but historians, will draw contrary deductions from the same facts, and will dispute as to what are the facts from the same sources, is evidenced by this eulogy of Cicero by Mr. Trolloppe, and the recent life of Cæsar by Mr. Froude.

On this subject, Mr. Walter B. Hill, in an article in the *Quarterly Review* of the Methodist Episcopal Church, South, for April, 1881, speaks as follows on the duties and privileges of the lawyer: "His position is one of *agency*; such is his relation to his client, and this relation is fully recognized by the court. Universal experience has shown that

the best system of settling issues between parties is by having trained men discuss the respective sides before an impartial tribunal. The lawyer is a part of this system. If it be objected to as defective, it is enough to say that no better system has ever been devised or proposed. In the argument of a mooted point of law before the court, the advocate does not say—his position does not authorize or require him to say—'I have presented to the court all the law on both sides of this case. I have presented to the court that view which, if I were judge, I would, after balancing both sides, entertain.' If he attempted to do this, he would not fulfill his duty to his client, which binds him to represent that client's side in the strongest light of which it is capable; and he would cease to be an efficient aid to the court, which, in order to arrive at the correct decision, expects and desires the counsel on each side not to take the place of the court, but to present their respective sides with their utmost skill. All this applies to the discussion of conflicting evidence before the jury. The position of the lawyer, in reference to his client, and to the tribunal before which he appeals, commits him to this, and only this: to do for his client what the latter could lawfully do for himself, if he acted in person; to urge those views of the law and the facts which arise in favor of the side which he represents." We have never seen the matter more simply, lucidly, and convincingly treated than in this extract.

In Mr. Trolloppe's interesting account of the trial of Verres, he refers to Cicero's denunciation of the judges. He says: "He would so appall these corrupt judges that they should not dare to acquit the accused. This *Actio Prima* contains the words in which he did appall the judges. As we read them, we pity the judges." These judges, it must be remembered, were rather jurymen. To define the bounds of an advocate's duty or license in this matter in modern times is a delicate undertaking. We once heard an appalling denunciation by an advocate in a railroad case, of "railroad judges, who sit to try railroad cases, with free railroad passes over the party's road in their pockets." The judge wisely took no notice of the remarks. On the other hand, we once knew a judge to fine several respectable counsel, for writing him a respectful letter, asking him not to sit in a certain case, because he had once sat in it, and their client believed him to be prejudiced against him! But at all events, nothing is more unbecoming to our profession, and more deleterious to the influence and character of our judges, than the reckless, flippant, and generally baseless accusations which defeated counsel make out of court against the judges. We once knew a whole court—the highest in the State, if not the highest in the country—assailed and denounced in the newspapers, industriously and with costly elaboration, by a cross and venomous advocate who had been defeated by them, and who a few years afterward invited the same whole court to dinner! Even if these slanders do not reach the ears of the judges,

the result is demoralizing. Under the head of "Judicial Ethics," a correspondent writes us: "Any person of a thoughtful turn of mind who associates much with lawyers must certainly have observed how flippantly some of them are accustomed to speak of the judges before whom they constantly appear, and a foreigner might readily suppose, if he took the opinions of these lawyers, that the American judiciary was a very contemptible body of men. We have fallen into such a constant habit of disparagement of late, that an attorney who is always careful to remember what is due to the judge, out of respect to the office, is apt to be set down as an old fogey and far behind this age of progress. Do these grumblers take care themselves to obey rigidly-established precedent? Are they not sometimes guilty of forcing the law to gain a point? of overlooking or disregarding an authority if it sets dead against them, rather than advising a client frankly that he has no case? No doubt such a conscientious course would hurt practice, but unquestionably it would help precedent. If the various bar associations would discourage in every way the present prevalent fashion of verbally assaulting the judges for opinions or decisions which do not happen to suit the views of the aggrieved attorneys, they will not have been formed in vain, and will confer lasting benefits upon the community at large. The practice in question is dangerous, because it is always unsafe for the ignorant to be led into the belief that the judges are corrupt and incompetent, and often induces the unlearned to take the law into their own hands, and attempt to obtain their remedy by force, a result which is especially to be deplored and guarded against by every means in our power. It cannot be doubted that there is a growing tendency toward the enforcement of rights by force, and that with very many the chief question is, to what extent dare I evade the law and escape punishment?"

The late judicial election in Wisconsin will be instructive to those who think the people are incapable of choosing their own judges, and that a proper choice can only be made through an elected agent. The official count shows that the total vote for chief justice was 179,118, of which Judge Orasmus Cole received 177,522, the remaining 1,596 being cast principally for James G. Jenkins, democrat. For associate justice, 179,304 votes were cast, of which Judge John B. Cassoday received 177,553, and G. W. Cate most of the rest. Judges Cole and Cassoday, who are the present incumbents, ran on a non-partisan platform.

Mr. Field has submitted to the senate judiciary committee a list of amendments proposed to the general Civil Code, and designed to obviate the objections raised by the committee of the Bar Association of the city of New York. These amendments number twenty, and are thought to meet every objection in which there is any color of plausibility. They are submitted, not because the codifier deems them essential, but to evince his willingness to sub-

mit his work to any fair or plausible correction or amendment.

The *Washington Law Reporter* says. "We feel assured the ALBANY LAW JOURNAL would detract nothing from its high character or dignity by accrediting to the *Washington Law Reporter* opinions copied from its columns. The attention of the editor of the JOURNAL is called to this matter in the best of good-fellowship." The *Reporter* then instances the opinions in *State v. Perry*, 22 Alb. L. J. 513, and *Murray v. Ager*, ante, 332. We have no objection to making public the fact that those opinions were derived from the *Reporter*, but we do not concede that it is a breach of what the *Reporter* calls "journalistic courtesy," to omit credit with the publication. We generally make our own head-notes and statements, and it has never been our custom, nor has it been the custom of any law journal in the country, to "credit" such matters. Opinions which we have paid for are copied by other law journals without crediting us, and we have never thought of finding fault. Frequently we do give credit, especially in our notes of cases, but we cannot undertake to do so in every instance. Original articles we invariably credit to the sources from which we derive them, but the opinions of courts are on a different footing. In copying an opinion, indeed, we generally have no assurance that it has not been copied by the very journal from which we derive it; although of course in the two particular instances cited, the natural presumption would be, as no doubt the fact is, that the *Reporter* was the first publisher, the cases being from the District of Columbia. We do not see that the *Reporter* has any cause to rebuke us.

In Mr. Strahan's senate bill, in regard to building in the city of New York, he proposes to have the Legislature of the State of New York enact that "all plastering mortar for the scratch coat shall have a sufficient quantity of long hair in it, and the lathing shall have openings not less than five-sixteenths of an inch between the lath." This is descending to extraordinary detail.

Assemblyman Strahan proposes to let married people be absolutely divorced, where they have lived separate, by agreement, for four years before the passage of this act, and since, without cohabitation, and with design always to live apart, where neither is dependent or has received support from the other, and there are no minor children. This is special legislation in the extreme. If such a law is advisable, why limit it to persons who have lived separate four years before the passage of the act? The thing smells "fishy."

NOTES OF CASES.

THE German Imperial Appellate Court has held the editor and the publisher of a newspaper guilty of publishing obscene writings for putting the following advertisement in their paper: "An

unmarried gentleman, twenty-eight years old, desires as a companion on a journey to Italy, which will last three or four months, a lady, not too young, with pretty looks. Offers, with precise statement of conditions, accompanied by photograph, may be sent to A. S. S., 299, care of this office. Strictest discretion assured." The court say that it is apparent from this advertisement that no nurse was to be engaged, but that sexual relations were the object; therefore, because the purpose is immoral, the offense is made out, although the words do not appear obscene.

The current number of the *Juristische Blätter* contains several interesting decisions, of which the following is a synopsis: 1. The Austrian law makes marriage brokerage contracts unlawful. A. sued B. on a promise to pay him 300 florins. B. proved that A. was a marriage broker, and had advertised himself as such; that he went to him and obtained of him the address of a person, C., who was desirous of marrying; that then he gave him a written promise to pay him 300 florins if the marriage should be effected between him and C. The marriage afterward took place. A. claimed that the promise was given him merely for giving B. the name of C. and a letter of introduction to her brother; that he had nothing further to do with the negotiations between B. and C.; that the 300 florins were to be given him as a present. The Imperial Appellate Court decided that the fact of A.'s being a professional marriage broker, and the promise being conditional on the accomplishment of the marriage, avoided the contract. The main object of the law is to exclude from marriage contracts all influence of persons who by reason of a promise of payment have a direct personal interest in bringing the marriage about. 2. Force threatened to obtain a thing legally due to a person, does not make the person guilty of extortion — *erpressung* — (probably robbery under our laws is more nearly the equivalent). 3. A person throwing down crosses put up for monuments is guilty of injuring "burial places" (*grabstaetten*).

In *Mulliken v. City Council of Weatherford, Texas* Supreme Court, March 11, 1881, 4 Tex. L. J. 499, it was held that a city ordinance prohibiting the mere renting a habitation to prostitutes without regard to its use, and making the same a penal offense, is unconstitutional. The law in question also made it an offense for a prostitute or lewd woman to inhabit any place in the city. The court said: "Although we most heartily approve the desire of the city council, that dens and haunts of prostitution, 'going down to the chambers of death,' shall be prohibited and suppressed, and that their inmates shall not be permitted to ply their nefarious traffic in the property, reputation and souls of fellow-beings, within the limits of the city, yet we are of opinion that the alleged offense, in this case, did not embrace such act which the council, under our Constitution and laws, had the power to make penal. That unfortunate and degrading class, against whom the ordinance was mainly intended, however far

they may have fallen beneath the true mission of women, which it is one of our highest duties to foster and protect in social and domestic life, are still human beings, entitled to shelter and the protection of the law, and the council did not have the power to so far proscribe them, as a class, as to make it a penal offense in any one to rent them a habitation without regard to its use. Such an ordinance is null and void, because unreasonable and in contravention of common right. Const. 1876, Bill of Rights, §§ 19, 20; *Chy Lung v. Freeman*, 2 Otto, 275; *Hayden v. Noyes*, 5 Conn. 391; *Hays v. City of Appleton*, 24 Wis. 542; *Barling v. West*, 29 id. 815; S. C., 9 Am. Rep. 576; *Austin v. Murray*, 16 Pick. 121; *Dunham v. Trustees, etc.*, 5 Cow. 462; 1 Dill. on Mun. Corp., § 259; Cooley's Const. Lim. (4th ed.) 246." See the case of the colored woman, ejected from the railway car because she was of unchaste character, 32 Alb. L. J. 401.

In *Buckles v. Ellers*, Indiana Supreme Court, 1 Ind. L. R. 85, it was held that although the Code of that State allows an unmarried woman to maintain an action for her own seduction, yet this remedy, being purely statutory, and not existing at common law, has no extra-territorial force, and does not authorize an action in that State for acts of seduction committed in another State. The court said, adopting Mr. Rorer's views (Inter. State Law): "Where certain acts are made wrong by statute which were not theretofore, or where remedies additional to those which existed at common law are provided by statute, advantage can be taken of these new and additional remedies only within the territory or locality in which the statute has force. These constitute new rights, so to speak, and depend for their enforcement always upon the statutes by which they are created. And such statutes will be enforced only by the courts of the State wherein they are enacted." On the argument of comity they said: "The rules governing the prosecution of actions by comity between States have no application to this case, for two reasons: 1. Nothing being shown to the contrary on the trial, we must assume that the common law was in force in Illinois on the subject of prosecution for seduction. By the common law, the appellee acquired no right of action against the appellant for her own seduction, and hence putting the worst possible construction upon the evidence as against the appellant, she did not bring with her from Illinois any right of action to be enforced in this State. 2. If it had been shown upon the trial that there was some statute of Illinois conferring upon her a right of action for her own seduction, that would not have authorized the appellee to prosecute this action in the court below, upon the principle of comity, as it is only common-law rights, or such rights as are recognized as existing by the general usage of civilized nations which can be enforced by comity in a foreign forum." The last conclusion seems to be contrary to that of *Dennick v. Railroad* and *Leonard v. Columbia Steam Nav. Co.*, ante, 309, 311.

WHEN OVER-VALUATION AND FALSE SWEARING VITIATE INSURANCE.

IN *Helbing v. Seac Insurance Co.*, 54 Cal. 156, it was held that an insurance warranty against over-valuation is broken only in case of an intentional over-valuation; and a provision that fraud or false swearing shall work a forfeiture means intentional false swearing. The court said: "It may indeed be true that if the discrepancy, in view of all the circumstances, is so great as to convey the conviction of fraud to the reasonable mind, the jury should find fraud, as they should find in accordance with the fact in respect to every other subject, and in a plain case of a finding against evidence the trial court should grant a new trial. But it must be apparent that the effects of such discrepancies must vary innumera-ly, reference being had in each case to the circumstances under which the statement is made by the assured, its greater or less positiveness, and the consideration whether the verdict itself is in the particular instance to be treated as based upon positive data, or as an estimate only, approximating exact justice. So complicated a question is one peculiarly for the jury, the determination of which by that body can only be set aside when the court is clearly convinced, after full consideration of all the incidents made to appear at the trial, that the verdict is wrong."

That over-valuation, to vitiate a policy when a mere representation, must be intentional, is held in *Fuller v. Boston Mut. Fire Ins. Co.*, 4 Metc. 206; *Field v. Ins. Co. of N. A.*, 6 Biss. (U. S.) 121; *Stewart v. Phoenix Fire Ins. Co.*, 5 Hun, 261; *Laidlaw v. Liverpool and London Ins. Co.*, 13 Grant Ch. 377; *Cox v. Etna Ins. Co.*, 29 Ind. 586; *Bonham v. Iowa, etc., Ins. Co.*, 25 Iowa, 328; *Rinch v. Niagara, etc., Ins. Co.*, 21 U. C. (C. P.) 464; *Williams v. Phoenix Fire Ins. Co.*, 63 Me. 67; *Am. Ins. Co. v. Gilbert*, 27 Mich. 429; *Park v. Lycoming Ins. Co.*, 79 Ind. 402.

Mr. Wood (Fire Ins., 5220) states the rule as to misrepresentations of value: "It must either be shown that the insured knew that it was worth less, or the actual value of the property must be so much less than that stated as to warrant a presumption that the error was intentional, and the burden is on the insurer to show the fraud."

So in *Wall v. Howard Ins. Co.*, 51 Me. 32, where the valuation of the insured was \$2,400, and the jury found the value \$1,040, the insurer was held released; and in *Catron v. Tenn. Ins. Co.*, 6 Humph. 176, a valuation of \$12,000, by the insured, the actual value being \$8,000, was held as a matter of law a fraudulent over-valuation; and so in *Phoenix Ins. Co. v. Munday*, 5 Cold. 547, where the loss was stated at \$15,989.18, and the jury found it \$12,043; and in *Protection Ins. Co. v. Hull*, where the valuation was \$4,500, and the real value from \$3,000 to \$3,600.

But in *Moore v. Protection Ins. Co.*, 29 Me. 47, it was held that where the plaintiff swore in his proofs that the value of the goods consumed was \$2,800, and the jury found it \$1,853, there was no evidence false swearing to justify setting aside the ver-

dict. To same effect, *Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. 400, where the loss was stated at \$3,041.86, and the verdict was \$412.27; *Gerhauser v. N. B. Ins. Co.*, 7 Nev. 174, valuation \$6,000, verdict \$3,000; *Unger v. Peoples' Fire Ins. Co.*, 4 Daly, 96, valuation \$9,989.03, verdict \$6,500; *Marchesseau v. Merchants' Ins. Co.*, 1 Rob. (La.) 488, valuation \$15,549, verdict \$8,000; *Planters' Ins. Co. v. Deford*, 38 Md. 382, an excessive estimate of 388 hides in 3,159.

In *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67, the total insurance was \$2,500, and the verdict was for \$1,202. The court said the question was for the jury, and that "the discrepancy, between the value of the goods as found by the jury and the amount insured, is not so great as to make it absolutely incredible that the over-valuation, and the over-estimate in the proofs of loss, may have occurred without positive dishonesty or fraudulent intent on the part of the plaintiff. The owner of goods may fairly be expected to set a higher value on them than anybody else would, and whatever might be the suspicions excited by a perusal of the testimony here, we cannot say that it is demonstrated that the jury erred in relieving the plaintiff from the imputation of fraudulent intent."

In *National Bank v. Ins. Co.*, 95 U. S. 673, it was held that a representation, not amounting to a warranty, of the value of the property insured, although an over-valuation, will not vitiate the policy unless it appears that it was intentionally excessive. The valuation was \$80,000; the value as found by the trial court was \$20,000.

Mr. Wood says (Fire Ins., 426, note 3) that "it has been held, however, that a false statement of the cash value of property upon which insurance was asked, although not fraudulent, would avoid a policy." The cases which he cites to this, however, do not sustain the statement, and he undoubtedly states the true doctrine in the text, as follows: "But whatever may be the number of decisions, holding the one way or the other, there can be no doubt, that in conformity with the ordinary rules of construction applied to insurance contracts, and the ordinary principles of justice and fair dealing upon which they are supposed to be predicated, a policy cannot be held void for the breach of such a condition, unless the over-valuation is intentional and fraudulent, and not a fair expression of the honest judgment of the insurer, and the fact that the property is considerably over-valued does not of itself establish such fraud upon the part of the assured as avoids the policy."

That false swearing, to vitiate the policy, must be intentional and material, is held in *Marion v. Great Rep. Ins. Co.*, 35 Mo. 148; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Ins. Co. v. Weides*, 14 Wall. 375; *Moadinger v. Mechanics' Fire Ins. Co.*, 2 Hall, 490; *Franklin Ins. Co. v. Oulver*, 6 Ind. 137; *Israel v. Teutonia Ins. Co.*, 28 La. Ann. 689.

In *Dogge v. North-western Nat. Ins. Co.*, 49 Wis. 501, there was no specific provision in the policy against over-valuation, but the policy provided that

any claim under it should be forfeited by an attempt at fraud by false swearing, etc. The total amount of insurance was \$1,150; the plaintiff, in his proofs of loss, under oath, stated the value of the property at over \$5,000; and the referee found its value to be \$2,000, but also found that plaintiff did not knowingly, willfully and for the purpose of defrauding defendant, swear to a false statement of the value, but grossly exaggerated its value and quantity in consequence of his imperfect knowledge of the English language, while acting under the direction of the person who aided him in making the proofs. *Held*, that upon these findings plaintiff was not precluded, upon the ground of fraud, from recovering. The court said: "Under these circumstances, if the plaintiff did honestly, or without any fraudulent intent, place an extravagant valuation upon the property, it would not prevent a recovery upon the policy. *Parker v. Amazon Ins. Co.*, 34 Wis. 364; *Ins. Co. v. Weides*, 14 Wall. 375; *Williams v. Phoenix Fire Ins. Co.*, 61 Me. 67; *Moore v. Protection Ins. Co.*, 29 id. 97; *Franklin Fire Ins. Co. v. Updegraff*, 43 Penn. St. 350; *Marion v. Great Republic Ins. Co. of St. Louis*, 35 Mo. 148; *Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. 400. Nothing is more common in the affairs of life than for men to over-value their property; and when, as the referee finds in this case, it is not done with any fraudulent purpose, it should not avoid the policy. 'It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies.'" 14 Wall. 183. The discrepancy between the value of the property as found by the referee and as stated by the plaintiff in his proofs of loss is not so great as to warrant a court in assuming that the over-valuation was made with a fraudulent intent, or for the purpose of obtaining some undue advantage over the company."

In *Leach v. Republic Fire Ins. Co.*, 58 N. H., it was held that an over-valuation of property destroyed, made under oath by the assured and through carelessness and inattention to the subject, but which by due attention could not have been honestly made, though not to defraud the company, is a ground of forfeiture, for fraud and false swearing, of all claim under the policy. Such a representation is fraudulent. *Kerr on Fraud and Mist.*, 54, 55; *Stone v. Denny*, 4 Metc. 151; *Harding v. Randall*, 15 Me. 332. Although there was no positive intent to defraud the defendants, the false estimate was designed for the defendants to act upon as true, and tended to produce the same mischief that would result from actual and willful falsehood. Ignorance of what the plaintiff was bound to know was not innocence, and gross negligence in a matter so grave was a positive wrong. 2 Pars. on Cont. 785. In an over-valuation, grossly out of proportion to the actual value of the property, the plaintiff is not entitled to immunity from the charge of fraud. *Wall v. Howard Ins. Co.*, 51 Me. 32.

In *Bobbitt v. Liverpool, etc., Ins. Co.*, 66 N. C. 70, there was a warranty that the cash value was \$30,000, and the insurance was for \$20,000. It was

held substantially that the warranty was broken if the cash value was not as stated, although not fraudulently misstated.

In *Boutelle v. Westchester Fire Ins. Co.*, 51 Vt. 4; S. C., 31 Am. Rep. 666, it was held that a policy of fire insurance conditioned to be void for over-valuation is avoided by any substantial over-valuation whether fraudulent or innocent. The cases cited in the opinion are not in point, except two, and these are cited above.

PIERCE'S LAW OF RAILROADS.*

THERE are at the present time two distinct methods of preparing works on special subjects, each of which has its peculiar advantages. In one class the statutes themselves form the text, and the thought, labor and research of the author are presented to the reader in notes and authorities appended to each individual section. Of this class the Annotated Code of Practice, wherever codes have been adopted, afford conspicuous examples. In England, where railway legislation for the whole kingdom has been codified, this course has been pursued by the most recent writers on railway law; as Shelford, who devotes his first volume to General Railway Acts and his second volume to Consolidated Clauses Acts; and in the still later work of Godefroi & Short, which has now become the recognized authority on railway law in Great Britain. This course has also been pursued by McMaster's brief but very valuable work on New York Railroad Law, published in 1871. In the other class the body of the work is a consecutive treatise, illustrated with notes, in which work the statutes are subordinated to the order of arrangement, and the authorities found in the reports have a more apparent if not a more intrinsic importance. Deas, in his Law of Railways applicable to Scotland, 1873, endeavors to combine the excellencies of both systems by first writing a treatise and then giving the statutes in chronological order in an appendix. The standard work of Sir William Hodges on the Law of Railways, Railway Companies and Railway Investments is the best example of this latter class on railway laws in England.

Of course this is the only feasible plan for an American writer who intends, as Mr. Pierce does, to offer a work for general acceptance throughout the United States. Taking this form, he commences his work with the existence of the corporation, its officers as related to the corporation, its stockholders and the public, the creation of its stock, the capital stock with all its incidents of private and municipal subscriptions, dividends and preferred stock. This portion of the work is valuable in relation to every kind of corporation as well as those for which it was specially written, and every lawyer who has occasion to study any of these questions will find this volume exceedingly helpful. Then four chapters are devoted to the location of the road and acquisition of the right of way by purchase, by right of eminent domain, and over highways. The next seven chapters are devoted to its liabilities for injuries, classified as torts in general, negligence, injuries to travellers on highways, injuries to servants, to cattle, and to property by fire. Following these are the three closing chapters on legislative control, taxation and the power of the corporation.

It will thus be seen that the topics which are treated at large in other works on negligence and common carriers do not comprise the bulk of the volume, but are rather relegated to such other works. In fact, duties as a common carrier are very lightly touched upon; for example, the chapter on injuries to cattle relates

*A Treatise on the Law of Railroads, by Edward L. Pierce. Boston: Little, Brown & Co., 1881. Pp. 539.

solely to cattle in adjacent fields, on highways, and on the track; it does not refer to rights and duties as a carrier of cattle at all.

The brevity and comprehensiveness of the title of this work is characteristic of the most notable feature of the work itself. It is the author's evident desire to eliminate every superfluous word. In this purpose he has admirably succeeded. We know of no American work that has excelled this in condensation. In this one volume of less than 550 pages the learned author has compacted more law and has cited more cases than can be found elsewhere in the same compass. The amount of material here used would have been expanded by most authors into two or three volumes. Page after page bristles with citations of cases, the titles of which alone occupy nearly one-third of the page, while the remainder of the page boils down in terse sentences the law derived therefrom. The work is a model of brevity. It is interesting to notice how the author has grown with the study of the subject. In his first edition he cited less than 1,400 authorities. In this, so enormous has been the mass of litigation concerning and affecting railroads in the past twenty years, he cites about 4,500 cases. Not only in number of cases has there been this extraordinary increase; in new and complex problems on the application of established principles to new conditions, in exceptions engrafted on general principles and in special exceptions to the main exception, the material necessary to be digested has likewise enormously increased. Notwithstanding this the law has been compressed into a volume that is substantially the same as the first edition. The capacity to accomplish this involves the ability to write well. Its composition is worthy of the reputation which its accomplished author has achieved in general literature. In reading the volume we notice but one inaccuracy, and that should have been corrected by the proof-reader. On page fifty it appears that "the failure of subscribers to pay a certain per cent, usually five or ten, on the amount subscribed which the charter or statute requires to be paid at the time of the subscription, has been held in some States essential to the validity of the subscription."

Perhaps the doctrine laid down in *Oxlade v. N. E. Ry. Co.*, 15 C. B. (N. S.) 180, and *Johnson v. Midland Ry. Co.*, L. R., 18 Ex. 360; S. C., 6 R. C. 61, that a carrier may limit his common-law obligation as a common carrier by contracting to carry a specific kind of merchandise only from one station to another particular station, and in such case he is not bound to carry such merchandise to or from intermediate stations, did not strictly come within the scope of the work, in the author's judgment. But it is a doctrine that should not have been omitted in a work of this character, particularly in the present agitation of the power, necessity and limits of legislative control over the gigantic railroad monopolies in this country. We also take exception to the unqualified statement that the charters of private corporations are contracts that cannot be impaired by the Legislature, laid down in the first chapter of the work, upon the authority of the *Dartmouth College* case; because the learned author should have stated in that connection that under the Grainger decisions and the decisions in *Mum v. Illinois*, in 94 U. S. 113, railroad corporations are not private corporations in that sense, and therefore they are in a peculiar manner subject to such control.

These however are trivial blemishes. A serious defect in the work is its index. The value of a proper and copious index can scarcely be overrated. An organization has been formed in England, entitled the Index Society, for the express purpose of properly indexing the works of standard authors. In this volume the index is so meager that it impresses us that that duty was devolved upon some law student who had not developed any aptitude for the work. If intentional, it

was misplaced brevity; but that it was not so is shown by such titles as "inducement," with sub-titles of "effect of, in liabilities for injuries," "effect of, in cases of injuries to children;" and on the same page "invitation," with the same sub-titles and no others. Then we find "powers, corporate" and "corporate powers," but with "existence, corporate" there is no "corporate existence;" and also there is "exclusive grants," but no "grants." We also find the following: "proximate and remote negligence," "consequential injuries" and "causa proxima," which show, with the other titles in the index, that there was no method pursued in preparing the index. Thus in "exclusive grants" the adjective controlled; in "powers, corporate" the noun controlled; and in "corporate existence" both were indexed; while on the other hand the most obvious titles were wanting. It can be safely said that they ought to be doubled. We point out this defect because of its importance to practical lawyers who purchase or consult such works not for the purpose of perusal but for reference to some particular topic, and because in a future edition it can be so readily rectified.

But we recur to the beginning of our article to say that this is a valuable work and will prove a valuable acquisition to any public or private law library.

BURIAL GROUND NOT A NUISANCE.

MAINE SUPREME JUDICIAL COURT, AUGUST 4, 1880.

MONK V. PACKARD.

A burial ground which does not affect the physical health of the occupants of a dwelling-house near which it is located nor their olfactories by any effluvia from the graves, is not in law a nuisance. The human contents of graves cannot offend the senses in a legal point of view. To become a nuisance the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort physically of human existence, and the inconvenience must be something more than fancy, delicacy or fastidiousness.

ON motion. Action for a nuisance. The facts appear in the opinion.

O. H. Hersey and Enoch Foster, for plaintiff.

Black & Holl, for defendants.

VIRGIN, J. This is an action on the case for an alleged nuisance, consisting of a private burying ground containing seven or eight graves, situated near the plaintiff's dwelling-house.

Prior to 1850, the father of two of the defendants, and of the wives of the other defendants, owned about fourteen acres of land on the east side of the county road in a sparsely settled part of Hebron. The north-east (back) corner of the lot, bounded on the east by the high bank of a brook, was appropriated for a private burial place, in which at various times from fifteen to forty years ago some nine or ten bodies had been buried in a somewhat promiscuous manner. It was never inclosed and it had no definite boundaries; but it was separated from the remaining portion of the lot by a board fence extending from the road easterly near the graves to the brook, leaving about an acre north and the remainder south of the fence.

In 1850 one of the defendants came into possession of the larger parcel, erected thereon a small house the front of which was about thirty-three feet from the road with the north end about the same distance from the board fence; and in the rear of the house but quite near to it a small stable with its north end flush with the fence.

In 1868 the plaintiff purchased the larger parcel of land with the buildings thereon, dug a well some thir-

teen feet in depth and about seventy feet from the fence, between the house and the road, and has occupied the premises most of the time since.

In 1875 the defendants fenced off the south-west (front) corner of the small lot, inclosing a parcel thereof thirty-three feet on the road and extending back nearly to the north-east (back) corner of the stable for a new burying ground; and into this they removed the remains of all the old graves except two, one of which being included within the new inclosure and the other not removable on account of water in the grave. One of the reasons for removing the graves was the caving off of the bank of the brook as it was worn away by spring and fall freshets, which had nearly reached the graves nearest the bank. The old board fence was removed and a double wall, faced on the side next the plaintiff's premises, was substituted; the new cemetery was tastefully graded and suitable headstones erected at the several graves, the nearest being about forty feet from and opposite to the window of the plaintiff's sitting-room and also in plain view from his front windows and door. As first located, the graves were only visible from the back rooms of his house.

The plaintiff claimed this new graveyard to be a nuisance, for the reason that its proximity and relative position render his residence uncomfortable and the enjoyment of his property disagreeable; and that it has rendered the water in his well unpalatable and unwholesome, and has lessened the market value of his property.

The jury, under instructions not excepted to, returned a verdict for the plaintiff and assessed damages in the sum of twenty-five dollars, which the defendants ask us to set aside as being against law and the weight of evidence.

There is no pretense that the plaintiff's physical health or his olfactories have in any degree been affected by any effluvia from the new graves; for the undisputed testimony is overwhelming that they contained nothing which could render such a result possible. And if the verdict was based upon testimony of the plaintiff that the water in his well (which is closely covered about the pump and has never been cleaned out) "tastes bad and smells bad" on account of a few dry bones buried seventy feet distant therefrom with level ground intervening, it would be so manifestly erroneous and against the weight of evidence, we should not hesitate to set it aside.

Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. *New Orleans v. Wardens, etc.*, 11 La. Ann. 244.

But assuming that the jury, in respect to these matters, found in behalf of the defendants and concluded that there was no injury to the plaintiff's property or to his physical health or comfort, and based their verdict solely upon the ground that on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting-room or steps from his door, and that thereby the comfortable enjoyment of his dwelling-house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action.

It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort as well as that which causes injury to property. *St. Helens Smelting Co. v. Tipping*, 11 H. L. Cas. 642. But it must injuriously affect the senses or nerves. Thus sound, whether caused by a locomotive

blowing off steam, the ringing of bells or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. *First Baptist Church v. R. R. Co.*, 5 Barb. 79, and cases there cited. To become actionable, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be "something more than fancy, delicacy or fastidiousness." Cooley on Torts, 600.

Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination they become unpleasant and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful.

The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is under the circumstances a private nuisance, then is it also a public nuisance to every traveller who passes on that road, as well as every soldiers' monument in the country. See Cooley on Torts, 602 *et seq.*; *Barnes v. Hathorn*, 54 Me. 124.

We think the verdict is against law, and it must be set aside.

INSURANCE AGAINST FIRE BY ONE HOLDING MECHANIC'S LIEN.

UNITED STATES SUPREME COURT, MARCH 23, 1881.

ROYAL INSURANCE COMPANY OF LIVERPOOL V. STINSON.

One building a hotel on contract, to secure what was due him, filed a mechanic's lien and commenced action thereon. While the action was pending he took a fire policy on the building, the policy stating his interest to be that of contractor and builder. The building being burned, the insured did not further prosecute the action on the lien. In an action upon the policy, held, that the failure of the plaintiff to prosecute his suit upon the lien was not a defense and that plaintiff had an insurable interest in the property.

IN error to the Circuit Court of the United States for the District of Massachusetts. The opinion states sufficient facts.

BRADLEY, J. This was an action on a policy of insurance against loss or damage by fire. Stinson, the plaintiff below, had a contract to build a hotel to be called the Webster House, at Marshfield, Plymouth county, Massachusetts, for the sum of \$25,000, and had nearly completed it; but failing to get his payments from the owner, he stopped work and took the necessary steps for securing a mechanic's lien on the building. For this purpose he filed the required statement with the town clerk, and commenced an action to enforce his lien within the period prescribed by law. Whilst this action was pending, in July, 1875, he procured the policy in question from the plaintiffs in error, the defendants below, insuring him for three months against loss or damage by fire to the amount of \$5,000 on the building—the policy stating his interest to be that of contractor and builder. The loss occurred during the continuance of the policy, and due notice was given. After the fire the plaintiff did not further prosecute his action to enforce the lien, but commenced the present action for the amount of his insurance. When the building contract was entered into, and until the loss occurred, the property on which the building was erected was subject to a

mortgage for a debt of \$17,000, being the purchase-money which the owner had agreed to pay to the former owner, and which is conceded to have been a lien on the whole property prior to that of the plaintiff. Two defenses were made by the insurance company to the action; first, the failure of the plaintiff to prosecute his suit for enforcing his lien; secondly, want of insurable interest, from the alleged fact that the property, at the time of the loss, was not worth more than the amount of the prior mortgage. The court overruled these defenses, and charged the jury substantially as follows, namely: that if the plaintiff had a valid builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court against the equity of redemption of the property, and if it was a valid and subsisting lien at the time of the loss, it was immaterial whether he did or did not subsequently perform those acts, the non-performance of which as conditions subsequent might have dissolved the lien.

The court further instructed the jury in substance that if the plaintiff had such builder's lien when the policy was effected, which could have been enforced by the decree of the appropriate court, and by virtue of which he could have recovered the equity of redemption on that property, then he was entitled to recover, without regard to the question what his equity of redemption might or might not have realized at an auction sale; that if a party has a valid and subsisting second security for a given amount, and he enters into a contract of indemnity against the destruction of that security, and a loss by fire occurs, both parties having full knowledge of the state of the property and the title when the contract is entered into, such insurance would cover that second security, although by the subsequent course of events the older and prior security might have swept away the value of the second; and that if the jury found in this case that this plaintiff had a valid claim for a given amount subsisting at the time of the loss, and which he had done every thing that was required of him to enforce up to the time of the loss, and that it was such a claim, for instance, as he could have recovered a judgment for \$5,000 or \$6,000 or \$8,000, and a judgment against that equity of redemption on that property, that was, for the purposes of this trial, an insurable interest, and an interest which he had on that property, whether by any course of events that property might have been by subsequent events more or less affected, and for the purposes of this trial the court instructed the jury to so consider it.

To this charge, and to the refusal to give instructions to the contrary, the defendants took a bill of exceptions.

We think that the instructions were correct. As to the first point, based on the abandonment by the plaintiff, after the destruction of the building, of the proceedings to enforce his lien, it is apparent from the evidence adduced by the defendants themselves, that it could not have injured them. But aside from this consideration, if the plaintiff had an insurable interest at the time of issuing the policy and at the time of the loss, equal to the amount insured, he had a complete and absolute cause of action against the defendants, and it was no concern of theirs whether he further prosecuted his lien or not, unless they desired to be subrogated to his rights and gave him notice to that effect. Whether, if they had done this, and had offered to indemnify him against all costs and expenses, a refusal on his part to continue the proceedings would have been a defense to this action, it is unnecessary to inquire. No such course was taken by the defendants. We may remark, however, that where a creditor effects insurance on property mortgaged or pledged to him as security for the payment of his debt, the insurers do not become sureties of the

debt, nor do they acquire all the rights of such sureties. They are insurers of the particular property only, and so long as that property is liable for the debt, so long its destruction by fire would be a loss to the creditor within the terms of the policy. A surety of the debt might complain if the creditor should surrender to the debtor collateral securities; but an insurer of property for the benefit of the mortgagee would have no just ground of complaint. True, after a loss has occurred and the insurance has been paid, sufficient to discharge the debt, the insurers may be entitled to be subrogated to the rights of the creditor against the debtor, and to any collateral securities which the creditor may then hold and which are primarily liable for the debt before the insurers. But even then we do not think that the creditor is bound to take any active steps to realize the fruits of a collateral, or to keep it from expiring, unless the insurance be first paid and notice be given to him of a desire on the part of the insurers to be subrogated to his rights, with a tender of indemnity against expenses. We are aware that views somewhat differing from these have been held by respectable authority; but we think without any sound reason. See *May on Insurance*, § 457; *Sussex Co. v. Woodruff*, 2 Dutch. 541. To impose such restrictions and obligations upon the creditor would be to add to the contract of insurance conditions never contemplated by the parties, making of it a mere shadow of security, and increasing the avenues of escape from obligation to pay, already too numerous and oppressive. When a building is insured in the interest of a mortgagee, the insurance company does not inquire what other collaterals he holds, and never reduces its premium on any such consideration.

As to the other question, relating to the insurable interest of the plaintiff, we think that the charge given was equally free from exception. There is no doubt that the owner of the property had an insurable interest to the extent of the value of the building notwithstanding the existence of a mortgage on the property of sufficient amount to absorb it. Leading authorities on the point may be found cited in *May on Insurance*, §§ 81, 82. The remarks of Chief Justice Marshall in delivering the opinion of the court in *Columbian Insurance Co. v. Lawrence*, 2 Pet. 48, are apposite and illustrative. The insured in that case, though in possession, had only a contract for a purchase of the property subject to a condition which had not been complied with, but of which the vendor had taken no advantage at the time of effecting the insurance, or at the time of the loss. The chief justice says: "That an equitable interest may be insured is admitted. We can perceive no reason which excludes an interest held under an executory contract. While the contract subsists, the person claiming under it has undoubtedly a substantial interest in the property. If it be destroyed, the loss in contemplation of law is his. If the purchase-money be paid, it is his in fact. If he owes the purchase-money, the property is its equivalent, and is still valuable to him. The embarrassment of his affairs may be such that his debts may absorb all his property; but this circumstance has never been considered as proving a want of interest in it. The destruction of the property is a real loss to the person in possession, who claims title under an executory contract, and the contingency that his title may be defeated by subsequent events does not prevent this loss."

The principle asserted in these remarks, as well as the reason of the thing, leads to the conclusion that the owner of an equity of redemption has an insurable interest equal to the value of the insurable property embraced therein, whether he is personally liable for the mortgage debt or not. His interest arises from his ownership, carrying with it the incidental right of redeeming the property from the incumbrances on it.

If he is also personally liable for such incumbrances, it only makes his interest more direct and exacting.

Such being the insurable interest of the owner of the equity of redemption, it follows that one who has a mechanic's lien on the property by virtue of a contract with such owner, has an equal insurable interest, limited only by the value of the property and the amount of his claim. In the present case it is admitted that the value of the building insured exceeded the amount of the plaintiff's claim; and that the latter was equal to the amount insured. The insurable interest of the lienholder arises from the nature of the lien, which is a *ius ad rem*. All the owner's rights in the property are potentially his. They are under hypothecation to him for his security, and he can reduce them to possession if the debt be not paid. He is therefore directly interested in the property to the extent of his demand, whatever other security he may hold; and is entitled to insure to that extent, and if a loss occurs, to recover the full amount of his insurance, or so much thereof as may be necessary to satisfy his debt.

We think that there is no error in the record, and the judgment of the Circuit Court is affirmed.

TAXATION OF NATIONAL BANKS.

UNITED STATES SUPREME COURT, MARCH 23, 1881.

GERMAN NATIONAL BANK OF CHICAGO V. KIMBALL.

A court of equity will not enjoin the collection of a local tax upon National bank shares on the ground that the assessment is partial, unequal and unjust, as compared with that upon other property, there being no offer to pay any tax, and the effect of an injunction being to declare the whole tax of a State for the year void.

The cases, *People v. Weaver*, 100 U. S. 539; *Pelton v. National Bank*, 101 id. 143, and *Cumming National Bank*, id. 153, where the inequality was the result of a State statute or of a combination of the assessing officers, distinguished.

A PPEAL from the Circuit Court of the United States for the Northern District of Illinois, by the complainant in an action by it against Mark Kimball, collector of the town of South Chicago, and Samuel H. McCrea, treasurer, etc., to enjoin the collection of a tax. The opinion states the case.

MILLER, J. This is a bill in chancery, filed by the appellant in the Circuit Court for the Northern District of Illinois, to enjoin the defendant, who was the State tax collector, from enforcing payment of the taxes assessed against its shareholders on their shares of the bank stock.

The general ground on which this relief is sought is two-fold, namely: that the assessment violates the provision of the act of Congress concerning National banks, which forbids the States from taxing these shares at any higher rate than other moneyed capital within the State; and that it also violates the provision of the Constitution of the State of Illinois concerning uniformity of taxation. The bill of complaint was dismissed on demurrer and from that decree this appeal is taken.

The bill is made up of averments which are intended to show that the valuation of the property of other persons in the same town, made by the same assessor, is less in proportion to its actual cash value than that of plaintiff's shares; that the same is true in other parts of the State. That some corporations are favored in this valuation, and that certain classes of property are favored in a general way. But there is no distinct averment that the shares of this bank are valued higher for the purpose of taxation than other moneyed capital generally, though this is alleged in regard to particular instances. The allegations are pretty full that the assessments are partial, unequal

and unjust, and do not result in the uniformity of taxation which the Constitution of Illinois requires.

But we think there are two fatal objections to the bill. The first of these is that there is no offer to pay any sum as the tax which the shares of the bank ought to pay.

We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessed against him as it can be plainly seen he ought to pay. That he shall not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government, and cannot throw that share on others, while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder. *State Railroad Tax cases*, 92 U. S. 575.

The bill attempts to evade this rule by alleging that the tax is wholly void, and therefore none of it ought to be paid, and that by reason of the absence of all uniformity of values, it is impossible for any person to compute or ascertain what the stockholders of the complainant bank ought to pay on the shares of the bank. In the case above mentioned this court said, in answer to the first objection: "It is clear that the road-bed within each county is liable to some tax at the same rate that other property is taxed. Why have not complainants paid this tax? It is said they resist the rule by which the value of their road-bed in each county is ascertained. But surely they should pay tax by some rule. * * * Should they pay nothing, and escape wholly, because they have been assessed too high? These questions answer themselves. Before complainants seek the aid of the court to be relieved of the excessive tax, they should pay what is due. Before they ask equitable relief, they should do that justice which is necessary to enable the court to hear them." Id. 616.

In the same case the court said: "It has been repeatedly decided that neither the mere illegality of the tax complained of, nor its injustice, nor irregularity, of themselves give the right to an injunction in a court of equity," and the authorities there cited support the proposition. The whole extent of the injustice complained of in this bill is the inequality of the actual assessment, and for this it is argued the whole tax of the township is void; and as the bill seeks to bring into view the inequality as regards other counties in the State, it follows that if the bill be sustained the entire tax of the State for that year must be declared void, in order that complainant may be relieved of a few thousand dollars and escape taxation for that year entirely.

In the case just referred to this court said: "Perfect equality and perfect uniformity of taxation, as regards individuals and corporations, on the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens, of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by

all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence on which human judgment is founded." Page 612.

These principles are sufficient to decide the case, and were declared by this court in a case arising in the same State and under the same Constitution and revenue laws with the one now before us. The case seems to have escaped the attention of counsel on both sides, as no reference is made to it in the briefs, though they are very full.

In the recent case of *People v. Weaver*, 100 U. S. 539, and *Pellon v. National Bank*, 101 id. 143, and *Cumming v. National Bank*, id. 153, an apparent exception to the universality of the rule is admitted. It is held in these cases that when the inequality of valuation is the result of a statute of the State designed to discriminate injuriously against any class of persons or species of property, a court of equity will give appropriate relief; and also where, though the law itself is unobjectionable, the officers who are appointed to make assessments combine together and establish a rule or principle of valuation, the necessary result of which is to tax one species of property higher than others, and higher than the average rate, the court will also give relief. But the bill before us alleges no such agreement or common action of assessors, and no general rule or discriminating rate adopted by a single assessor, but relies on the numerous instances of partial and unequal valuations which establish no rule on the subject.

So far as any thing of the kind is to be inferred, it is that shares of National bank stock, including plaintiffs, were assessed at only 34 per cent of their value, which, by the board of equalization, was raised to 53 per cent; and other property more, and still other less.

The case, then, made by plaintiff is this: that the shares of the bank are taxed at the same per cent on their assessed value as all other property; that the valuation of these shares, on which this rate is apportioned, is only about half their actual value; that some other property is valued at less than half of its cash value, and for this reason no tax should be paid on the shares of complainant's bank.

And if any should be paid at all, the sum which may in the end be found justly due, and which, during the four or five years of this litigation, must be paid for the support of the government by some one else, shall remain in complainant's pocket until it is ascertained precisely to the last dollar what each share should have paid.

We think the Circuit Court did not err in dismissing such a bill, and its decree is affirmed.

REMOVAL TO FEDERAL COURT OF ACTION TO TRY TITLE TO STATE OFFICE.

UNITED STATES SUPREME COURT, MARCH 28, 1881.

DUBUCLET V. STATE OF LOUISIANA EX REL. MONCURE.

The provision of section 2010, United States Revised Statutes, giving a right of action in the Federal courts to one defeated or deprived of an election to an office by reason of a denial of the right of citizens to vote on account of race, etc., does not authorize a removal to the Federal courts of an action for an office, begun in a State court.

IN error to the Circuit Court of the United States for the District of Louisiana. The opinion states the case.

WAITE, J. This is a suit begun in a State court of Louisiana, on the 20th of March, 1877, to try the title of Dubuclet, the plaintiff in error, to the office of treasurer of State, the duties of which he was perform-

ing under a commission from the governor, dated December 31, 1874. The allegations of the petition are, in substance, that Moncure was in fact elected to the office at an election which was held on the 2d of November, 1874, but that the returning board, by a false and illegal canvass and compilation of the votes, declared that a majority were in favor of Dubuclet, who was thereupon commissioned.

On the 2d of April, 1877, Dubuclet filed his petition for the removal of the suit to the Circuit Court of the United States for the District of Louisiana. This petition was granted by the State court, but when the case got to the Circuit Court it was remanded on the ground that it was not in law removable. To reverse that order of the Circuit Court this writ of error was brought.

It is conceded that according to the decisions in *Strauder v. W. Virginia*, 100 U. S. 303, and *Virginia v. Rives*, id. 313, a case was not made for removal under section 641, Revised Statutes. We think it equally clear that the showing in the petition was not sufficient to effect a transfer under the act of March 3, 1875, 18 Stat. 470, ch. 137, § 2. The averments relied on for this purpose are as follows:

"Petitioner further represents that at the election held in this State on the day of November, A. D. 1874, for State treasurer, at which petitioner was a candidate, in the parishes of De Soto, Bienville, Union, Grant, and other parishes of the State, there were more than five thousand citizens of color of the State of Louisiana and of the United States qualified by law to vote at said election, and who offered to vote, and if they had been permitted to vote would have voted for petitioner, and against Jno. C. Moncure, relator, and who were prevented, hindered and controlled and intimidated from voting for petitioner by relator Moncure and those acting in his interest, by means of bribery, threats of depriving them of employment and occupation, and of ejecting them from rented houses, lands, and other property, and by threats of refusing to renew leases or contracts for labor, and by threats of violence to them or their families, in violation of their and your petitioner's civil rights, and in violation of the laws of the United States, made and enacted to protect the civil rights of citizens of color and previous condition of servitude.

"Petitioner further represents, that in consequence of said illegal acts and violation of the laws of the State of Louisiana and the United States, by relator Moncure, and those acting in his interest, at and before said election, and for the purpose of defeating your petitioner for treasurer of the State of Louisiana, the returning officers of election of the State of Louisiana, in accordance with law, and their sworn duty, duly returned your petitioner elected, by rejecting the votes cast in the several parishes and at the several polls where relators, in their petition, complain the vote should have been counted in his, Moncure's, favor, and where they complain the vote should not have been counted in favor of petitioner.

"Petitioner further represents that the suit of relators is for the object and purpose of depriving your petitioner of the office of treasurer of the State of Louisiana, by reason of the denial of the aforesaid citizens the right to vote on account of race, color and previous condition of servitude, in violation of the laws of the United States made to protect the equal civil rights of petitioner and those offering to vote for him, and by reason of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States."

If all that is here alleged be true, it does not show a case "arising under the Constitution or laws of the United States." If Moncure was guilty of what is charged against him, he had violated the provisions of section 5507 of the Revised Statutes, but that gave

Dubuclet no right, under the laws of the United States, to have the entire vote of the designated parishes thrown out by the canvassers of the election. Moncure might have been prosecuted for what he had done, but neither his prosecution, conviction nor punishment would of itself set aside the vote of the parishes or polls as returned. The effect of such conduct on the validity of the election depended, so far as this record shows, on the laws of the State and not on those of the United States. Whether Moncure and those in his interest have been guilty of a crime punishable by law, may depend alone on the laws of the United States, but the United States have not as yet attempted to declare what effect such unlawful acts shall have on the election of a purely State officer. The laws of Louisiana, it is conceded, gave colored men the right to vote at all elections, and because in this case they were prevented by intimidation from exercising that privilege, the properly constituted canvassing board of the State, acting, as is alleged by Dubuclet in his petition, "in accordance to law and their sworn duty," rejected all votes from the parishes and polls where intimidation occurred, and thus found that he was elected. Had the vote of these parishes been counted, the result would have been in favor of Moncure. Thus, according to Dubuclet's own showing, his right to his office depends on the laws of the State. Because the laws of the State require the returning board to reject the votes of the parishes and polls where intimidation, whether of white or colored voters, materially interfered with the election, the majority of the votes cast at the election, which could be counted, were in his favor, and therefore he is in office. Such is in effect his allegation in the petition for removal. Clearly, then, on his own showing, his right arises not so much under the Constitution and Laws of the United States as under those of the State.

Section 2010, Revised Statutes, gives one who "is defeated or deprived of his election," to such an office as Dubuclet holds, the right of suing for his office in the courts of the United States, "where it appears that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who offer to vote, on account of race, color or previous condition of servitude." That certainly is not this case; for Dubuclet, instead of being defeated or deprived of his election, is now in office under his election duly declared pursuant to the laws of the State, and exercising all the duties of his place and enjoying all its privileges. This section provides for an original suit by one out of office to get in, but not for the removal of a suit against one in office to put him out. It is unnecessary to discuss the validity of the law in its application to purely State offices, for it does not affect this case. It is one thing to have the right to sue in the courts of the United States, and another to transfer to that jurisdiction a suit lawfully begun in a State court.

We think it clear that the Circuit Court ought not to have taken jurisdiction of the case, and its judgment to that effect is consequently affirmed.

NEGLIGENCE OF PASSENGER ON STREET RAILWAY.

PENNSYLVANIA SUPREME COURT, JAN. 24, 1881.

GERMANTOWN PASSENGER RAILWAY CO. v. WALLING.

Riding on the front platform of a street car which is crowded is not contributory negligence *per se*, precluding a recovery for the death of a passenger occurring while so riding.

ACTION for the death of Bernard Walling, claimed to be caused by the negligence of the railway company named, the defendant below. The facts

were these: On the second of October, 1876, deceased took passage in one of defendant's street-cars; when the car stopped for him he tried to get on the rear platform but could not do so on account of the crowd thereon. He then went to the front platform and found a place upon the step which he took and kept by holding with one hand on to the iron of the dasher and with the other hand to an iron bar under the front window of the car. While the car was going round a corner some little time after deceased had commenced to ride, several passengers were thrown against him, forcing him to let go his hold on the iron bar under the window, and causing him to fall over in front of the car in consequence of which he was run over and killed. There was a conflict of evidence as to the cause of the passengers being forced against deceased, whether by a jolt of the car resulting from a defect in the rails at that point or by the movements of a tinsmith who with his furnace and tools was at the time trying to get off the car. From a judgment in favor of plaintiff below defendant took a writ of error.

C. H. Gross and T. J. Barger, for plaintiff in error.

R. P. White, for defendant in error.

TRUNKY, J. At the outset the defendant (plaintiff in error) claims that but two questions are presented in the assignments. 1. Was Bernard Walling guilty of contributory negligence *per se*, so as to make it the duty of the court below to instruct the jury that he could not recover? And 2. Was the evidence of damage too vague under the requirements of the act of April 4, 1868, to justify a verdict for the plaintiffs below?

In fact the second question is not raised in the record. As a general rule, where specific instructions were not requested by a proper point and no exceptions were taken to such as were given, there is no error for correction. Complaint is not now made of the charge respecting damages; the only errors alleged are the refusal of the defendant's points, and they were upon another branch of the case. Surely if the decedent's death, without fault in him, was caused by the defendant's default, the plaintiffs were entitled to recover. In a charge of marked accuracy and fairness the questions of defendant's negligence and of the decedent's concurrent negligence were submitted to the jury. It is not pretended that the court could have refused to submit to them to decide whether the defendant was negligent, and it is conceded that fact is settled by the verdict. If it was the duty of the court to determine there was contributory negligence by the decedent, all the defendant's points should have been affirmed. This is the sole question now for consideration—the one first stated by defendant.

The facts claimed to reveal want of due care in the decedent are not in dispute. "He voluntarily got upon a car so crowded that he was obliged to take a position on the step of the front platform of the car, occupied at the time by two other men between whom he squeezed into a position where for the purpose of retaining his place he was obliged to hold fast with one hand to the dasher and the other to the iron bar under the window of the car"—so says the defendant. In addition, the car stopped and received him as a passenger. The driver testifies he knew the car was so full a man could not go through to the back platform. Crowded as it was, the conductor says there was room for more, both inside and on the rear platform. But Walling first tried to get on the rear platform and falling went to the front.

Conductor, driver and passengers acted as if there was room, so long as a man could find a rest for his feet and a place to hold on with his hands. Nor was that action exceptional. Notoriously it was very common in 1876, and perhaps it is not infrequent at this

day. The companies do not consider such practice dangerous, for they knowingly suffer it and are parties to it. Their cars stop for passengers when none but experienced conductors could see a footing inside or out. The risk in travelling at the rate of six miles an hour is not that when the rate is sixty or even thirty. An act which would strike all minds as gross carelessness in a passenger on a train drawn by steam-power, might be prudent if done on a horse-car. Rules prescribed for observance of passengers on steam railroads, which run their trains at great speed, are very different from those on street railways. In absence of express rules every passenger knows that what might be consistent with safety on one would be extremely hazardous on the other.

Street railway companies have all along considered their platforms a place of safety, and so have the public: Shall the court say that riding on a platform is so dangerous that one who pays for his standing there can recover nothing for an injury arising from the company's default?

Meese v. Lynn & Boston R. Co., 8 Allen (Mass.), 234, was a case much like this in its facts. The court said: "It is well known that the highest speed of a horse-railroad car is very moderate and the driver easily controls it and stops the car by means of his voice, his reins, and his brake. In turning round an angle from one street to another passengers are not required to expect that he will drive at a rapid rate, but on the contrary might reasonably expect a careful driver to slacken his speed. The seats inside are not the only places where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full, and then to stand on the platforms till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platforms. Neither the officers of these corporations nor the managers of the cars nor the travelling public seem to regard this practice as hazardous; nor does experience thus far seem to require that it should be restrained on account of its danger. There is therefore no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care. It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence." These remarks are quite applicable to the case in hand.

Standing on the front platform of a horse-car when there is room inside, is not conclusive evidence that the person injured by the driver's default was not exercising due care. *Maguire v. Middlesex R. Co.*, 115 Mass. 239. A street railway company has the right to carry passengers on the platforms, and if a passenger be injured while standing there without objection by the company's agent, whether the injury was with his contributory negligence is for the jury to decide under all the facts and circumstances detailed in evidence. *Burns v. Bellefontaine & St. L. R. Co.*, 50 Mo. 139.

It has also been decided in other States that if a passenger be injured while standing on the platform of a street or horse-car the question of his contributory negligence is one of fact for the jury.

So little danger exists in riding on the platforms, accidents to passengers while thus riding are so rare, that this is the first time the question raised has been presented in Pennsylvania. We think the decisions in other States above referred to are sound. They accord with well-settled principles. What is and what is not negligence in a particular case is generally a question for the jury and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. When the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as a matter of law. When both the duty and the measure of its performance are to be ascertained as facts, a jury alone can determine

what is negligence and whether it has been proven. *West Chester & Philadelphia R. Co. v. McElwee*, 17 P. F. S. 311.

It is the duty of courts in cases of clear negligence arising from an obvious disregard of duty and safety to determine it as a question of law. This principle was applied in the numerous cases cited by defendant. It should always be when the admitted facts or the proofs adduced by a party conclusively show his negligence.

The undisputed facts in this case show that the measure of duty on the part of the deceased was ordinary and reasonable care, and what that was and whether he complied with it could only be determined by the jury.

Judgment affirmed.

EMPLOYER NOT LIABLE FOR NEGLIGENCE OF CONTRACTOR.

MAINE SUPREME JUDICIAL COURT, AUGUST 4, 1880.

MCCARTHY V. SECOND PARISH OF PORTLAND.

The employment of one who carries on an independent business, and who in doing his work does not act under the direction and control of his employer but determines for himself in what manner it shall be carried on, does not create the relation of master and servant; and the employer would not be responsible for the negligence of a person thus employed nor that of his servants.

A slater by trade, who carried on the business of slater in Portland and had done so for more than twenty years, keeping a shop and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive, was held to be carrying on what the law denominates an independent business.

ACTION for negligence. The verdict below was in favor of plaintiff for \$3,000. The facts appear in the opinion.

Nathan & Henry B. Cleaves, for plaintiff.

W. W. Thomas, Jr., and *George E. Bird*, for defendants.

WALTON, J. Some men at work upon the roof of the Second Parish church in Portland carelessly allowed a ladder in use by them to be blown down by the wind and it fell upon the plaintiff and injured him. The question is whether the parish is responsible for the injury. We think not. True, the law makes a master responsible for the negligence of his servant, but the employment of one who carries on an independent business, and in doing his work does not act under the direction and control of his employer, but determines for himself in what manner it shall be carried on, does not create the relation of master and servant, and this responsibility does not attach.

The general rule, says Judge Thomas in *Linton v. Smith*, 8 Gray, 147, is that he who does the injury must respond; that the well-known exception is that the master shall be responsible for the doings of the servant whom he selects, and through whom, in legal contemplation, he acts; but when the person employed is in the exercise of a distinct and independent employment and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach.

In *DeForrest v. Wright*, 2 Mich. 368, the court say that where an employee is exercising a distinct and independent employment and is not under the immediate control, direction or supervision of the employer, the latter is not responsible for his employee's negligence. In that case a drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer at so much per barrel, and

while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against the plaintiff and injured him as he was passing upon the sidewalk, and it was held that the employer was not liable for the injury. In another case in the same volume, *Moore v. Sanborne*, 2 Mich. 519, the court held that where one was employed to cut and haul all the logs on certain land of the employer and deliver them at a place named, the employer to have nothing to do with the cutting or hauling, the relation of master and servant was not thereby created, and that the employer would not be liable for the carelessness of his employee in performing the labor.

"Although in a general sense every one who enters into a contract may be called a 'contractor,' yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do specific jobs of work for other persons without submitting himself to their control with respect to all the petty details of the work. * * * The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work and not as to the means by which it is to be accomplished."

* * * "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely according to his own ideas or in accordance with a plan previously given him by the person for whom the work is done, without being subject to the latter with respect to the details of the work, is clearly a contractor and not a servant." S. & R. on Negligence, §§ 76, 77.

"The difficulty always is to say whose servant the person is that does the injury; when you decide that the question is solved. * * * When the person who does the injury exercises an independent employment the party employing him is clearly not liable." Williams, J., in *Mulligan v. Wedge*, 12 Ad. & El. 177. In that case a butcher employed a drover to drive a beast home for him and the drover employed a boy, and through the boy's negligent driving the beast ran into the plaintiff's premises and damaged his property, and the court held that the boy was the servant of the drover and not the servant of the butcher, and that the latter was not liable for the injury.

"I understand it to be a clear rule in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control of the work; that you cannot go further back and make the employer of that person liable." Willes, J., in *Murray v. Currie*, L. R., 6 C. P. 24. In that case a stevedore was employed to unload a vessel, and the plaintiff was injured by the carelessness of one of the vessel's crew, who at the time of the injury was working for and under the direction of the stevedore, and the court held that the employer of the stevedore was not liable for the injury.

In *Reedie v. Railway Co.*, 4 Exch. 244, a contractor's workmen, in constructing a bridge over a public highway, negligently allowed a stone to fall upon one passing beneath, and it was held that the railway company was not responsible for the injury. Platt, B., put this significant inquiry: "Suppose the occupier of a house were to direct a bricklayer to make certain repairs to it, and one of his workmen, through clumsiness, were to let a brick fall upon a passer-by, is the owner to be liable?" The decision shows, that in the opinion of the court, the question should be answered in the negative.

In *Murphy v. Caralli*, 3 Hurl. & C. 461, the plaintiff was injured by the falling of a bale of cotton, which had been negligently piled by persons employed by the

defendant; but it appearing that the piling was done under the direction of one Jones, who was employed by the owner of the warehouse in which the cotton was stored, the court held that this fact relieved the defendant from responsibility. "The bales which caused the mischief," said Pollock, C. B., "having been stowed under Jones' directions, I think that he and his master alone are responsible."

In *Pearson v. Cox*, 2 C. P. Div. 369, a tool, called a straightedge, was jostled out of the window of a house that was being built, and fell upon the plaintiff and injured him; but it appearing that the act which caused the straightedge to fall was the act of one of the men employed by the mason, a sub-contractor, the court held that the builders of the house were not liable.

In *Forsyth v. Hooper*, 11 Allen, 419, the defendants had contracted to cast a chime of bells and place them in the tower of the Arlington street church in Boston. The plaintiff was injured by a chain carelessly thrown from the tower by one of the men engaged in hoisting the bells. The jury returned a verdict for the defendants, and the court sustained it upon the ground that the defendants had employed one Leonard to do this part of the work, and that the evidence, though conflicting, was sufficient to justify the jury in finding that the defendants had relinquished to Leonard the management and control of the manner of doing the work.

In *Wood v. Cobb*, 13 Allen, 58, the court say it is too well settled to admit of debate that the employer of one who exercises an independent employment is not responsible for the negligence of one in the latter's service. In that case the defendants, who were dealers in fish, had employed a truckman to deliver fish to their customers each Friday, for a dollar a day, he furnishing his own team and taking such route as suited his convenience. On one occasion, being sick, he told his servant to get help, and the defendants allowed a boy in their employ to drive one of the teams; and he, while doing so, drove against the plaintiff and caused the injury complained of; and the court held that at the time of the injury, the boy was the servant of the truckman, and not the servant of the defendants, and that the latter were not responsible for the injury.

In *Eaton v. E. & N. A. Railway Co.*, 59 Me. 520, the question we are now considering was fully examined, and the doctrine of the foregoing cases affirmed.

Assuming, therefore, that the law is now well settled that an employer is not responsible for a contractor's negligence, nor for the negligence of a contractor's workmen; and that one who carries on an independent business, and in the line of his business is employed to do a job of work, and in doing it, does not act under the direction and control of his employer, but determines for himself in what manner it shall be done, is a contractor, within the meaning of the law, let us apply it to the case before us.

The case shows that Canselo Winship was a slater by trade, and carried on the business of a slater, and had done so, in Portland, for more than twenty years, keeping a shop, and a slate on which to receive orders, and men constantly in his employ to assist in executing such orders as he should receive. He was therefore carrying on what the law denominates an independent business. The case also shows that he had been employed to slate the Second Parish church, in Portland, then being built, and to do other work upon it; that the roof afterward leaked and he was requested to repair it; that he took two men, then in his employ, and went into the tower of the church and assisted them in putting out a ladder to enable them to get on and off the roof, and to carry on the materials needed to make the necessary repairs; that the men continued to use the ladder (taking it into the tower when they

went to their dinners, and putting it out again upon their return) till about three o'clock in the afternoon, when it was blown down and fell upon the plaintiff, as already stated. No officer or agent of the parish interfered with the men, or gave them any directions whatever. On the contrary, the chairman of the parish committee, by whom Winship was employed, testifies that he intrusted the matter entirely to him, as he had been in the habit of doing; and this is confirmed by the men and contradicted by no one. Winship paid his men but a dollar and a half a day, while he charged and received from the parish four dollars a day for their labor.

Here then we have a case where a man who is carrying on an independent business, is employed, in the regular course of his business, to do a job of work; he is left entirely free to do the work as he pleases; he sets two of his own servants at work upon the job, charging his employer a much larger sum for their labor than he pays them; they so negligently place a ladder in use by them that it is blown down by the wind and injures a passer-by. Now, if it be a rule of law that one who carries on an independent business, and in doing jobs of work for others acts independently, so far as the manner of doing it is concerned, is a contractor, and not the servant of his employer, can there be a plainer case for the application of the rule than this? We think not. If Winship and his workmen can under these circumstances be regarded as the servants of the parish, so as to make the parish liable for their negligence, we fail to see why the same rule would not apply to the expressman, who is employed to carry a trunk to a depot, or to the hackman who is employed to drive one about town, or to the scissors-grinder who stops in front of a house and is employed to sharpen the knives and the scissors of its occupants, or to the plumber and the gas fitter; and why it would not have applied to the drover, and the steydore, and the truckman, and the drayman, in the case cited. We think it would. In principle the cases are not distinguishable.

Our conclusion is, that the verdict in this case is clearly wrong and must be set aside.

Verdict set aside.

UNITED STATES SUPREME COURT ABSTRACT.

APPEAL—WHAT IS NOT FINAL DECREE IN PARTITION SUIT.—F. brought a suit in partition, the petition alleging that she was the owner of one-half the property; that she was not willing to continue her joint ownership, and that a partition by sale was necessary, as a division could not be made in kind. The prayer of her petition was in accordance with these allegations. The court below made a decree that F. was the owner of one-half the property and that the case be referred to a master "to proceed to a partition according to law, under the direction of the court." *Held*, not a final decree from which an appeal could be taken to the Supreme Court. In partition causes, courts of equity first ascertain the rights of the several persons interested, and then make a division of the property. After the division has been made and confirmed by the court, the partition, if in kind, is completed by mutual conveyances of the allotments to the several parties. *Mitford's Eq. Pl.* (4th ed.), by Jeremy, 120; *1 Story's Eq.*, § 660; *2 Daniel's Ch. Pr.* (4th Am. ed.) 1151. A decree cannot be said to be final until the court has completed its adjudication of the cause. Here the several interests of the parties in the land have been ascertained and determined, but this is merely preparatory to the final relief which is sought; that is to say, a settling off to the complainant in severalty her share of the property in money or in kind.

This can only be done by a further decree of the court. Appeal from United States Circ. Ct., Louisiana, dismissed. *Green v. Fisk*. Opinion by Waite, C. J. [Decided March 28, 1881.]

CONSTITUTIONAL LAW—IMPAIRING CONTRACT—STATE CONTROL OVER OPERATION OF RAILROADS.—The N. Company was chartered by the State of Connecticut to operate a railroad, its charter providing that the same may be altered, amended or repealed at the pleasure of the Legislature. The railroad was built and three stations established in the town of S. Thereafter the Legislature passed a statute forbidding the abandonment of any established railroad station without the approval of the State railroad commissioners. The N. Company, being desirous of abandoning two of its stations in the town of S., applied to the railroad commissioners for permission so to do. The commissioners granted the permission upon condition that the company should erect an acceptable passenger-house at the remaining station. The company thereupon erected a passenger-house as required by the commissioners, at an expense of \$10,000, and abandoned the two stations as permitted. Subsequently the Legislature passed an act requiring the company to stop its trains at one of the abandoned stations. *Held*, that the enactment last mentioned was authorized under the charter above named and was not invalid as impairing the obligation of any contract rights which the N. Company had acquired from the State. See *State v. New Haven & N. Co.*, 37 Conn. 163, and 43 Id. 66. Judgment of Connecticut Supreme Court of Errors affirmed. *New Haven & North Hampton Company v. Hamersley*. Opinion by Waite, C. J. [Decided March 7, 1881.]

MUNICIPAL BONDS—CONSTRUCTION OF STATUTE AUTHORIZING AID TO RAILROAD.—A statute of Arkansas provided as follows: "That any county in this State may subscribe to the stock of any railroad in this State, now chartered or incorporated, or which shall hereafter be chartered or incorporated, under and in accordance with the laws of this State, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions, and upon such conditions as the county court may require, and the president and directors of such company may approve; provided that the amount of such subscription shall not exceed one hundred thousand dollars, and the consent of the inhabitants of such county to such subscription shall be first obtained in the manner hereinafter provided." *Held*, that this did not restrict a county to a single subscription. It might subscribe to any railroad in the State, to the extent of one hundred thousand dollars, and such subscription would not exhaust its power under the statute. Judgment of United States Circ. Ct., E. D. Arkansas, affirmed. *Chicot County v. Lewis*. Opinion by Bradley, J. [Decided March 28, 1881.]

STATUTORY CONSTRUCTION—POWER OF EXECUTIVE TO REMOVE ARMY OFFICERS.—The true construction of the 5th section of the army appropriation act of July 17, 1866 (14 Stat. 82), is that whereas, under the act of July 17, 1862 (12 Stat. 596), as before its passage, the President alone had the power to dismiss an officer in the military or naval service for any cause which in his judgment either rendered the officer unfit for or whose dismissal would promote the public service, he alone shall not thereafter, in time of peace, exercise such power of dismissal except in pursuance of a court-martial sentence to that effect, or in commutation thereof. Congress did not intend by the act of July 17, 1866, to deny or restrict the power of the President, with the concurrence of the Senate, to displace officers in the army or navy by the appointment of others in

their places. See *Ex parte Hennen*, 13 Pet. 259; 1 Kent's Com. 309 et seq.; 2 Story on Const. (4th ed.) §§ 1,537-1,540 and notes; 2 Marshall's Life of Washington, 162; Sergeant's Const. Law, 372; Rawls on the Const., ch. 14; Dubarry's case, 4 Atty-Gen. Opinions, 612; Lansing's case, 6 Id. 4; *Mimmaok v. United States*, 97 U. S. 437. Judgment of Court of Claims affirmed. *Blake v. United States*. Opinion by Harlan, J. [Decided March 28, 1881.]

TAXATION — EXEMPTION FROM, NOT TO BE PRESUMED — GRANT TO ONE RAILROAD COMPANY OF POWERS AND PRIVILEGES OF ANOTHER. — By a statute of Maryland the Annapolis & Elk Ridge Railroad Company was "invested with all the rights and powers necessary to the construction and repair" of its railroad, and for that purpose was to "have and use all the powers and privileges" and be subject to the obligations contained in certain enumerated sections of the Baltimore & Ohio Railroad Company's charter. Under one of these sections the shares of the capital stock of the Baltimore & Ohio Railroad Company were exempted from taxation. Held, that this did not exempt from taxation the property of the Annapolis & Elk Ridge Railroad Company. Grants of immunity from taxation are never to be presumed. On the contrary, all presumptions are the other way, and unless an exemption is clearly established all property must bear its just share of the burdens of taxation. The last-named company was not granted all the privileges of the Baltimore & Ohio Company named in the enumerated sections, but only of such as were necessary to carry into effect the objects for which the new company was incorporated. Such is the import of the language employed. Consequently only such of the privileges of the old company could be enjoyed by the new as were appropriate to the work the new company was authorized to do. See *Railroad Company v. Gaines*, 97 U. S. 711; *Morgan v. Louisiana*, 93 Id. 217. Judgment of Maryland Court of Appeals affirmed. *Annapolis & Elk Ridge Railroad Co. v. Commissioners of Anne Arundel County*. Opinion by Walte, C. J. [Decided March 7, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

ILLEGAL CONTRACT — EXPENSES IN EVADING COURT PROCESS. — Expenses incurred by an employee in evading the process of a court, at the request and for the benefit of his employer, cannot be recovered upon a promise of reimbursement. "Courts owe it to public justice, and to their own integrity, to refuse to become parties to contracts essentially violating morality or public policy by entertaining actions upon them. It is judicial duty always to turn a suitor, upon such a contract, out of court, whenever and however the contract is made to appear." *Wight v. Rindakopt*, 43 Wis. 348. See, also, *Badger v. Williams*, 1 Chipman (Vt.) 137; *Valentine v. Stewart*, 15 Cal. 387. The cases, *Armstrong v. Toler*, 11 Wheat. 258, and *Planters' Bank v. Union Bank*, 16 Wall. 483, distinguished. *United States Cir. Ct., E. D. Wisconsin*, Dec. 22, 1880. *Bierbauer v. Wirth*. Opinion by Dyer, D. J.

MUNICIPAL CORPORATION — PRECINCT IN COUNTY IS NOT SUABLE FOR BONDS ISSUED FOR IT BY COUNTY IN WHICH IT IS, BUT COUNTY LIABLE. — A statute of Nebraska provided, *inter alia*, that "any precinct, in any organized county in this State, shall have the privilege of voting to aid works of internal improvement, and be entitled to all the privileges conferred upon counties and cities by the provisions of this act, and in such case the [county] commissioners shall issue special bonds for such precinct, and a tax

*Appearing in 5 Federal Reporter.

to pay the same shall be levied upon the property within the bounds of such precinct. Such precinct bonds shall be the same as other bonds, but shall contain a statement showing the special nature of such bonds." Held, that a precinct issuing bonds under the terms of this statute was not thereby impliedly created a body corporate in order to insure the collection of the coupons attached to such bonds. In *Jordan v. Cass County*, 8 Dill. 185, a case similar to this, the court said: "Undoubtedly the Legislature designed that there should be a remedy upon these bonds, and if it were consistent with the legislative intent the court would be justified in holding, if necessary to afford an effectual remedy, that the township was created by implication, as to this particular matter, a body corporate, and as such liable to be sued." See *Russell v. Devon*, 2 T. R. 672; *Levy Court v. Coroner*, 2 Wall. 501; *Inhabitants v. Wood*, 18 Mass. 192; *Bradley v. Case*, 3 Scam. 608; *North Hempstead v. Hempstead*, 2 Wend. 100; *Beesey v. Unity Plantation*, 65 Me. 347; *Freeholders of Sussex v. Strader*, 3 Harr. (N. J.) 117; *Cumberland v. Armstrong*, 3 Devereux, 284; *Dean v. Davis*, 51 Col. 406; *Gaskell v. Dudley*, 6 Metc. 532; *Hunnehan v. Fire District*, 37 Vt. 40, where a fire district authorized to purchase an engine, was held to be a corporation; *Ang. & Ames on Corp.*, §§ 77-79; *Commissioner of Roads v. McPherson*, 1 Spear (S. C.) 218; *Governor v. Allen*, 8 Humph. 176. An examination of these authorities will show that it is only in cases where a *bona fide* contract cannot be otherwise enforced, that courts will hold that a corporation has been created by implication. In the case at bar the bonds were held enforceable against the county in which the precinct was located, to be paid by a tax levied upon property within the precinct. *United States Cir. Ct., Nebraska*, January, 1881. *Blair v. West Point Precinct*. Opinion by McCrary, C. J.

VOTER — UNDER NEW YORK LAW — RESIDENCE — A MARINE LIVING IN UNITED STATES BARRACKS DOES NOT GAIN RESIDENCE. — By a provision of the Constitution of the State of New York, a prior residence of thirty days in the election district is necessary to entitle a person to vote. Held, that under this provision, in order to prove a residence in an election district, something more must be shown than the fact of having lived in the United States marine barracks, located within the limits of such district, in the capacity of a marine. A residence in Brooklyn is not shown by proving the fact of leaving the place of former residence and coming to Brooklyn for the purpose of enlisting as a marine, with the intent to return in case the application to be enlisted should be refused. The acts of leaving New York and enlisting at the Brooklyn navy yard, under such circumstances, are to be deemed consecutive acts. No residence is acquired while proceeding through the streets of Brooklyn on the way to the navy yard for the purpose of enlisting, with the intent to return to New York if not enlisted. No residence in the election district wherein the marine barracks are located is acquired by the act of enlisting there as a member of the marine corps of the United States navy. The fact that the practice of the navy justifies an expectation, on the part of one enlisting as a marine in the Brooklyn navy yard, that the first two years of the term of enlistment would be spent in the Brooklyn navy yard, does not alter the case. See *Frost v. Brislin*, 19 Wend. 14; *Ames v. Duryea*, 6 Lans. 155. *United States Cir. Ct., E. D. New York*, Nov. 1, 1880. *In re Green*. Opinion by Benedict, D. J.

ILLINOIS SUPREME COURT ABSTRACT.

EMINENT DOMAIN — PROPERTY ALREADY APPROPRIATED TO PUBLIC USE CANNOT BE TAKEN. — When property has already been appropriated to public use, a

is in fact in such use in the hands of one railroad corporation, it cannot rightfully be taken away from such corporation, even by authority of a statute, for the purpose of subjecting it to the same public use in the hands of another corporation. To warrant the taking of property of one party already appropriated to public use, and placing it wholly or in part in the hands of another party for a public use, it is essential that the new use be a different use and also that the change from the present use shall be for the benefit of the public. Whether the new use be different from the present one is a judicial question for the courts to decide, but where such new use may be in its nature a public benefit, whether the change will be for the benefit of the public is a political question to be determined by the law-making power. *Lake Shore & Michigan Southern Railway Co. v. Chicago & Western Indiana Railroad Co.* Opinion by Dickey, J. [Decided Feb. 3, 1881.]

MUNICIPAL CORPORATION — LIABILITY FOR ACT ULTRA VIRES. — Where a city is empowered to provide for the erection of lamp-posts and for lighting the city by gas, even if it is not authorized to enter into a contract to light the city for thirty years, such a contract will be good as to the time it is executed, without objection on the part of the city, and no steps have been taken to avoid the contract, and the city will be compelled to pay for the same at the contract price. *City of East St. Louis v. East St. Louis Gas & Coke Co.* Opinion by Sheldon, J. [Decided Feb. 3, 1881.]

RECORDING ACT — WHO IS NOT SUBSEQUENT PURCHASER. — Where A executed a mortgage on lots to B and the same were subsequently sold under a prior lien against the same and passed redemption, whereby the mortgage was extinguished, and about a year after the date of the mortgage A bought the same lots of the holder of the title, giving him mortgage for the purchase-money, which the vendee failed to place on record for several months, it was held, that while the mortgage from A to B was revived as to the title subsequently acquired by A, B was not a subsequent purchaser under the recording laws, and did not acquire a prior lien on the lots from the delay in A's grantor to record his mortgage. *Elder v. Derby.* Opinion by Walker, J. [Decided March 21, 1881.]

COLORADO SUPREME COURT ABSTRACT.

DECEMBER, 1880.

CONTRACT — MUTUALITY REQUIRED TO RENDER VALID — BOND TO CONVEY LAND AT A SPECIFIED PRICE. — Plaintiffs below, the original locators of a mining claim, executed to L. a bond in the penal sum of \$1,000, conditioned to convey the claim to him on payment to them of \$550 before a time specified. The bond was not signed by L., contained no clause granting him permission during the option, and no consideration was expressed for the option. Held, that such bond, until acceptance by L., was not a binding contract; might be revoked by plaintiffs, and could not be enforced by them against L. A bond of this nature is, in the first instance, a mere option to the obligee, to purchase at any time within the period therein limited, upon simple compliance with the terms stated. Until acceptance by the obligee, there being neither mutuality nor consideration, it imposes no obligation whatever on either party, and is subject to revocation by the maker at any time. It lacks the elements of a valid and binding contract. It is not signed by the purchaser, and no consideration is expressed for the option given. Not being enforceable to any degree

against the purchaser, he is equally incapable of enforcing it against the seller, for contracts to be obligatory upon either party must be mutual. Until acceptance by the obligee, or the performance of some act equivalent to an election to purchase under the terms mentioned therein, it is a *nudum pactum*. Its legal effect is that of a continuing offer to sell, which is capable of being converted into a valid contract by a tender of the purchase-money, or performance of its conditions. *Boston & M. R. Co. v. Bartlett, & Cosh.* 224; *Corson v. Mulvany*, 49 Penn. St. 88; *Perkins v. Hadael*, 50 Ill. 216; *Esmay v. Gorton*, 18 Id. 483; *Estes v. Furlong*, 59 Id. 300; *Vassault v. Edwards*, 43 Cal. 456; *Stevenson v. McLean*, Q. B., 11 C. L. J. 229; *Rutledge v. Grant*, 4 Bing. 653; *Cook v. Oxley*, 3 T. R. 653; *Elison v. Henshaw*, 4 Wheat. 226; *Carr v. Duval*, 14 Pet. 77; *Fry on Sp. Perf.*, §§ 64, 166, 167, 177-179. *Gordon v. Darnell.* Opinion by Beck, J.

CORPORATION — LIABILITY OF STOCKHOLDERS FOR UNPAID ASSESSMENTS — ACTION TO ENFORCE WILL LIE AGAINST INDIVIDUAL STOCKHOLDER BY CREDITORS WHO IS ALSO STOCKHOLDER. — The statute of Colorado relating to corporations provides thus: "All the stockholders of every company incorporated under the provisions of this article shall be severally individually liable to the creditors of the company in which they are stockholders, to the amount of unpaid stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited shall be paid in." Held, first, that one of the creditors of a corporation can maintain an action at law for the recovery of his individual claim against a stockholder who is indebted for his stock (*Culver v. Third Nat. Bk. of Chicago*, 64 Ill. 528; *Butler v. Walker*, 80 Id. 345), and second, that a stockholder who is a creditor of such corporation, but who has paid in full for the stock subscribed by him, can maintain such an action. *Smith v. Londoner.* Opinion by Beck, J.

WHEN EXISTENCE OF DE FACTO ONE CANNOT BE QUESTIONED COLLATERALLY — MEMBERS OF, NOT LIABLE AS PARTNERS. — While some diversity of opinion is found in the courts of the different States as to when the existence of a corporation may be questioned, if at all, in a collateral proceeding, the authorities are almost unanimous in holding that such collateral inquiry cannot be made touching the corporate existence of a *de facto* corporation when there was a lawful authority for its creation. *Cochran v. Arnold*, 58 Penn. St. 406; *Rondell v. Fay*, 82 Cal. 354; *Baker v. Administrator of Backus*, 82 Ill. 110; *Tarbell v. Page*, 24 Id. 46; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Hubbard v. Chappel*, Id. 601; *Heaston v. Clin.*, etc., R. Co., 18 Id. 279; *Washington College v. Duke*, 14 Iowa, 17; *Slocum v. Providence, etc., Co.*, 10 R. I. 114; 1 Redf. Railw. (5th ed.) 73; *Ang. & Am. Corp.* (10th ed.), § 635. And where one deals with a *de facto* corporation as such, the existence of whose corporate powers he is estopped from denying, a member of the corporation cannot be held by him upon his contract made with the corporation as a copartner. And it does not follow, as a rule of law, if the legal existence of the corporation could be attacked and overthrown, collaterally or otherwise, that the members of such *de facto* corporation would be liable as members of a copartnership. See, as to this point, upon which there is a diversity of opinion, *Fuller v. Rowe*, 57 N. Y. 25; *Whipple v. Parker*, 29 Mich. 380; *Abbott v. Omaha Smelting Co.*, 4 Neb. 423; *Tarbell v. Page*, 24 Ill. 47; *Stowe v. Flagg*, 72 Id. 307. The case of *Fay v. Noble*, 7 Cush. 189, is a strong authority and directly in point, that a partnership liability does not attach to the members of an irregularly organized or illegally assumed corporation. *Humphrey v. Mooney.* Opinion by Stone, J.

NEW JERSEY SUPREME COURT ABSTRACT.

NOVEMBER TERM, 1880.*

MASTER AND SERVANT — NEGLIGENCE OF MASTER — CO-SERVANT — PRESIDENT OF MINING COMPANY IS NOT WITH MINER — USE OF DYNAMITE IN BLASTING. — Plaintiff was employed as a miner by the defendant company. When he engaged to work, the ordinary blasting powder was used. The president of the defendant introduced thereafter for blasting a highly dangerous explosive, known as giant powder, and the proper manner of using it was not made known to plaintiff although printed instructions were in possession of defendant. While using it an explosion occurred, injuring plaintiff. *Held*, that defendant was guilty of negligence rendering it liable to plaintiff. In a suit by a servant the negligence by which he is injured, to be actionable, must be that of the master, or such as can be imputed to the master. A corporation is liable to its servant for the negligence of its president, who is its chief executive officer, in the discharge of those duties which the corporation owes to its servants. In that case the negligence of the president is the negligence of the company itself. See *Paulmier v. Erie R. Co.*, 5 Vroom, 151; *McAndrews v. Burns*, 10 *id.* 117; *Mullan v. Philada. & So. Mail S. Co.*, 78 Penn. St. 25; *Ardesco Oil Co. v. Gilson*, 63 *id.* 146; *Patterson v. Pittsburg & Con. R. Co.*, 76 *id.* 389; *Huntingdon & B. T. R. Co. v. Decker*, 84 *id.* 419; *Cleveland, etc., R. Co. v. Keary*, 3 Ohio St. 201; *Berea Stone Co. v. Kraft*, 31 *id.* 287; *Cook v. Haulbal & St. Jo. R. Co.*, 63 Mo. 397; *Louisville, etc., R. Co. v. Bowler*, 9 Heisk. 886; *Nashville R. Co. v. Jones*, *id.* 27; *Washburn v. Nashville R. Co.*, 3 Head, 638; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; *Flike v. Bost. & Alb. R. Co.*, 53 *id.* 549; *Ford v. Fitchburg R. Co.*, 110 Mass. 240; *Brickner v. N. Y. Cent. R. Co.*, 2 Lans. 606; *affd.*, 49 N. Y. 673; *Malone v. Hathaway*, 64 *id.* 5. *Smith v. Oxford Iron Co.* Opinion by Van Syckel, J.

NUISANCE — EXCAVATION ON PRIVATE LAND NEAR HIGHWAY. — An excavation adjoining a public highway or so near thereto that a person lawfully and with ordinary care using the way, might by accident fall into it, is *per se* a nuisance unless proper means are adopted to guard against the occurrence of such accidents. *Howland v. Vincent*, 16 Metc. 371; *Coupland v. Hardingham*, 3 Camp. 398; *Barnes v. Ward*, 9 C. B. 362; *Hardcastle v. S. Y. R. & R. D. Co.*, 4 H. & N. 67; *Hounsell v. Smyth*, 7 C. B. (N. S.) 731; *Binks v. S. Y. R. & R. D. Co.*, 3 B. & S. 244; *Hadley v. Taylor*, L. R., 1 C. P. 83; *Birge v. Gardiner*, 19 Conn. 507; *Beck v. Carter*, 8 Hun, 604; *Temperance Hall Association v. Giles*, 4 Vroom, 200; *Vanderbeck v. Hendry*, 5 *id.* 467. Whether, if the excavation existed before the highway was laid out, the land-owner is bound to provide guards against persons falling into it is more doubtful. *Bliss v. Hall*, 4 Bing. (N. C.) 183; *Tipping v. St. Helen's Smelting Co.*, L. R., 1 Ch. App. 66; S. C., 11 H. L. C. 642; *Fisher v. Prowse*, 2 B. & S. 770; *Robbins v. Jones*, 15 C. B. (N. S.) 221. But in an indictment against the land-owner for maintaining the nuisance the pre-existence of the highway need not be averred. 1 Chit. on Pl. 383; *State v. Hageman*, 1 Green, 314; *State v. N. J. Turnpike Co.*, 1 Harr. 222. *State of New Jersey v. Society for Establishing Useful Manufactures.* Opinion by Dixon, J.

PRACTICE — ORDER REFUSING TO AMEND RECORDS. — An order of a court refusing to amend its records is not reviewable for error. *Mellish v. Richardson*, 1 Cl. & Fin. 224; *Scales v. Cheese*, 12 M. & W. 635; *Marine Co. v. Hodgson*, 6 Cranch, 206; *Matheson v. Grant*, 2 How. 268; *Varnum v. Bissell*, 14 Pick. 191; *Layson v. Sullivan*, 1 Barb. 428; *High Mand.*, § 154; *Rex v.*

Justices of Suffolk, 5 N. & M. 139; *Rex v. Hewes*, 3 Ad. & El. 725. *State of New Jersey, Davis, prosecutor, v. Township of Delaware.* Opinion by Reed, J.

MAINE SUPREME JUDICIAL COURT ABSTRACT.*

EXECUTOR — PLEDGE OF PERSONAL PROPERTY OF TESTATOR BY, VALID. — As a general rule, an executor has an absolute control over all the personal effects of his testator — his title being fiduciary and not beneficial. An executor may pledge the personal property of his testator for the general purposes of the will. If the person receiving a pledge from an executor has at the time knowledge or notice that the executor intends to misapply the money or is in the very transaction applying it to his own private use, the pledge is not valid. Where an executor pledged certain stock belonging to the estate to a bank to secure his note for money loaned in good faith by the bank, and upon the affirmation of the executor that the money was wanted for the settlement of the estate, the pledge was valid. *Wentw. Off. Ex.* (14th ed.) 198; *Pinchon's case*, 9 Coke, 86, b; *Dalton v. Dalton*, 51 Me. 171; *Weeks v. Gibbs*, 9 Mass. 79; *Hutchins v. State Bank*, 12 Metc. 423; *Peterson v. Chemical Bk.* 32 N. Y. 31; *Sumner v. Williams*, 8 Mass. 198; *Sherley v. Healds*, 34 N. H. 407; *Monroe v. Holmes*, 13 Allen, 110; 2 *Williams on Ex's*, 1001; *McLeod v. Drummond*, 17 Ves. 154; *Andrew v. Wrigley*, 4 Br. Ch. Cas. 125; *Earle Vane v. Rigden*, L. R., 5 Ch. App. 683; *Scott v. Tyler*, 2 Dick. 712; *Collinson v. Lister*, 7 DeG., M. & G. 633; *Yerger v. Jones*, 16 How. 30; *Fleld v. Schieffelin*, 7 Johns. Ch. 150. *Carter v. Manufacturers' National Bank of Lewistown.* Opinion by Virgin, J. [Decided Nov. 27, 1880.]

MASTER AND SERVANT — FATHER NOT LIABLE FOR NEGLIGENCE OF SON ACTING FOR HIS OWN PURPOSES. — A son for purposes of his own, in the absence of his father and without his knowledge, took his father's horse and carriage and left the horse unfastened in the street, and the horse being frightened ran away and the carriage collided with the plaintiff's and injured the same. *Held*, that the father was not liable. The master is liable for every wrong of his servant committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved. Otherwise if the servant is acting on his own account and not executing the commands or doing the work of the master. *Whart. on Negl.*, § 161; *Mitchell v. Crasaweller*, 76 Eng. C. L. 236; *Bard v. John*, 26 Penn. St. 482; *Herlihy v. Smith*, 116 Mass. 265; *Sheridan v. Chadwick*, 4 Daly, 338; *Howe v. Newmarch*, 12 Allen, 49. *Maddox v. Brown.* Opinion by Appleton, C. J. [Decided Nov. 19, 1880.]

SHERIFF — LIABILITY OF, FOR ACTS OF DEPUTY. — In any proceeding to "fix up" an execution in the hands of a deputy sheriff for collection, by taking an indorsed note from the judgment debtor under the instruction of the creditor, the deputy would be acting as agent for the creditor and not in his official capacity. *Harrington v. Fuller*, 18 Me. 277; *Marshall v. Hosmer*, 4 Mass. 63. Where the plaintiff in an execution gives to the deputy sheriff a power over it not given by the law, or gives directions for the management of it otherwise than as required by law, the sheriff is not responsible. *Samuel v. Commonwealth*, 6 Monr. 174. See also *Strong v. Bradley*, 13 Vt. 9; and discussion by Shaw, C. J., of what will and what will not constitute an official neglect or misfeasance on the part of a deputy sheriff in *Lawrence v. Bliss*, 12 Metc. 531. The sheriff is not liable on the contracts of his deputy

* Appearing in 18 Vroom's (48 N. J. Law) Reports.

* To appear in 71 Maine Reports.

though such contracts grow out of and are connected with his official duties, so long as they are not a part thereof. *Tobey v. Leonard*, 15 Mass. 200; *Waterhouse v. Waite*, 11 id. 207; *Gorham v. Gale*, 7 Conn. 739. *Dyer v. Tilton*. Opinion by Barrows, J. [Decided Oct. 18, 1880.]

WISCONSIN SUPREME COURT ABSTRACT.

FEBRUARY 8, 1881.

CONSTITUTIONAL LAW — STATE LAW REGULATING DOWER DOES NOT IMPAIR CONTRACT. — The statute of Wisconsin which provides that "a woman, being an alien, shall not on that account be barred of her dower, but any woman residing out of this State shall be entitled to dower only of lands of her husband being in this State of which he died seized" (R. S., § 2160) is valid and not in conflict with the provisions of the Federal Constitution against impairing the obligation of contracts, or that preserving the privileges and immunities of citizens in the several States. In *Barbour v. Barbour*, 46 Me. 9, it was held that "the wife has no vested right of any kind to dower in the estate of her husband before his decease; and until then her right may be modified, changed or abolished by the Legislature." To the same effect, *Magee v. Young*, 40 Wis. 164; *Lucus v. Sawyer*, 17 Iowa, 517; *Price v. Johnston*, 4 Yeates (Penn.), 520; *Moore v. New York*, 4 Sandf. 456; S. C. affirmed, 8 N. Y. 110; *Hammond v. Pennock*, 61 id. 158; *Noel v. Ewing*, 9 Ind. 37; *Taylor v. Sample*, 51 id. 423. In *Ware v. Owens*, 42 Ala. 212, it was held that "the widow's right of dower is governed by the law that was in force at the time of the husband's death, and not that which was in force at the time of marriage or may have been during its continuance." See also *Botts v. Wise*, 11 Ohio, 219; *Rufner v. McLenon*, 16 id. 634; *Weaver v. Grigg*, 6 Ohio St. 547; *Johnson v. Van Dyke*, 6 McLean, 440; *Noel v. Ewing*, 9 Ind. 37; *Thurber v. Townsend*, 32 N. Y. 517; *Connor v. Elliott*, 18 How. 591. *Bennett v. Harris*. Opinion by Cassoday, J.

MORTGAGE — TO SECURE SEVERAL NOTES DUE AT DIFFERENT TIMES. — While it is the settled law of Wisconsin that in case of a mortgage given to secure several notes falling due at different times, the proceeds of a foreclosure sale are to be applied to the payment of the notes in the order of their maturity, yet where by the terms of the instruments any default in payment renders the whole mortgage debt absolutely due at once, the several holders are entitled to have the proceeds of the foreclosure sale applied pro rata to the payment of their several notes secured by the mortgage. *Marine Bank v. International Bank*, 9 Wis. 57, distinguished. See *Wood v. Trask*, 7 Wis. 566; *Lyman v. Smith*, 21 id. 674; *United States Bank v. Covert*, 13 Ohio, 240; *Church v. Smith*, 39 Wis. 402. *Pierce v. Shaw*. Opinion by Orton, J.

PARTNERSHIP — RIGHT OF PARTNER TO SUE CO-PARTNER BEFORE FINAL ACCOUNTING. — A contract between partners which can be enforced without a general accounting as to the partnership business, may be enforced at law if of such a nature as to be enforceable at law when made between persons not partners. If the several members of a firm, indebted in at least a certain sum, by mutual agreement apportion that sum among themselves, each promising the others, in consideration of their like promises, to pay a stipulated amount and save them harmless therefrom, the contract is enforceable at law. In such a case, if any one of the partners neglects to pay his stipulated part of the firm indebtedness within a reasonable time after the same becomes due, any other copartner may pay the same without awaiting an action therefor, and the whole amount apportioned being paid, may recover of

the delinquent partner the amount thus paid to make good his delinquency. *Sprout v. Crowley*, 30 Wis. 187; *Brown v. Tapscott*, 6 M. & W. 119; *Venning v. Leckie*, 13 East, 7; *Collyer on Part.* (6th ed.), §§ 196, 197, and note on p. 332; 2 Lindley on Part. (4th ed.) 1027; *Glover v. Tuck*, 24 Wend. 153, 158; *Wadsworth v. Manning*, 4 Md. 59; *Wheeler v. Arnold*, 30 Mich. 304; *Williams v. Henshaw*, 11 Pick. 79; *Collamer v. Foster*, 26 Vt. 754; *Gibson v. Moore*, 6 N. H. 547; *Coffee v. Brian*, 3 Bing. 54; *Wilson v. Cutting*, 10 id. 496; *Sedgwick v. Daniel*, 2 H. & N. 319; *Currier v. Webster*, 45 N. H. 226, 223; *Scott v. Campbell*, 30 Ala. 729; *Jackson v. Stophard*, 2 Cr. & M. 361. *Edwards v. Remington*. Opinion by Taylor, J.

FINANCIAL LAW.

BANK — LIABILITY OF STOCKHOLDER IN — TRANSFER OF STOCK. — M., subscribed for shares of the capital stock of a bank. While there was an unpaid balance due upon this subscription he transferred his stock, with the consent of the officers of the bank, to C. Held, that he was not thereby released from liability for the balance due upon his subscription. *Frank's Oil Co. v. McCleary*, 13 P. F. S. 317; *Coal Co. v. Otterson*, 4 Week. Not. Cas. 545. The capital stock of a corporation is a trust fund for the protection and benefit of creditors, and this extends to the entire stock subscribed, and not merely to the percentage paid in. *Pennsylvania Sup. Ct.*, Jan. 3, 1881. *Messersmith v. Sharon Savings Bank*. Opinion by Gordon, J.

NATIONAL BANK — JURISDICTION OF STATE COURTS AS TO. — Where a National bank goes into voluntary liquidation, thus severing its connection with the United States government, it becomes subject to like proceedings as domestic corporations, and if its president had and held a fund liable to the payment of debts, a court of equity, at the instance of a creditor, could reach and appropriate the same to the payment of an outstanding judgment. *Georgia Sup. Ct.*, Nov. 27, 1880. *Merchants and Planters' National Bank v. Trustees of Masonic Hall*.

NEGOTIABLE INSTRUMENT — INDORSEMENT AFTER MATURITY. — B., the payee of a negotiable note of N., payable at the E. Bank, indorsed his name on it and put it in the bank for collection. It was not paid at maturity, and B. withdrew the note, and after holding it for some years, and after the E. bank had ceased to exist, he transferred it to H., writing over his name the words "protest waived." H. failing to obtain payment of the note from N. brought his action against B. to hold him responsible upon his indorsement of the note. Held, that when B. put his name on the back of the note it was only for its collection, and he was still the owner of it. And when he transferred the note to H. his indorsement must be considered as of that date. The indorsement of an overdue note does not relate back to the date of the note; but as a new and independent contract only takes effect from the time it is made, and must be determined by the laws and circumstances then existing. *Edwards on Bills*, 201; 1 Dan. on Neg. Inst., § 669. The indorsement of a bill or note is not merely a transfer thereof, but it is a fresh and substantive undertaking, embodying all the terms of the instrument indorsed in itself. In *Brown v. Davis*, 3 T. R. 80, Buller, J., said, when a note is indorsed after it becomes due, he considered it as a note newly drawn by the person indorsing it. Story on Prom. Notes, § 129; *Young v. Bryan*, 6 Wheat. 146; 2 Rob. Prac. 239. See, especially, *Leidy v. Tammany*, 9 Watts, 863. So entirely distinct and independent is the contract of the indorser from that of the maker, that at common law, a separate action against each was indispensable. *Patterson v. Todd*,

18 Penn. St. 426. Virginia Sup. Ct. of Appeals, March 11, 1880. *Brown v. Hull*. Opinion by Staples, J.

— ACCOMMODATION MAKER LIABLE ON NOTE DIVERTED FROM ITS AGREED USE. — The maker of a note payable to a savings bank for the accommodation of a third party to enable such party to raise money thereon, without restriction or limitation as to its use, is liable on the same to one who on its delivery by the party to be accommodated has advanced the amount due and the money has been appropriated to the purpose for which the note was given. The note being received, the surrender of the first note is a sufficient consideration for a new note similar in form. The indorsement by the treasurer of the savings bank passes the title. The maker of an accommodation note cannot set up the want of consideration as a defense against it in the hands of a third person, though it be there as collateral security merely. "He who chooses to put himself in the front of a negotiable instrument," observes Black, C. J., in *Lord v. Ocean Bank*, 20 Penn. 384, "for the benefit of a friend, must abide the consequence and has no more right to complain, if his friend accommodates himself by pledging it for an old debt, than if he had used it in any other way. See, also, *Bank of Newburg v. Rand*, 38 N. H. 106; *Robbins v. Richardson*, 2 Bosw. 253; *Lathrop v. Morris*, 5 Sandf. 7; *Elliott v. Abbott*, 12 N. H. 549; *Cross v. Rowe*, 22 id. 77; *Hunt v. Aldrich*, 27 id. 31; *Bank of Chenango v. Hyde & Co.* 567; *Bank of Rutland v. Buck*, 5 Wend. 66; *De Zeng v. Fyfe*, 1 Bosw. 336; *East River Bk. v. Butterworth*, 45 Barb. 476; *Sturtevant v. Ford*, 4 Man. & Gr. 102; *Stein v. Yglesias*, 1 Crompt. M. & R. 565; *Harrington v. Dorr*, 3 Robt. 283; *Maitland v. Citizens' National Bank*, 40 Md. 540; *Lime Rock Bk. v. Macomber*, 29 Me. 565; *Chase v. Hathorne*, 61 id. 513; *Starrett v. Barber*, 20 id. 457; *Dockray v. Dunn*, 37 id. 422. Maine Sup. Jud. Ct., June 28, 1880. *Dunn v. Weston*. Opinion by Appleton, C. J.

RECENT ENGLISH DECISIONS.

ATTORNEY AND CLIENT — DEALINGS BETWEEN — DAMAGES FOR ATTORNEY'S WRONGFUL ACT. — A solicitor may not take from a client a mortgage containing a power of sale exercisable without previous notice to the mortgagor, unless he has first clearly explained to the client the unusually stringent character of the power of sale; and the burden of proving that such explanation was given rests upon the solicitor. Where a solicitor took from a client a mortgage in such a form without explanation and exercised the power of sale without previous notice to the mortgagor, the price received being a fair one, held, that the measure of damages to which the mortgagor was entitled by reason of the solicitor's wrongful act was to be arrived at by calculating (1) the expense to which the mortgagor had been put by reason of the wrongful sale; (2) the expense to which he would be put in making an investment equivalent to the old one; (3) the probable increase in the value of the property sold; (4) the difference between the party and party costs which the plaintiff would receive as the costs of the action, and the solicitor and client costs for which he would be liable to his solicitor. Ch. Div., Dec. 1, 1880. *Cockburn v. Edwards*. Opinion by Fry, J., 43 L. T. Rep. (N. S.) 755.

EXECUTOR — ADMINISTRATOR MAY NOT GRANT LEASE WITH RIGHT TO PURCHASE. — An executor or administrator, in selling or subletting the leaseholds of a testator or intestate, is considered by the court to stand to the beneficiaries or next of kin in the same relation as a trustee to his *cestui que trust*. Consequently, for an administrator to enter into an agreement to grant an under-lease with an option of purchase by the sub-

lessee at a future time, at a price fixed by such under-lease, is *ultra vires*, and a breach of trust on the part of the administrator. It would be a dangerous and unwarranted extension of the power reposed in an administrator if such a transaction (however advantageous to the estate) were to be supported. Ct. App., Nov. 22, 1880. *Oceanic Steam Navigation Co. v. Sutherland*. Opinions by Jessel, M. R., James and Lush, JJ., 43 L. T. Rep. (N. S.) 743.

WILL — ALTERATION BY INTERLINEATION — Alteration, by interlineation subsequent to execution, though duly acknowledged and attested by the initials of the witnesses, will not operate as a re-execution of the will as so amended, there being no subsequent re-execution and re-attestation of it as such. Probate Div., Dec. 14, 1880. *In Goods of Shearn*. Opinion by Hannin, P., 43 L. T. Rep. (N. S.) 736.

— DEVISE TO "NEPHEWS AND NIECES," CHILDREN OF WIFE'S SISTER, NOT NEPHEWS AND NIECES. — Testator devised lands to trustees to pay the rents to A. G., sister of his late wife, for life, and after her decease devised the same to the children of the said A. G. and S. H., and E. A., and "my niece M. W." in common. He devised other real estate in trust to sell and pay the income of the proceeds amongst "all my nephews and nieces" for their lives and the life of the survivor, and bequeath the proceeds to the survivor of "my said nephews and nieces." He made other disposition in favor of his "said nephews and nieces." Testator left many nephews and nieces of his own and nine of his wife. S. H., E. A., and M. W. were all daughters of his wife's sister, E. W. Held, that neither M. W., though called a niece by the testator, nor any other of his wife's nephews or nieces, was entitled under the description "nephews and nieces." Grant v. Grant, 22 L. T. Rep. (N. S.) 829; L. Rep., 5 C. P. 727, disapproved of. Ch. Div., Jan. 13, 1881. *Merrill v. Morton*. Opinion by Malins, V. C., 43 L. T. Rep. (N. S.) 750.

NEW BOOKS AND NEW EDITIONS.

MCGLOIN'S REPORTS.

WE have received advance sheets of "Reports of Cases argued and determined in the various courts of appeal of the State of Louisiana. Reported by Hon. Frank McGloin, one of the judges of the Court of Appeals for the parish of Orleans." The courts in question, as we understand, are the first appellate tribunal, from which an appeal lies to the Supreme Court. The cases are well reported, and several of them are of general interest.

XXIV AMERICAN DECISIONS.

This volume contains cases from 8, 9, 10, Wendell; 3 Paige; 5 Devereux, Law; 2 Devereux, Equity; 5 Ohio; 8 Penrose & Watts; 3 Rawle; 1 Richardson Equity; 1, 2, 3 Yerger; 4 Vermont; 3, 4 Leigh; 4, 5 Stewart, Alabama; and important notes on measure of damages in trover when value enhanced by wrongdoer; Liability of warehouseman; Lien of judgments in Federal courts; Administrators *de bonis non*; Parol evidence of trust in bequest; "Law of the land;" granting compulsory nonsuits.

JARMAN ON WILLS.

We have received from the publishers, F. D. Sims & Co., of Jersey City, the third and last volume of this valuable work, annotated by Messrs. Randolph and Talcott. The work is printed, as to the text, from advance sheets of the fourth English edition, and by authority from the English publisher. We have before spoken in the highest terms of the work, and especially commended the admirable annotations of the Ameri-

can editors. The present volume seems in every way equal to its predecessors. Each volume has an independent index and table of cases cited, and there is no general index or general table of cases cited. This is a defect, consequent, probably, on the plan of publication in separate volumes, but which ought to be corrected as soon as possible. In every other respect we regard the edition as quite unrivalled.

COPP'S UNITED STATES MINERAL LANDS.

United States Mineral Lands; Laws governing their occupancy and disposal; decisions of Federal and State courts in cases arising thereunder, and regulations and rulings of the Land Department in connection therewith; with forms, glossary, and Rules of Practice. By Henry N. Copp. Published by the Editor, Washington, D. C., 1881. Pp. xxviii, 560.

This is an admirably constructed manual on a subject of importance, by a very competent editor. The book shows a great amount of faithful and minute labor. It is well printed, and is free from padding.

HOLMES ON THE COMMON LAW.

The Common Law. By O. W. Holmes, Jr. Boston: Little, Brown & Co., 1881.

Young nations are more prone to the practical than the theoretical. The results of the former are direct and immediate, while the successful pursuit of the latter requires a certain amount of capital, which is the product of time. So, though we are the most inventive people in the world, our discoveries in pure science compare unfavorably with those in Germany or England; and the same holds true in law. Our law schools are incomparably superior to those of England in the preparation of young men for practice. Our text-writers have produced a greater number of valuable works than here, and our reports contain at least as many valuable opinions on the application of general principles to particular cases, or the adaptation of an old rule to a new set of circumstances. But in the history of the evolution of jurisprudence and the progress through custom and morality to positive law, a point to which constitutional law has but just attained, and from which international law is still far distant; and in the analysis of the principles which underlie the science, and the correct definition of its leading terms, our authors have been, hitherto, far behind those of the mother country. It is for this reason that the work on "The Common Law," by the son of the author of "The Autocrat of the Breakfast Table," will be welcomed by every student of the law who reads with other motives than the desire of better fitting himself to win a case. Its substance is familiar to the readers of the American Law Review, to which Mr. O. W. Holmes, Jr., has for a number of years contributed a series of articles upon the greater part of the subjects touched upon in this volume; and in a series of lectures delivered before the Lowell Institute in Boston, this winter, he went over the whole ground covered in it. But a certain obscurity of style which disfigured the essays has now been corrected, and the necessities of addressing a somewhat popular audience from the platform, prevented the use of some of the terse epigrammatic language which is here to be found. The entire work is written from the stand-point of the new philosophy; and those hackneyed terms *natural justice* and *equity* are excluded from it. On the contrary, we find (p. 44) a principle, which although familiar to most thinkers, we never saw so well expressed: "But it seems to me clear that the *ultima ratio*, not only *regum*, but of private persons, is force, and that at the bottom of all private relations, however tempered by sympathy and all the social feelings, is a justifiable self-preference."

This is the basis of his analysis of criminal law, and

of the origin of the rights attached to provision which the State allows to prevent bloodshed.

The doctrine of negligence, too, has probably never been put in so clear a light. Brushing it clear of the cobwebs spun by Austin and Campbell, who define it as a state of a man's mind, he shows that it is such a voluntary act as one of ordinary intelligence must have foreseen would probably result injuriously to another. The scope of an ordinary intelligence, or as Mr. Holmes puts it, the intelligence "of the average man," is, in simple cases, determined by the judge; in doubtful ones, by twelve average men; and the dubious line of demarcation between the provinces of the court and the jury is traced by Mr. Holmes with great ingenuity, although many courts, even at the present day, refuse to admit its accuracy.

The history of the common law of contracts, which is brought down to a period before that with which Mr. Pollock begins, of succession and of bailments, which he seems to show is of Germanic rather than Roman origin, is also exceedingly interesting, and displays great learning. In short, the work is one which displays the qualities of a thinker, combined with those of an antiquary, and few can read it without feeling that their stock of knowledge has been increased and their minds broadened. R. F.

CORRESPONDENCE.

"WOOD ON MANDAMUS."

Editor of the Albany Law Journal:

My attention has been called to a work bearing the above title, purporting to have been written by "H. G. Wood, author of *The Law of Nuisances, etc.*," and that certainly means me, but I never wrote the work; never authorized its publication under my name, and never aided or assisted in its preparation or publication.

The text of the work seems to consist of the text of Tiffany and Smith's New York Practice, upon the topics covered, with some notes that I made thereto several years ago, injected into the text in a most unskillful and slovenly manner.

The publisher had an undoubted right to publish the notes as notes to the text of that work, which he did do, but he had no right whatever to attempt to palm off such a heterogeneous mass of stuff, as my work, and whether the work is creditable or discredit to me, I cannot consent to father it as my production.

Yours, H. G. WOOD.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, May 3, 1881:

Appeal of levy dismissed, with costs—*Peck v. New Jersey & New York Railway Co.*; *Demarest v. Same.*—Appeal dismissed, with costs—*Granger v. Craig.*—Judgment affirmed, with costs—*Ward v. King.*—Order of General Term reversed, order of Special Term affirmed, with costs; leave to defendant to come in and defend on the terms named by Special Term, and also on payment of costs of appeals to General Term and to this court—*Bullard v. Sherwood.*

NOTES.

THE *Canada Legal News* reports a recent conviction of assault, upon a plea of guilty, where the defendant was condemned to pay the doctor's fee for sewing up the lip of the complainant. The court on appeal observed: "Whatever may be thought of the apparent reasonableness of such an exercise of jurisdiction (and I confess to a certain reluctance in disturbing it), there is no authority in the law for it."

The Albany Law Journal.

ALBANY, MAY 14, 1881.

CURRENT TOPICS.

THE *New York Daily Register* makes some excellent observations on the nomination of Mr. Stanley Matthews. It says: "A judge should be selected for his known possession of judicial qualities; and that brilliant political services or personal interest are no sufficient reason for selection but rather for the contrary, unless such judicial qualities are possessed." "And it is becoming more and more apparent to the country at large that gifts, character and attainments appropriate to the functions of a judge are peculiarly essential in any fit appointment, and that besides such attainments, some actual judicial experience and success are almost as essential to a fit candidate for elevation to the bench of a court of last resort. It is a wholesome sign that it begins to be instinctively felt that the judge of a State court of last resort should, other things being equal, be chosen from among the most eminent and able of the judges of courts of original jurisdiction; and that the most fit candidates for positions in the Supreme Court of the nation are those who have served with distinguished success in the Circuit Courts, or the State courts. When men " "whose judicial services have commanded the confidence of the country are named in connection with the vacancies in the Supreme Court of the United States, there is a general sense of the fitness and the public advantage of such principles of selection. When other considerations appear to have dictated or influenced the selection, no matter how far above suspicion of any unworthy motive the nominating power may be, there is a sense of disappointment manifested in the comments of the press at large and in professional opinion, such as we may confidently expect will in the end compel a full recognition of the principles to which we have adverted." To this we must add, that Mr. Matthews is understood and believed to be in the interest of the great railroads, and it is even believed that his nomination has been brought about by the influence of these powerful corporations with a view to their own purposes. It is easy to select a nominee free from any such accusation or bias.

But it is urged that previous judicial experience is not essential; that the present composition of the Federal Supreme bench and of our own Court of Appeals demonstrates this. This may be. Perchance a lawyer may be as fit for the highest judicial post without previous judicial experience, but it is not the natural or customary result. Certainly judicial experience does not disqualify a man for the judicial office. Every judge must be the better for his judicial experience. If he has had no such experience there must be a period in which he is learning. He must learn to lay aside the mental

habits of the advocate. Especially is this previous experience desirable in the case of the Federal Supreme Court, where the gravest and most unusual questions come. Does any man pretend, for example, that Judge Cooley is not just as good a general lawyer as Mr. Matthews, and that his long judicial experience, and his rare acquirements in constitutional learning, are not a peculiar advantage? Why should Mr. Matthews be preferred to such men? What we may say on this subject can have little political influence, but we are bound, out of respect for our profession and in duty to the legal interests of our country, to protest against this nomination. It is brought about by Ohio men, through State pride or State interest, without due regard to judicial fitness or the rights and demands of other States. If Judge Cooley were nominated there would not be a protesting voice in the land. But Ohio having now the chief justiceship and the presidency, and having had them for years, wants another judge, and apparently political bargaining is going to give him to her. It is a dangerous thing to accumulate men from the same State on this bench. For two presidents from the same State in succession to try to do this thing, is not only dangerous but indecent.

The Howard Association in England have published statistics on the subject of capital punishment, supposed to show that it is difficult to inflict the extreme penalty, and that its abolition does not increase crime. It is stated, in respect to the former point, that "in Austria, during the decade 1870-79, there were sentenced to death for murder 806 persons, of whom only 16 were executed; in France, during the same decade, 198, of whom 93, or less than half, were executed; in Spain, decade 1868 to 1877, 291, and 126 executed; in Sweden (1869-1878), 32, and only three executed; in Norway (1867-1878), 14, and only three executed; in Denmark (1868-1877), 94, and only one executed; in Bavaria (1870-1879), 249 committed for murder, seven executed; in Italy, about 1,600 homicides per annum, followed by very few executions or other severe punishments; in Germany (North), during the decade 1869-78, 1,301 persons were convicted of homicidal crime, of whom 484 were sentenced to death, and one executed (Hodel); in the United States about 2,500 murders per annum were committed, with about 100 executions and 100 'lynchings' per annum. In Australia and New Zealand during a recent decade there were 453 sentences of death, followed by 123 executions. In England and Wales, from 1850 to 1879 inclusive, there were 2,005 committed for murder, of whom 665 (33 per cent) were convicted, and 372 (nearly 19 per cent) were executed. The proportion of convictions in England for non-capital crimes averaged 76 per cent, showing, it was argued, how much easier it is to secure conviction and punishment where the irrevocable penalty does not exist. In Ireland during the last twenty years sixty were sentenced to death, and 36 (54 per cent) executed; and in Scotland during the same twenty

years forty were sentenced to death, and fifteen (nearly 38 per cent) executed."

On the latter point, it is said that "experience now extending over many years shows this result in general, that wherever the capital penalty has been substituted by a severe secondary punishment, enforced with comparative certainty and under common-sense conditions, murders have not increased, but the certainty of conviction and punishment has increased, as, for example, in Holland and Finland." "In America the States of Michigan, Wisconsin, Rhode Island and Maine have abolished the death penalty, and without a concurrent increase of murder. In Michigan, where capital punishment has been abolished nearly thirty-five years, official statistics show that murders of both degrees have decreased, relatively to population, 57 per cent since 1847, the date of abolition." We were rather surprised by these assertions in regard to our own country, our opinion being pretty firmly settled that crime had greatly increased in those States where capital punishment had been abolished. Mr. Bishop's statistics published in this JOURNAL, some time ago, strongly contradict the above assertion in respect to Michigan. But these statistics present the following startling facts: the percentage of executions on convictions in England is nineteen, while in this country it is four; and Judge Lynch executes as many here as the legal courts. It should be noted, however, that the lynchings seldom occur except where the death penalty prevails—a fact which emphasizes the allegation of the difficulty of enforcing the death penalty.

In the journal of the proceedings of the American Social Science Association, at the meeting held at Saratoga, last year, we find much of interest to our profession. The following papers are especially to be noted: Pensions in a Republic, Frederick J. Kingsbury; Modern Legislation touching Marital Property Rights, Henry Hitchcock; The German Socialist Law of October 21, 1878, Henry W. Farnam; The Study of Anatomy, Historically and Legally Considered, Edward Mussey Hartwell; Indeterminate Sentences and their Results in New York, Z. R. Brockway. Mr. Kingsbury advocates pensions. In respect to the judiciary he observes: "The independence and purity of the judiciary is the corner stone of liberty—the only guaranty of freedom for the country or the individual. To maintain this, we should at all times be able to place upon the bench the best men whom it may be possible to select, whose character and acquirements most fit them for the high office. Successfully to do this we must, in all ways possible, exalt and dignify the position itself, so that the office may of its own force carry with it grandeur and nobility. This cannot successfully be done without seeing to it that the mind of the occupant shall be free from all pecuniary anxiety." "Thus far, it is true, we have, on the whole, been fortunate in our judiciary. The value of money has been greater in the time

past, and I fear, the honor of the position also. But we are beginning to suffer from a change. It has become notoriously difficult to fill the higher judicial places with the men whom public opinion designates as most fit. Do we appreciate as we ought the full significance of this? Is it not fraught with evil? A fact to make us tremble. Can it be well with a nation when she cannot freely command the services of her best citizens for her highest offices? Now, there are but two remedies for this trouble. Either salaries must be increased to so large an amount as to bear some close relation to the professional gains of the ablest men, or a substitute must be offered, in such an assured support through life, as shall seem an equivalent therefor. We can hardly expect to bring ourselves at once up to the standard of the great but perhaps, not too great, judicial salaries of Europe, but we can accept the other alternative. Briefly, then, I would urge, that to our highest judicial positions, say our courts of last resort in the States, and to our Federal courts generally, there be attached pensions liberal in amount, either for life or beyond, to be entered upon whenever old age or declining health render the recipient unable longer to perform the duties of his office. That such a plan as this would have no place under a system which appoints or elects the judges of its highest courts, for terms of five or ten years, will, I trust, be no argument against it." In referring to Washington, Mr. Kingsbury says: "Why was it that no man quite dared to speak of him as a bloated-bondholder, or a purse-proud aristocrat, or even as the owner of a barrel?" The truth is that Washington was spoken of in just that way, although not in those exact terms. The display and profusion of his personal expenditures in his administration were unsparingly censured, as well as his reserved manners. No one in our history was ever better abused than Washington.

The London *Law Times* contrives to bring the late Lord Beaconsfield within the jurisdiction of a law journal, by chronicling the statement that he was early in life in the office of an attorney. The *Times* continues: "To the deceased the legal profession owes a great deal as one of the most brilliant romance writers of the age, in whose works the tired pleader has found refreshment and relaxation, and the weary advocate reinvigorated his mind in the intervals of work in preparation for renewed efforts in the dusty arena of courts of justice." The idea that anybody could "invigorate his mind" by reading the flashy, fustian, forcible-feeble novels of D'Israeli, stuffed with sham sentiment and crammed learning, disfigured by bad grammar, resonant with thin sound, and vainly struggling to sink the reader in water in which one can wade, strikes us as singular. Literature owes absolutely nothing to D'Israeli. He never wrote a book nor made a speech that anybody will care any thing about or will ever read in the future. His success was that of Mephistopheles. He bullied, sneered, stung, giped, and laughed at mankind, and became

eminent by dint of boundless audacity. He despised men for letting him have sway. He led a flashy, shallow life. He will not leave a ripple on the ocean of history. In every point of view he presents a repulsive contrast to his great rival, Gladstone, who has succeeded by just means — by severe morality, by magnanimity, by dignity, by earnestness and sincerity, by learning, by lofty eloquence — and who has made speeches and written books which will outlive him.

Senator Braman proposes that no action shall be maintained against a municipal corporation, for tort or negligence, unless the claim shall have been presented to the common council or chief fiscal officer, before the commencement, and within six months after the accruing of the cause of action, and that no costs shall be recovered if such action is commenced within forty days after such presentment; this not to apply to pending actions, nor to pending causes of action until six months thereafter. The question of the sufficiency of such notices is a fruitful source of litigation, where similar statutes prevail. — Senator Seebacher proposes to prevent discrimination on account of race, creed, or color, in respect to hotels, restaurants, public conveyances and places of public amusement, and to punish infraction by fine of \$500 to \$1,000, and imprisonment from thirty days to a year. Where is Judge Hilton?

NOTES OF CASES.

IN *Ex parte Maguire*, California Supreme Court, April 13, 1881, 7 Pac. C. L. J. 357, it was held that an ordinance of San Francisco, providing that "every person who causes, procures, or employs any female to wait, or in any manner attend on any person in any dance-cellar, bar-room, or in any place where malt, vinous or spirituous liquors are used or sold, and every female who in such place shall wait or attend on any person, is guilty of a misdemeanor," conflicts with the constitutional provision that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession." The court, Thornton, J., said: "But it is further contended that the inhibition or disqualification is not on account of sex, but on account of its immorality. That such employment of a woman is of a vicious tendency, and hurtful to sound public morality, and that this only is the object and design of the ordinance. It is not contended that such business is *malum in se*, but of a hurtful and immoral tendency. It may be admitted that such is its object and design, but this object is aimed to be accomplished by an ordinance which precludes a woman from a lawful business. It is said that the presence of women in such places has this tendency. If men only congregate, this tendency does not exist in so hurtful a degree; at any rate, it has not been regarded so hurtful, and has not fallen as yet under the legislative ban. So that it comes at last to this: that the preclusion and disqualification is on account of sex. As we have

in effect said above, the attempt is thus made to do that by indirection which cannot be done directly. The organic law of the land annuls all such enactments. *Cummings v. Missouri*, 4 Wall. 227; *People v. Albertson*, 55 N. Y. 50; *Taylor v. Commissioners of Ross County*, 23 Ohio St. 22." Sharpstein and McKee, JJ., concurred. McKinsty, J., concurred in the result. "I am not prepared to say, however, that the supervisors cannot, by proper legislation, prevent females from pursuing avocations which, although permissible to men, involve a propinquity of the sexes under such circumstances as may lead directly to immoral results, or to the desecration of the prudent reserve between members of the opposite sexes which it is the province of wise legislation to encourage. It has always been understood that the prevention of such results was a proper exercise of the police power of the State. By such legislation the woman (or the man, as the case may be) is not prohibited from pursuing any lawful business, vocation, or profession 'on account of her sex;' she is prohibited because of the immorality or indecency connected with the business. For example, there might be very good reason why women (and not men) should be employed as attendants at a bathing establishment to which their own sex alone have admission; but if a law should be enacted prohibiting the employment of females as attendants at public baths frequented by men only, would it be adjudged that the law was unconstitutional because persons would thereby be prohibited from pursuing a vocation 'on account of sex?' The Constitution provides that no persons shall be prohibited from pursuing any lawful business merely because of his or her sex; but it does not prohibit the Legislature from declaring certain conduct unlawful, even though it may constitute a 'business.' The Constitution does not, in my view, deny the power to enact such legislation as may prevent the intrusion of men into the conjoint pursuit with women of occupations which considerations of decency and morality require should be carried on by the latter separately, and *vice versa*." "But while I am not prepared to agree that section 18 of article 20 of the Constitution prohibits any law or ordinance which would prevent the presence of women, as attendants or otherwise, at liquor 'saloons, bar-rooms,' etc., I agree that petitioner should be discharged, because I am of opinion that the ordinance under which petitioner has been prosecuted is void, in that it is unreasonable, of ambiguous import, and not of uniform operation." Morrison, C. J., and Myrick, J., dissented. There was an attempt to evade a similar statute, in *Walter v. Commonwealth*, 88 Penn. St. 137; S. C., 32 Am. Rep. 429; but the question of constitutionality was not raised.

Wilkin v. Tharp, Iowa Supreme Court, April 6, 1881, 8 N. W. Rep. 467, is a curious case of slander. The court said: "The petition alleges that both plaintiff and defendant engaged in the business of buying and selling live stock, which was weighed and delivered upon purchases made by them at the stock-yard of a railroad company; that the defend-

ant, intending to injure plaintiff, spoke of him certain scandalous and defamatory words, implying that plaintiff was accustomed, when stock was weighed, of which he was to purchase, to 'lift up' the scales, and when defendant's stock was weighed to 'bear down' thereon, thus causing the scales in the one case to show less and in the other more than the true weight." "The court, in two or three instructions, held that the language of defendant in charging that plaintiff did 'bear down' on the scales when the stock of defendant was weighed, and did 'lift up' when his own was weighed, would not charge the crime of obtaining goods under false pretenses unless it charged that plaintiff was the 'weigh-master' having charge of the scales. The instruction is correct. The plaintiff could make no pretenses as to the weights unless he had charge of the scales. His act in causing a false weight was not a pretense as to the weights, and could not have been unless he was regarded as the person charged with the duty of weighing the stock. Certain instructions recognized the doctrine that the act of plaintiff, as charged in the language of defendant, in 'bearing down' upon the scales when defendant's stock was weighed was not a fraud punishable by law, but that his 'lifting up' when the stock was weighed was a fraud for which the law provides punishment. We think the view of the court below is correct. As the act of 'bearing down' upon the scales when defendant's stock was weighed could result in no profit or advantage to plaintiff, it cannot be regarded as fraud. While it resulted in injury to defendant, plaintiff derived no profit from the act. It was an act of wanton mischief, perpetrated with an evil design. It cannot be called a fraud; but as plaintiff was profited by the act which caused the stock he was purchasing to appear lighter than their true weight, it is a fraud and punishable as an offense."

In *State v. Shultz*, Iowa Supreme Court, April 7, 1881, 8 N. W. Rep. 469, it was held that where one assuming to act as physician administers medicine to a patient, with honest intentions and expectation of a cure, he is not criminally liable for death caused thereby. The defendant "used an instrument and *oleum Bauscheiditii*." This treatment consists in pricking the skin of the patient on different parts of the body with an instrument armed with a number of needles and operated with a spring, and then rubbing the parts thus pricked with an irritating oil. (See *ante*, p. 42.) The court said: "The case of *Commonwealth v. Thompson*, 6 Mass. 134, is a very interesting and instructive one upon this question. From the testimony in that case it appears that the defendant was a grossly-ignorant quack. He had three remedies, which he called *coffee*, *well-my-gristle*, and *ram-cats*. He persisted in administering emetics to his patient until he died, to all appearances, from the effects of his treatment. In this case it was held that 'if one assuming the character of a physician, through ignorance administered to his patient with an honest intention and expectation of a cure,

but which causes the death of the patient, he is not guilty of felonious homicide.' The case of *Rice v. State*, 8 Mo. 561, is much like the preceding. The defendant in that case was a botanical physician, and administered lobelia, from the effects of which the patient died. It was held that 'if a person assume to act as a physician, however ignorant of medical science, and prescribe with an honest intention of curing the patient, but through ignorance of the quality of the medicines prescribed, or the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the person prescribing, he is not guilty of murder or manslaughter. But if the party prescribing have no such knowledge of the fatal tendency of the prescription that it may be reasonably presumed that he administered the medicine from an obstinate, willful rashness, and not with an honest intention and expectation of effecting a cure, he is guilty of manslaughter, at least, though he might not have intended any bodily harm.' These cases seem to us to announce a correct rule. The interests of society will be subserved by holding a physician civilly liable in damages for the consequences of his ignorance, without imposing upon him criminal liability when he acts with good motives and honest intentions."

In *Mann v. White River Log and Booming Co.*, Michigan Supreme Court, April 13, 1881, 8 N. W. Rep. 550, it was held that a log-driving and booming company is not subject to the liabilities of a common carrier. The court said: "The peculiarity which is most apparent is that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as they were in the present case, set floating promiscuously, and only sorted and separated when the run is as to some portion at least substantially completed. The logs are floated down the streams by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct the floatage." "It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we cannot always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend

the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness. Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are quite as analogous as carriage. Drovers — or as the common law calls them agisters — perform functions not unlike those of log-drivers. Their animals move themselves, while logs are moved by the stream, and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443." But in *Columbia Conduit Co. v. Commonwealth*, 90 Penn. St. 307, it was held that a company engaged in removing petroleum from place to place by means of pipes laid between those places, through which it flowed, was a "transportation" company, within the tax law.

ADMISSION TO THE BAR.

ONE of the most interesting articles that we have read in a long time is that on "Admission to the Bar, with a table of the requirements in the United States and elsewhere," by Francis L. Wellman, in the May number of the *American Law Review*. The author gives particular examination to the subjects of a definite term of pupillage, allowance made to graduates of universities, clerkship in a law office, a definite prescribed course of study, examinations, and law-school privileges, and concludes with eighteen proposed rules for the regulation of admission. His views are of course expressed in these proposed rules. He would have a State board of six salaried examiners, appointed by the Supreme (highest) Court, no law-school lecturer to be eligible, and their certificate to entitle to admission. The term of study must be three years, time spent in a law school to count like time spent in an office. A certificate of the commencement of the term of study must be filed. Unless the student has the degree of bachelor of arts from a college, he must be examined, preliminarily to commencing study, in English grammar; Latin and one modern language beside English; American and English contemporaneous history and constitutional history; modern geography; elementary political economy; elementary book-keeping. But the examiners may in their discretion dispense with this examination. Students to pay a fee of five dollars for the preliminary, and ten dollars for the final examination. The examiners may accept a law-school degree as an equivalent for examination in any two of the subjects of examination. Examinations to be held quarterly at the capital, and in writing. No lawyer to be admitted from the bar of another State, unless he has practiced two years in the highest court, or passes the final examination. Every candidate at the final examination to produce the certificate of his last preceptor, or of some member

of the bar, that he is qualified for examination. This is the substance of Mr. Wellman's scheme, elaborated in an article of thirty-five pages.

The scheme seems to us on the whole a very good one, subject to a few minor criticisms. The State board of examiners is an excellent suggestion. It must be confessed that our present mode of examination is extremely inadequate. A few busy and hurried lawyers, in term time, are assigned by the court to quiz the young gentlemen, and they go through the duty reluctantly, hastily, and perfunctorily. It would be well to have a stated board, known and approved, not holding office too long, able and willing to spend the requisite time, and give the necessary attention. Mr. Wellman proposes to have two of the board retired and new ones supplied every year after the second. Such a board, receiving a moderate salary, would be able to spend the requisite length of time, and the candidate would be thoroughly examined for a day or two days, at least, instead of a few hours. The English examinations extend over four days.

As to the preliminary examination, we see no objection to the scheme, as a whole, but some of the details seem objectionable. For example, we see no particular virtue in the critical analysis of a poem. Better take one of Mr. Evarts' long sentences. And why should knowledge of any one modern language beside English be required? Comparatively few lawyers know any modern language but their own, nor does it seem that they need to know any other. These things are refinements.

The most serious defect in Mr. Wellman's scheme seems to us to be his not positively requiring a clerkship in a law office. Three years at a law school are to suffice. This we believe wrong judgment. It seems to us that some time, say a year, spent in the office of a practicing lawyer, should be required. Our readers know what we think of a law-school education — that we esteem it the best way of learning the principles of the law. But of the application of principles in practice, an observant man can learn more in an active lawyer's office in a year than he can ever learn in any law school. Our only doubt is whether this clerkship should precede or follow the attendance on lectures. Mr. Wellman strongly urges that it should follow. He says: "To pass a year in an office before you have mastered the first elements of legal science is a perverse method of study, and entails an untold amount of wasted labor." On the other hand, it is true that one who has been in a law office possesses some peculiar facilities for profiting by lectures. Perhaps on the whole Mr. Wellman is right. Undoubtedly the student who reads first in an office learns much that is obsolete, and fails to draw necessary distinctions. But what we esteem the office experience for is not so much the reading, as the observation, the listening, the practical application of principles. Some such experience seems indispensable.

In this particular Mr. Wellman's scheme differs from that prevailing in this State. Here we require at least one year spent in an office. Two other im-

portant differences may be noted: 'In this State a deduction of one year from the specified term of three years is made to graduates of colleges; but on the other hand, the three (or two) years' term only entitles to examination for admission as attorney, and the examination for admission as counselor can only take place after two years' practice as attorney. The difference then is, that under our system a college graduate can become an attorney in two years (one spent in an office), and a counselor in four years; while under Mr. Wellman's the college graduate gets no advantage, save on preliminary examination, but all may become counsellors in three years, spent anywhere.

It has always seemed to us that this distinction between attorneys and counsellors is rather vague and shadowy, and that it would be better to give full admission after a sufficient term of study. More mischief can be done by an unskillful attorney than by an unskillful counsellor. There is far more responsibility attaching to the bringing and defending of suits by attorneys than to the trial by counsellors. It seems to us that Mr. Wellman is right in disregarding any such distinction. It is not suited to our jurisprudence, and tends to make a temporary use of an expedient which we are agreed on all hands is inexpedient in the long run—that is, to distinguish between attorneys and barristers.

One more point, on which we shall not say too much. Does our present system, or does Mr. Wellman's, afford any or sufficient encouragement to the students to acquire the best education? Mr. Wellman says: "While there has been a strong movement in many of the States for raising the standard of qualification for admission to the profession, it has never appeared to be in any degree the aim of the movement either to strengthen and support the schools, or even to make use of them in the furtherance of the objects in view." And yet he advises nothing more than that the time spent in the law schools should count like time spent in an office. What encouragement is there for the student to incur the expense of the law school? Many young men can ill afford it. It has always seemed to us that some allowance in the length of the term of study should be made to the law-school student. On the other hand, the statement made by Mr. Wellman that "in fifteen States the law-school diploma is still received as a substitute for the public examination," is disheartening. There must be a golden mean between the two conditions.

OBSERVATIONS ON THE PARTICULAR JURISPRUDENCE OF NEW YORK.

IX.

(1777—1821.)

AN outline or sketch of the externals of the jurisprudence of New York (and these papers pretend to be nothing more) would seem to require some reference to the early systematic writers who treat of the laws of New York. In this connection, it will be recalled that from 1694 until the American Revolution, the Session Laws of the Assembly of the Province of New York were regularly issued by the king's printers

in the city of New York; but besides these and the various revisions of the statutes previously noticed, there were no local publications relating to the law of New York until long subsequent to the war for Independence. Yet this last fact must not be accepted as an evidence of the efficiency which the law had then attained. Even during the colonial period the bar and bench of this province numbered many eminent lawyers; among them William Smith, Lewis Morris, Delancey, Horsmanden, Robert R. Livingston, Van Schaack, Murray, Alexander, Chambers, Bradley, Kissam, John Morin Scott and Richard Morris. It was under the tutelage of the colonial advocates that several of the most eminent lawyers this State has produced, were educated in their profession: George Clinton, John Jay, Egbert Benson, and others whose talents first gave direction and shape to the political institutions of this country, are a sufficient evidence, even if there were no other, of the high efficiency of the Colonial bar.

The dearth of legal treatises which has been noticed was at first doubtless occasioned by the very small sale such ventures might hope to realize; but later on, when there was a fair demand for other American publications, by the great similarity of the law of England to that of this State in particular. In colonial times the Assembly Laws, and in the new State government, the State Session Laws, together with the common-law reports, abridgments and institutes which almost every lawyer possessed, answered the requirements of the legal profession. Yet there were many features of the jurisprudence of New York which differed from that of England. The practice of the Supreme Court had always varied from that of Westminster Hall, and we accordingly find that this fact suggested the subject of the first regular legal treatise published in New York. In 1794, William Wyche, an attorney in the city of New York, who announced himself as "of the Honorable Law Society of Grey's Inn, London, and citizen of the United States of America," published by subscription a *Treatise on the Practice of the Supreme Court of Judicature of New York, in Civil Actions*.^{*} Judging from the preface it was deemed a somewhat bold undertaking, but it met with favor and was followed in the same year by Wyche's *Theory and Practice of Fines*.^{*} The latter must have been somewhat less successful for the author's proposal to publish a "Collection of select pleadings in the Supreme Court of Judicature of New York" never came to any thing.

The new institutions of government as they gave rise to questions on which the English precedents threw little or no light, led in part to the next legal publication, which discussed a question of the highest importance, and at that time not fully determined, viz., the power of the judicature to determine the validity of legislative enactments. Chancellor, then Mr. Kent, who had in 1793 been chosen law professor in Columbia College, published, the next year (1794), at the request of the trustees, his first lecture in that institution, which was of general interest because it discussed this question, so novel to previous conceptions of government.[†] In 1795 Kent published a small volume containing "Dissertations," or three other lectures, preliminary to his proposed course on the common law, but its sale was so limited as not to defray the expenses of publication, and in 1798 he discontinued his first course of law lectures, owing to the small and unsatisfactory attendance. In 1803 George Caines, the reporter, published his first volume of *Lex Mercatoria Americana*, which at that time was by far

* New York: Printed by T. & J. Swords, No. 167 William street, 1794.

† New York: Printed by Francis Childs, 1794.

‡ New York: Printed by George Forman, No. 186 Front street, for the author, 1795.

the most ambitious undertaking of the kind ever issued from the New York press. The second volume never appeared, so that the work is incomplete; there is little doubt that it must have proved a failure. It now fills no place in the literature of jurisprudence.

The first volume of the reports of cases in the New York courts was edited by William Coleman, counsellor-at-law, and was issued in 1801. It contains the cases of practice adjudged in the Supreme Court, from October term, 1791, to October term, 1800. It was followed in 1803 by a volume, now become exceedingly rare, containing judicial opinions delivered in the Mayor's Court of the city of New York (afterward the present Court of Common Pleas), by the famous Edward Livingston, one of the most distinguished jurists this country has produced. In 1804 the Legislature authorized the appointment of an official reporter for the Supreme Court. (Ch. 63, Laws 1804.) In the following year George Calves, the first official reporter, issued the first volume of the decisions of the court of final resort, and in the same year Coleman and Calves' Cases on Practice followed. Calves' Cases in Error were part of the official series, but they contained many decisions collected by Mr. Coleman prior to Mr. Calves' appointment. The official reports of the Supreme Court begin with the second volume of Calves' Term Reports, issued in 1805, the first volume having been prepared before Mr. Calves received his appointment as reporter. (See ch. 123, Laws 1815, act for relief of George Calves.) In 1806 William Johnson succeeded Mr. Calves, and in 1807 the first volume of Johnson's reports appeared. Mr. Johnson subsequently published three volumes of cases decided in the Supreme Court and Court of Errors, prior to any reported by Mr. Calves. Johnson's cases carried the law reports back as far as 1799, from which date the series of New York law reports is unbroken. The first New York chancery reports were not issued until 1816 (J. Johns. Ch.), but from that time until the merger of the courts of law and equity they are continuous. In 1820 John Anthon, a leading nisi prius lawyer, published a report of the nisi prius sittings of the Supreme Court; contrary to the general experience, this report, owing to the discriminating character of the cases reported, is good authority. In 1816 the criminal cases began to be reported in the City Hall Recorder, a work of very high authority. It is unnecessary to refer further to so familiar a topic as the reports in a consideration of the early legal publications of this State.

In 1806 Mr. Calves, by far the most prolific law writer of the time, published his Practice of the Supreme Court, but no work on the Chancery Practice was published until 1818, when one by Mr. Blake, a master in chancery, appeared. The remaining works relating to jurisprudence, published in the first period of the State government, were few and none of them of any marked or permanent value.* It is presumed that this con-

mentary will be confirmed by the general experience; it certainly is not so dubious a criticism as that of Phillimore on English legal literature. "no single great work on jurisprudence has ever been produced by an Englishman." (Preface to Private Law among the Romans, p. x, London ed., 1863.) While it is unquestionably true that the few treatises on the law, written and published in New York during this period, were of an ephemeral and common-place character, yet it is equally true that the character of the written opinions of the courts of the same period have probably never been surpassed in this State. It is only necessary to allude to the judges who delivered them, Lansing, Lewis, Benson, Kent, Radcliff, Brookholst, Livingston, Smith Thompson, Ambrose Spencer, William W. Van Ness, Daniel D. Tompkins, Yates, Jonas Platt and John Woodworth.

We have already observed some of the leading changes which the Legislature made in the law of real property during the first period of the State government (23 Alb. L. J., pp. 147, 148), and within a limited space it is impossible to notice them more in detail.

The Criminal Code of the State remained for some time very much as it existed at common law under the provincial government. The Revolution introduced few changes affecting this branch of the former jurisprudence. By the Constitution of 1777 (sec. 34), the accused were allowed counsel in all criminal cases as freely as in civil cases. It will be remembered that at common law the accused were deprived of counsel on the general issue in capital cases. In 1788 benefit of clergy was forever abolished in this State (2 J. & V. 242) and the common law was ameliorated by lessening the punishment for minor offenses, but for a long time the sanguinary laws of New York, attaching the death penalty to many crimes beside murder and treason, remained a blot on the advancing civilization. In 1790 many of the offenses previously punishable with death, such as grand larceny, burglary, highway robbery, arson, rape, forgery, counterfeiting, malicious wounding and the like, became punishable by imprisonment in the State prisons, first established by this act. (3 Gr. 291, ch. 30.) This important statute ameliorating the Criminal Code likewise declared that no appeal should be taken by the people against a person acquitted of felony. It also abolished whipping as a punishment for minor offenses, and it enacted that no conviction or attainder of any person should work a forfeiture of goods, chattels, tenements or hereditaments.

In the same year, 1796 (ch. 8, 3 Gr. 265), a very important act was passed to facilitate the trial of criminal cases and for the better prosecution of crimes against public justice. By this last named act the State was divided into districts, over each of which an assistant attorney-general was to be designated, to conduct the ordinary prosecutions of offenders. This was the origin of the present system of public prosecutors for each county. The extent of the powers of the attorney-general and his coadjutors, the district attorneys, has never been precisely determined in this State. They have been claimed to be defined only by the common law. (See Mr. Gerry's brief in *Henry Bergh's case*, 16 Abb. Pr. [N. S.] 274-284.)

The procedure and practice of the criminal courts remained in most respects as at common law, during the entire period in which the first Constitution was in force.

Under the original Constitution, the greater part of the *corpus juris* of the province continued unaffected by innovative legislation, and consequently the jurisprudence of the common law determined the decisions in the great majority of the cases submitted to the courts of justice or to the decision of counsel. For example, the construction of deeds of conveyance under the statute of uses, the operation of common

* The other works referred to are, *New Conductor Generalis*, by a gentleman of the bar; an edition, Albany, 1794; an edition, Albany, 1819; *Attorney's Manual*, New York, 1807 (containing Chitty's forms, adapted to Supreme Court); *Clerk's Assistant*, Poughkeepsie, 1815; *New York Justice*, relating to justices of the peace; *Attorney's Companion*, Poughkeepsie, 1818; *Anthon's Digest of Blackstone Com.*, and containing an essay on the Study of the Law, N. Y., 1810; *American Precedents of Declarations* (2d ed. by Anthon), N. Y., 1810; *Tappan's Consty and Town Officers*, Kingston, 1816; *Thoughts on the Constitution*; and *Strictures on the Court of Chancery*; The *Digests*, published prior to 1821, were Anthon's *Digest of the Reported Decisions of the several courts of law in the U. S.*, 2 vols., N. Y., 1813-16; Johnson's *Digest of cases decided and reported in the Supreme Court*, from 1799 to 1813; and Church's *Digest of the same reports*, until 1821; Dunlap's *Practice* (see Preface to Graham's *Practice*, p. 10) appeared in 1821; it was a mere adaptation of Tidd's *Pr* in the *K. B.* The first *Law Journal* in New York was the *New York Judicial Repository*, which appeared in 1818; it was short lived.

assurances, the interpretation of wills and testaments, the estates of dower and curtesy, the conduct and liabilities of executors, administrators and trustees, the limitations of suits, the domestic relations, and indeed whatever else was not wholly regulated by statute, were determined by the common law in so far as it was in force in the province of New York prior to the outbreak of actual hostilities against the monarchical and parliamentary government of England, or was not inconsistent with the positive principles of the new institutions of government.

The same remark applies with equal force to that important branch of remedial justice, the practice in the courts of judicature. The truth of the general observation is easily sustained without an explicit reference to particulars. In 1821, the last year of the old Constitution, Mr. Dunlap, in his practical treatise on the Supreme Court, states that the practice of that court was still in the main founded on that of the English courts, thus summarizing the fact that this branch of remedial justice had undergone but little more than formal changes since the political separation of the two countries. Yet there were many points of practice which had been peculiar to the New York courts from the earliest times. Even in 1762 these local peculiarities were so great as to much embarrass Benjamin Prat, a considerable lawyer of Boston, who was appointed by Lieutenant Governor Colden Chief Justice of the Supreme Court of New York, at a time when the former justices of the court refused to receive their commissions at the king's pleasure. (Colden Papers, N. Y. Hist. Soc., Pub. 1876, p. 148.) In 1794 we have the additional testimony of Mr. Wyche, the author of the first treatise on the practice of the Supreme Court. He says: "The Practice of the British courts, it must be acknowledged, 'is the model of that of our Supreme Court; but the 'various architects of the latter have not always 'adhered to their model; in many respects there is a 'material difference. When the student reads in 'Crompton, and other English practical treatises, of 'service of process with notice, of affidavits to hold to 'bail, of delivering declarations by the bye, of sum-' 'mons for time to plead, of demands of plea, of the 'mode of signing judgments, of carrying in and 'docketing rolls; in short, of various other proceed-' 'ings not consistent with the practice resulting from 'the law and custom of this State, it naturally be-' 'wilders his ideas: he is perplexed with a species of 'learning productive of confusion to himself, if not 'early corrected by extensive practice, as he will not 'have the power to discriminate what is the legal 'practice here from that which is peculiar to the other 'side of the Atlantic." Yet the local differences mentioned by Mr. Wyche were formal rather than substantial, the essential of the New York practice conforming to that in vogue in England. At this remote period such differences are only important as indicating the very early date at which an individuality was affixed to the practice of the New York Judicatories. Messrs. Paine and Duer, in their work on the practice of the courts (N. Y., 1830), refer to the curious fact that the practice of commencing actions by *capias ad respondendum* could not be traced to either the King's Bench or the Common Pleas.

From time to time during the colonial epoch the practice of the courts of this province had been amended by statute. In 1788 the first of the State revisors, Messrs. Jones and Varick, included most of the previous changes made in the common-law practice, by either the statutes of England or of the provincial Legislature, in several acts, entitled "An act concerning amendments and jeofails" (2 J. & V. 224), and "An act for the amendment of the law and the better advancement of justice." (2 J. & V. 269.) The latter statute relates also to the practice in chancery. In the same

year other statutes relating to the practice in particular actions were passed as they had been reported by the revisors, notably those acts affecting partitions (ch. 8, 11th Session), *qui tam* actions (ch. 9, 11th Session), and *replevins* (ch. 5, 11th Session).

Having given an outline of the more important changes which the legislation of the new State government imposed on the pre-revolutionary jurisprudence of New York, it would seem necessary to advert to the most marked idiosyncrasy of the *corpus juris* of New York. It is now comparatively of little importance; yet historically and traditionally it must always be of peculiar interest to the thousands and tens of thousands of the descendants of the original Dutch colonists of New York. The peculiarity referred to is the portion of the Law of New Netherland which has so long been a part, though a very small part, of our jurisprudence. By the articles of capitulation of 1664 the ancient Dutch inhabitants of New York possessed a legal *status* quite different from that of the native-born subjects of England. They were to enjoy their own customs as to inheritance, and we accordingly find that the Assembly of the Province while under English rule passed several acts recognizing this right of the Dutch *ancie nati*. The single instance to which it is desired now to allude, this subject having been previously referred to at greater length, is the case of *Denton v. Jackson*, before Chancellor Kent in 1817 (2 Johns. Ch. 324). This case involved the right of the town of Hempstead to certain lands originally granted by the Dutch governor Kieft in 1644 to six persons by name to build a town, to erect a body politic and to nominate magistrates — and one of the questions discussed was whether these six persons took in their private capacity or as a corporation. Chancellor Kent held substantially that under the civil law, which was the common law of the Dutch, the grant was sufficient to enable them to take as a body corporate. Although not the controlling point of this particular case, it is one instance of many where a reference to the former law of New Netherland has been necessary to a complete adjudication. (For more important instances, see 37 N. Y. 551; 1 Hoffman's Treatise on the Corp., p. 305; 36 Barb. 157; 17 Wend. 590, 617; 18 Hun, 80; 2 Wend. 110; 10 Barb. 141.)

Though, with the single exception referred to, the Jurisprudence of New York under the first Constitution was exceedingly similar to that of England, yet the time was not far distant when the democratic elements of the State government were to have a marked influence not only on legislation but on the structure of the Judicature and the tenure of the Judiciary. This movement at first exhibits itself in several ways, but principally by a determined effort to diffuse the common-law powers of the Judiciary.

We come next to consider the repeal, for such it was, of the original Constitution. Measures to amend the Constitution have now become so frequent as to attract very little of that attention which once accompanied any proposal to change the charter of the State government. In 1821 the dissatisfaction with the Constitution of 1777 had become so universal as to dissipate any resistance urged against change by the more conservative of the electors of the State. The large freeholders were, in the main, opposed to an extension of the suffrage which was agitated; and the leading Judges, who then possessed vast political influence as members of the Council of Revision, were opposed to any changes whatever in the substance of the original Constitution. There is no doubt that the first Constitution presented some features which were opposed to the most advanced conceptions of liberal political societies; it was in some respects a compromise with English institutions; it was obnoxious to the leaders of the republican (democratic) party because it lodged such extensive powers in the hands of

the judges, and it was distasteful to the masses of the people because of the limitation it imposed on the suffrage by either a property or a Burgess qualification. The years 1820-21 are interesting not merely because of the changes which were then made in the structure of the judicature of the State but also on account of the open avowal of a sentiment hostile to that part of the established jurisprudence of the State which had been derived from England. It was said that the entire history, rationale and tendencies of the common law were opposed to those more advanced political ideas which ought to prevail in a republic. The common-law powers exercised by a single chancellor were asserted to be of an aristocratic nature and consistent only with that monarchical government from which they were derived. Indeed, the entire Judiciary were asserted to be opposed to reform because of the prejudices which had been inculcated by their administration of a system of law founded on the different political conditions which obtained in England. There was an additional argument against the Chancery system; it was asserted to foster a class of lawyers who lived in the cities where the court sat, and who, from their better opportunities, monopolized the business of the court to the disadvantage of those members of the profession who were so unfortunate as to live beyond the mysterious precincts of the Court of Equity. However trivial, superficial or fallacious these objections were, they were very popular and when applied to certain external of the administration of the inherited juridical system of the State rather than to the jurisprudence itself, they were not wholly devoid of reason.

Prior to the second Constitution the supposed interference of the Judiciary in the politics of the State tended not only to lessen their usefulness, but to the actual defeat of the "no convention" party, opposed to any interference with the original Constitution of the State. Although at this later day we regard Kent and Spencer with unmingled admiration, in their own time they were not without their detractors and defamers. These distinguished jurists were as openly attacked in the convention of 1821 as if they had been common political adventurers whose sole aim was their own aggrandizement. Chancellor Kent was compared to the Bohon Upas of Java that destroyed whatever sought for shelter or protection in its shade; and Chief Justice Spencer, in some respects the ablest judge of his day, was contemptuously told that he might have been a Holt or a Mansfield had he kept from the political arena. Yet these gentlemen were doubtless the victims of the ill-assorted alliance between the Legislature and the supervising power of the Council of Revision, or of that mistake in the original Constitution which vested the judicature, as a sort of third estate, with the negative on legislation in all cases. Oftentimes the majority of the Legislature were unable to pass a bill over the veto of the Council and then their indignation would be visited on the judges who defeated them; the votes of the judges in the Council were attributed to political bias and not to conviction, and they were denounced with all the accompaniments of mere political virulence. This denunciation came ultimately to affect the usefulness of the Supreme Judiciary under the first Constitution and to tarnish their otherwise splendid administration of the law. This melancholy fact emphasizes the importance in the American Republics of keeping the judicature a separated institution or a sort of impersonal college, above and beyond the fatal blight of even a suspicion of low political bias.

In November, 1820, at an extra session of the Legislature, a bill passed both houses by the provisions of which delegates were to be elected and a convention to alter the Constitution to be held in the first instance without taking the sense of the people as to the necessity of such a convention. This bill was vetoed by the

Council of Revision, who assigned as a defect the omission mentioned. In March, 1821, the Legislature passed another act providing for an election to determine whether a Constitutional Convention should be held, and in that event providing also for the election of delegates to attend it. The electors having decided in the affirmative, the convention of the delegates chosen accordingly met at Albany in August, 1821, and in the following November agreed to the form of a new Constitution which was to be submitted to the people for ratification. Though portions of it took effect earlier, it was not until January, 1823, that the new charter was fully operative.

The delegates composing the convention were in almost every instance able men, and some of them noted for great ability. Among the most notable were Chancellor Kent, Chief Justice Ambrose Spencer, Henry Wheaton, Samuel Nelson, William W. Van Ness, Jacob Radcliff, John Duer, Jacob Sutherland, Daniel D. Tompkins, Judge Pratt, General Root, Rufus King, Martin Van Buren and Peter A. Jay—but this enumeration seems invidious. The debates of such a convention were of course interesting and their labor of great value. At the time the new Constitution was deemed almost a revolution, and it was said "that scarcely a pillar had been left standing in the venerable fabric erected by the political fathers of the State." (Intd. to Report of Proceedings of Convention of 1821.) But at this lapse of time we perceive that it preserved the essentials of the former framework of government; it was, however, more liberal and progressive than its predecessor.

We may next advert more in detail to the principal changes effected by the Constitution of 1821-3. The Council of Revision which under the original Constitution possessed the veto was abolished, but after the fullest deliberation the powers of the council were transferred to the governor. (Art. I, § 12.) Thus the wisdom of some limited check on hasty or partisan legislation was for a second time conceded by the highest deliberative body known to the State. From the debates in the convention it appears that the former Council of Revision were thought by some to have transcended their powers when they passed on the expediency of legislative bills, their true function being of a judicial character.

The changes made in the judicature by the Constitution of 1821 were said not to be considerable, but this is not quite accurate. The powers of the judges of the great courts (other than the Court of Errors which was undisturbed) were materially circumscribed. They were removed out of the immediate realm of politics by the destruction of the Council of Revision, of which they had been *ex officio* members. In view of the new circuit judgeships vested with the powers of the common-law judges at circuit and in chambers, the new Constitution reduced the number of the Supreme Court justices to three, a chief justice and two associates. (Art. 5, § 4.) By the creation of the circuit judgeships, the Supreme Court justices were deprived of the political advantages conferred on them, as it was supposed, by an official tour in the name and under the authority of the majesty of the law. While the ostensible reason for the creation of the circuit judgeships was the necessity for coping with the increase in the volume of litigation, the real reason of the opposition to an increase in the number of the former Supreme Court justices which would have rendered that court equal to the demands upon it, was the popular dislike of a politico-judicial domination of a class of great legal officers. The powers and jurisdiction of the Supreme Court justices not transferred to the Circuit judges were undisturbed by the second Constitution. They were still to hold their offices *quamdiu se bene gesserint* or until sixty years of age, but the Legislature might remove them by joint

resolution if two-thirds of the Assembly and a majority of the Senate concurred. (§ 13, art. 1; §§ 3, 4, art. 5, Const.) To crown the discomfiture of the old judiciary, the commissions of all persons holding civil offices on the last day of December, 1822, were declared to expire on that day. The new Constitution thus attained one of the objects of its chief promoters—it evicted the old judiciary and subjected them to a new appointment. (Art. 9.) While the minds of many revolted at this apparent breach of faith with eminent public servants, there is little doubt that a change was needed and that the wider distribution of judicial powers was wholesome; mainly because a local or vicinage judiciary was created intermediary between the County Courts and the general courts in banc. Local courts with a judiciary supplied from the neighborhood of its immediate jurisdiction are decidedly more consistent with our institutions than a centralized or bureaucratic administration of justice; but this is not true of appellate tribunals, for there the final decisions of abstract legal questions are of a general character and not local. By this change in the structure of the courts it will be perceived that the democratic features of the government, alluded to in the preceding paper, were at work to reduce the judiciary from ministers of State to officers of justice and nothing else.

Although the Court of Chancery was not yet to be destroyed, for the occasion was premature, its abolition was distinctly contemplated and even proposed in the convention of 1821. A step toward it was taken in the proposal to vest the circuit or district judges, or other subordinate judges, with equity powers—a matter referred to the Legislature to carry into execution. (§ 5, art. 5.) There is reason to presume that it was thought by some of its adherents that this measure would abridge the common-law powers of the Chancellor, but in this they were mistaken and a very different opinion was soon entertained by the Chancellors. (2 Paige, 95.) The Constitution of 1821 was afterward found to be defective in this respect, as the Chancellor's original jurisdiction was left in the same uncertainty as before; the Chancellors soon claimed that their jurisdiction was beyond the control of the Legislature. One thing in reference to the equity jurisdiction was however accomplished by the new Constitution: the union of subordinate legal and equitable powers in the same judges, soon demonstrated the practicability of merging these powers in one tribunal, a matter finally consummated under the succeeding Constitution.

The section of the original Constitution (§ 35, Const. 1777), declaring the fundamental "law" of the State was amended in the second Constitution so as to conform to the changes which had been made by the Legislature between 1777 and 1821. The Legislature repealed in 1788 all the Statutes of Great Britain and England, such statutes having been then revised and incorporated in Jones and Varick's revision. (See 23 Alb. L. J., p. 147.) The new Constitution, therefore, omitted any reference to the statute law of England and Great Britain, and substituted instead this phrase: "And such acts of the Legislature of this State as are now in force." (§ 13, art. VII, Const. 1821.) Otherwise the fundamental law of the State was again declared to consist of substantially the same elements as before; namely, such parts of the common law (the words "of England" were omitted) and of the acts of the Legislature of the colony of New York as together did form the law of the said colony April 19, 1775; the resolutions of the Congress of the colony and of the conventions of the State in force April 20, 1777, not since expired, repealed or altered, provided the same were not repugnant to the Constitution. The State Legislature retained under the new Consti-

tution the same power which it formerly possessed to alter the fundamental law.

Some additions taken from the amendments to the Federal Constitution were made to the Bill of Rights section of the original Constitution, although Chief Justice Spencer deemed most of them to be very unnecessary. One provision was entirely new (§ 8 of art. VII, Const. 1821-3): "In all prosecutions or indictments for libels the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true and was published with good motives and for justifiable ends the party shall be acquitted; and the jury shall have the right to determine the law and the fact." The history of this particular section will perhaps bear repetition. In 1803, Harry Crosswell, the editor of the *Wasp*, a newspaper published in the city of Hudson, was indicted for a libel on Thomas Jefferson, President of the United States. He was defended by Alexander Hamilton as leading counsel, and prosecuted by the attorney-general, Spencer. The trial excited great attention as it involved party questions at a time when the struggle and animosity between the federalists and republicans was desperate and bitter. Chief Justice Lewis, who held the circuit at which Crosswell was tried, charged the jury that under the law of this State the only questions for them were "publication" and the "truth of the innuendoes," the questions of intent and defamation being reserved to the court. Crosswell being convicted, on the motion in arrest of judgment argued in banc, Hamilton was said to have made the greatest argument of his life. The court was equally divided, Justices Kent and Thompson being for a new trial, and the Chief Justice and Justice Livingston for affirmance. This entitled the attorney-general to move for judgment on the verdict, but in view of the technical affirmance no such motion was made. This case presented the same question so repeatedly argued in England by Lord Erskine (*Dean of St. Asaph's case; King v. Woodfall*, 5 Barr. 2661), and finally set at rest by the declaratory statute (32 Geo. III, ch. 60) giving the jury the power to determine the whole issue upon indictment or information for libel. The point as to how far the defendant was entitled in criminal actions for libel to give the truth in evidence was also argued in banc in a case made by consent. In consequence of the unsettled condition of the law of libel, the Legislature in 1804 passed "An act relative to libel," which was vetoed by the Council of Revision because it made no distinction between the cases of defamatory matter circulated without malice and with good motives and for justifiable ends, and of those libels which were published for seditious and wicked purposes and in order to gratify individual malice and revenge. A bill was subsequently introduced in the Legislature (April 6, 1805; by William W. Van Ness, Esq., which settled the law for the time being. (Sess. 28th, ch. 90.) It declared the powers of the jury to determine the whole issue on indictments and informations for libel, and permitted the defendant to give in evidence the truth of the matter charged as libellous, but it distinctly provided that the truth should not be a justification unless it was made to appear that the matter charged as libellous was published with good motives and for justifiable ends. The section referred to in the Constitution of 1821 contained the substance of the latter act but made it somewhat clearer that it was the jury and not the court which was to determine whether the alleged libel was published with good motives and for justifiable ends.

It is only necessary to allude to those changes which are less intimately associated with the subject under discussion. The Council of Appointment was abolished and the nomination of the higher judicial officers vested in the governor, but the consent of the Senate

was requisite to an appointment. (§ 7, art. 4.) The manner of appointment or election of the other State officers was also determined by this article. The powers of the chief executive being thus increased by a part of the appointing power as well as by the veto power, his term of office, to insure a greater responsibility to the electors, was abridged from three to two years. The electoral body was increased by adding to the freeholders and householders all the male white citizens who having legal residence either paid taxes or contributed to the public service. (Art. 11, § 1.) It was not until 1826 that citizenship, manhood and residence became alone the sole basis of the right of suffrage (2d amendment, 1826), but by the Constitution of 1821 almost all but nominal restrictions were swept away. The defect in the original Constitution, which made no provision for future amendments, was remedied by article VIII of the Constitution of 1821, which was borrowed from an amendment to the Constitution of Massachusetts.

Such is a brief summary of the changes imposed in 1821 in the original charter of the State government; there was some suggestion, during the convention, to add a clause to the Constitution of 1821 repealing the Constitution of 1777, a matter of the utmost delicacy, but it was not received with favor. It was left to the canons of jurisprudence to determine how far the second Constitution repealed the first. Mr. Wheaton clearly intimated that in his opinion the latter operated as a repeal of the former only in so far as inconsistent.

UNACCEPTED RESIGNATION OF OFFICE INVALID.

UNITED STATES SUPREME COURT, APRIL 18, 1881.

EDWARDS v. UNITED STATES EX REL. THOMPSON.

The resignation of an office is not complete until accepted by the proper authority. This is the common-law rule. Accordingly where the supervisor of a township in Michigan made return to a mandamus requiring him to do certain acts that he was no longer supervisor, having filed his resignation in writing of such office, no acceptance of such resignation being shown, *held*, upon demurrer, that the return was insufficient.

In error to the Circuit Court of the United States for the Western District of Michigan. The opinion states the case.

BRADLEY, J. William F. Thompson, the relator of the defendant in error, on the 5th day of September, 1874, recovered a judgment in the Circuit Court of the United States for the Western District of Michigan against the township of St. Joseph in the county of Berrien in said State, for the sum of \$17,327.86 besides costs.

By the laws of Michigan an execution cannot be issued against a township upon a judgment, but it is to be "levied and collected as other township charges;" and when collected to "be paid by the township treasurer to the person to whom the same shall have been adjudged." Comp. Laws of 1871, § 6,630. The mode of raising money by taxation in townships is prescribed in sections 992 and 997 of the Compiled Laws of 1871, which make it the duty of the township clerk, on or before the first day of October of each year, to make and deliver to the supervisor of such township a certified copy of all statements on file or of record in his office, of moneys proposed to be raised therein by taxation for all purposes; and it is made the duty of the supervisor, on or before the second Monday of said month, to deliver such statements to the clerk of the board of supervisors of the county, to be laid by him before the board at its annual meeting. At this meeting the board are required to direct the several amounts

to be raised by any township, which appear by the certified statements to be authorized by law, to be spread upon the assessment-roll of the proper township, together with its due proportion of the county and State taxes. The whole is then certified and delivered by the clerk of the board to the town supervisor whose duty it is to make the individual assessment to the various taxpayers of the township in proportion to the estimate and valuation of their property. The assessment-roll is then delivered to the town treasurer for collection.

The judgment in the present case not being paid and the township officers having refused to take any steps to levy the requisite tax for the purpose, the relator on the 11th of October, 1876, filed his petition for a mandamus against Edward M. Edwards, supervisor of the township of St. Joseph, in which he set forth the judgment and alleged that on the 26th of September, 1876, he caused a certified transcript of the judgment to be served on the township clerk, with proper notice and demand; and on the 27th of September, 1876, he caused a similar transcript, notice and demand to be served on Edwards, the supervisor. The petition further alleged that these officers refused to do any thing in the premises, the clerk pretending to have resigned his office. An alternative mandamus was issued commanding Edward, as supervisor of the township, forthwith to deliver to the clerk of the board of supervisors of the county a statement of the claim of relator under and by virtue of the judgment.

Edwards duly filed a return stating that he was not supervisor and had no authority to perform the acts required of him; that at the general election of April 3, 1876, he was duly elected supervisor, and qualified and entered upon his office, and continued in office until the 7th of June, 1876, when he resigned; that his resignation was in writing as follows: "To the township board of the township of St. Joseph, county of Berrien, State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7, 1876. (Signed) Edward M. Edwards." That this written resignation was delivered to and filed by the township clerk on the same day; that since then he, Edwards, had not been nor acted as supervisor, nor had charge of the records or papers of the office. He further stated in his return that the township clerk had never delivered to him any certified copy of any statement of the moneys to be raised by taxation, either for the purpose of paying the claim of the relator or for any other purpose.

To this return the relator demurred, and the demurrer was sustained and a peremptory mandamus awarded. The present writ of error is brought to reverse this judgment.

If we could take notice of the affidavits annexed to the petition for mandamus, we should not have much difficulty in drawing the conclusion that the pretended resignations of the clerk and supervisor were either simulated or made for the purpose of evading compulsory performance of their duties. But the return being demurred to must be taken as true, and the affidavits cannot be considered. The only question to decide therefore is whether the facts set forth in the return exhibit a good and sufficient answer to the alternative writ; whether, in other words, they show such a completed resignation on the part of Edwards as amounts to a deposition of his office of supervisor of the township. This is the issue made by the parties and it is an issue of law. The plaintiff in error insists that having done all that he could do to discharge himself from the office by filing a written resignation with the township clerk, his resignation was complete. The defendant in error insists that a resignation is not complete until it is accepted by the proper authority. The question then is narrowed down to this: was the resignation complete without an acceptance of it, or something

tantamount thereto, such as the appointment of a successor?

As civil officers are appointed for the purpose of exercising the functions and carrying on the operations of government, and maintaining public order, a political organization would seem to be imperfect which should allow the depositaries of its power to throw off their responsibilities at their own pleasure. This certainly was not the doctrine of the common law. In England a person elected to a municipal office was obliged to accept it and perform its duties, and subjected himself to a penalty by refusal. An office was regarded as a burden which the appointee was bound in the interest of the community and of good government to bear. And from this it followed of course that after an office was conferred and assumed it could not be laid down without the consent of the appointing power. This was required in order that the public interests might suffer no inconvenience for the want of public servants to execute the laws. See 1 Kyd on Corp., ch. 3, § 4; Will. on Corp. 129, 238, 239; Grant on Corp. 221, 223, 268; 1 Dillon on Mun. Corp., § 163; *Rez v. Bower*, 1 B. & C. 585; *Rez v. Burder*, 4 T. R. 778; *Rez v. Lone*, 2 Str. 920; *Rez v. Jones*, id. 1146; *Hoke v. Henderson*, 4 Devereux, 29; *Van Orsdall v. Hazard*, 3 Hill, 247; *State v. Ferguson*, 31 N. J. 107. This acceptance may be manifested either by a formal declaration or by the appointment of a successor. "To complete a resignation," says Mr. Willcock, "it is necessary that the corporation manifest their acceptance of the offer to resign, which may be done by an entry in the public books or electing another person to fill the place, treating it as vacant." Will. on Corp. 239.

In this country, where offices of honor and emolument are commonly more eagerly sought after than shunned, a contrary doctrine with regard to such offices, and in some States with regard to offices in general, may have obtained; but we must assume that the common-law rule prevails unless the contrary be shown. In Michigan we do not find that any contrary rule has been adopted; on the contrary, the common-law rule seems to be confirmed by the statutes of the State so far as their intent can be gathered from their specific provisions. By section 690 of the Compiled Laws of 1871, if any person elected to a township office (except that of justice), of whom an oath is required and who is not exempt by law, shall not qualify within ten days, he is subjected to a penalty of ten dollars. By sections 691, 693, resignations of officers elected at township meetings must be in writing, addressed to the township board, who are authorized to make temporary appointments to fill vacancies. (The township board is composed of the supervisor, the two justices of the peace whose term of office will soonest expire, and the township clerk, any three of whom constitute a quorum. § 76.) Resignations of other officers are directed to be made generally to the officer or officers who appointed them or who may be authorized by law to order a special election to fill the vacancy. § 615. These provisions indicate a general intention in conformity with the principles of the common law. They make the acceptance of a township office a duty, and they direct resignations of office generally to be made to those officers who are empowered either to fill the vacancy themselves or to call an immediate election for that purpose — the controlling object being to provide against the public detriment which would ensue from the continued or prolonged vacancy of a public office. The same intention is manifested by section 649, which prescribes the term of office of township officers as follows: "Each of the officers elected at such meetings [that is the annual meetings of the township] except justices, commissioners of highways and school inspectors, shall hold his office for one year, and until his successor shall be elected and duly qualified." Here is manifested the same desire to prevent

a hiatus in the offices. There is nothing in the spirit of this legislation to indicate that the common-law rule is discarded in Michigan.

The 617th section of the Compiled Laws declares that "every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: first, the death of the incumbent; second, his resignation; third, his removal from office; etc., etc." But it is nowhere declared when a resignation shall become complete. This is left to be determined upon general principles. And in view of the manifest spirit and intent of the laws above cited, it seems to us apparent that the common-law requirement — namely, that a resignation must be accepted before it can be regarded as complete — was not intended to be abrogated. To hold it to be abrogated would enable every office holder to throw off his official character at will and leave the community unprotected. We do not think that this was the intent of the law.

The plaintiff in error has referred us to several authorities to show that in this country the doctrine that a resignation to be complete must be accepted, does not prevail. But whilst this seems to be the rule in some States it is not the case in all. In many States the common-law rule continues to prevail. In *Hoke v. Henderson*, 4 Devereux, 1, 22, decided in 1832, Chief Justice Ruffin, speaking for the Supreme Court of North Carolina, said: "An officer may certainly resign; but without acceptance his resignation is nothing, and he remains in office. It is not true that an office is held at the will of either party. It is held at the will of both. Generally resignations are accepted; and that has been so much a matter of course with respect to lucrative offices as to have grown into a common notion that to resign is a matter of right. But it is otherwise. The public has a right to the services of all the citizens, and may demand them in all civil departments as well as in the military. Hence there are on our statute book several acts to compel men to serve in offices. Every man is obliged, upon a general principle, after entering upon his office to discharge the duties of it while he continues in office, and he cannot lay it down until the public or those to whom the authority is confided are satisfied that the office is in a proper state to be left and the officer discharged." Page 29. Similar views were expressed by Mr. Justice Cowen in 1842, in delivering the opinion of the Supreme Court of New York in *Van Orsdall v. Hazard*, 3 Hill, 247, 248; and many common-law authorities on the subject were referred to. The Supreme Court of New Jersey maintained the same doctrine in 1864 in an able opinion delivered by the present learned chief justice in the case of *State v. Ferguson*, 31 N. J. Law, 107. Speaking of the officer in question (an overseer of highway) the chief justice said: "If he possess this power to resign at pleasure, it would seem to follow as an inevitable consequence that he cannot be compelled to accept the office. But the books seem to furnish no warrant for this doctrine. To refuse an office in a public corporation connected with local jurisdiction was a common-law offense and punishable by indictment." After reviewing the authorities cited to the contrary, particularly that in *McLean*, 512, the chief justice concludes: "I do not think any of the other cases relied upon on the argument sustain in the least degree the doctrine, but on the contrary they all imply that the resignation, to be effectual, must be accepted."

In *Gates v. Delaware County*, 12 Iowa, 405, referred to and much relied on by the plaintiff in error, whilst the court asserts that acceptance is not necessary, it nevertheless finds that there was, in fact, an acceptance in that case. The county judge to whom the superintendent of schools addressed his resignation, indorsed "resignation" and filed it in his office of the date specified; which act, under the circumstances,

was considered by the court an acceptance. This case, therefore, cannot be regarded as definitely settling the doctrine even in Iowa.

Much reliance is also placed on the decision of Mr. Justice McLean in the Circuit Court in *U. S. v. Wright*, 1 McLean, 509, where Wright was sued as surety on a collector's bond for delinquency committed by the collector after he had sent his resignation to the President but before it was accepted. Justice McLean held that the resignation was complete when received, and that the defendant was not liable. In announcing his decision he used this broad language: "There can be no doubt that a civil officer has a right to resign his office at pleasure, and it is not in the power of the Executive to compel him to remain in office." Chief Justice Beasley of New Jersey, in commenting upon this language in *State v. Ferguson*, already cited, justly observes: "It is hardly to be supposed that it was the intention of the judge to apply this remark to the class of officers who are elected by the people and whose services are absolutely necessary to carry on local government; or that it was the purpose to brush away with a breath the doctrine of the common law, deeply rooted in public policy upon the subject. However true the proposition may be as applied to the facts then before the Circuit Court, it is clearly inconsistent with all previous decisions, if extended over the class of officers where responsibility is the subject of consideration."

But conceding that the law in some of the States is as contended for by the plaintiff in error—and he cites cases to this purpose decided in Alabama, Indiana, California and Nevada—and conceding that Justice McLean's decision may have been correct in the particular case before him, the question is, what is the law of Michigan? and we think it has been shown that the common-law rule is in force in that State.

Now, in the present case it is true that the defendant in his return avers that he resigned his office on the 7th day of June, 1876. But he does not stop here. He goes on to show precisely what he did do. His whole return on this branch of the subject is as follows:

"That at the general election of April 3, 1876, this respondent was duly elected the supervisor of said township of St. Joseph, and on April 8, 1876, respondent qualified and entered upon his office as such supervisor. That respondent continued in said office of supervisor until the 7th day of June, 1876, when this respondent resigned his office as such supervisor. That such resignation was in writing, of which the following is a true copy:

"To the township board of the township of St. Joseph, county of Berrien and State of Michigan: I hereby tender my resignation of the office of supervisor of this township. St. Joseph, June 7, 1876.

"EDWARD M. EDWARDS."

"That said writing, of which the above is a copy, was signed by this respondent and after being so signed was by respondent delivered to and filed by the township clerk of said township of St. Joseph, and that said writing was so delivered to and filed by said township clerk on the 7th day of June, 1876. That since said 7th day of June, 1876, this respondent has not been the supervisor of said township of St. Joseph. That he has not acted or assumed to act as such supervisor in any particular. That respondent has not since said June 7, 1876, had charge of any of the records or papers of said office of supervisor."

It does not appear that the resignation was ever acted upon by the township board or that it was ever presented to or seen by them, or that the board was ever convened after the resignation was filed. According to the common-law rule the resignation would not be complete, so as to take effect in vacating the office, until it was presented to the township board and either

accepted by them or acted upon by making a new appointment. A new appointment would probably be necessary in this case, because the township board was not the original appointing power. The supervisor is not their officer, representative or appointee. They only represent the township in exercising the power vested in them of filling a vacancy when it occurs. This makes them the proper body to receive the resignation, because they are the functionaries whose duty it is to act upon it.

We think, therefore, that the return made to the alternative mandamus did not sufficiently show that the defendant had ceased to be supervisor of the township.

Other excuses for not obeying the mandamus are propounded in the return as follows:

"Respondent further says that he has never had served upon him in the cause in which said alternative writ issued, any process, notice or paper of any kind except said alternative writ.

"And respondent further shows that the township clerk of said township of St. Joseph has never made and delivered to respondent any certified copy of any statement on file or of record in his office of the moneys to be raised by taxation either for the purpose of paying the alleged claim of the relator or for any other purpose, and no statement whatever of the clerk of said township with reference to the amount of money to be raised for township purposes has ever been delivered to respondent."

The plea of non-service of the writ is inadmissible. The appearance of the defendant and the actual making of the return are a sufficient answer to it. Non-service may be good ground for a motion to set aside proceedings based on supposed service, but is not a good return to the writ.

The excuse that the clerk did not deliver to the defendant a certified statement is evasive. Why did he not do so? Was there collusion between them as stated in the petition for mandamus? The defendant does not state that the clerk refused to deliver him a statement; nor that he, the defendant, applied to the clerk for one. His own act in repudiating his office might well have prevented the clerk from delivering a statement to him. It is to be presumed that on resuming his duties the clerk will recognize his official character and furnish the requisite statement. But if the clerk should refuse, it would still be the defendant's duty as supervisor to see that the claim of the relator, which is a fixed and indisputable liability of the township, and has been duly presented, is placed before the board of supervisors and put in the way of payment by means of taxation.

We think the return was insufficient, and the demurrer was well taken. The judgment of the Circuit Court is therefore affirmed.

PURCHASE BY A NATIONAL BANK OF ITS OWN SHARES.

UNITED STATES SUPREME COURT, APRIL 18, 1881.

JOHNSTON V. LAFLIN.

The owner of shares in a National bank, which he believed to be solvent, sold them to a broker for a consideration, executing a power of attorney in blank, authorizing their transfer on the books of the bank. The shares were purchased by the broker, but without knowledge of the owner, for the president of the bank. The latter caused the name of his clerk to be inserted as attorney, the clerk then transferring the shares to the president as trustee, on the bank's official stock register. The president purchased the stock for the bank and with its funds. The clerk knew of this fact, but neither the broker nor the owner did. Held, that the sale to the broker could not be impeached as in viola-

the transfer, the association cannot clog the transfer with useless restrictions or make it dependent upon the consent of the directors or other stockholders. It is not necessary, however, to consider what restrictions would be within its power, for it had imposed none. As between Laffin and the broker the transaction was consummated when the certificate was delivered to the latter, with the blank power of attorney indorsed, and the money was received from him. As between them, the title to the shares then passed; whether that be deemed a legal or equitable one matters not; the right to the shares then vested in the purchaser. The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps also to protect the purchaser against proceedings of the seller's creditors. Purchasers and creditors, in the absence of other knowledge, are only bound to look to the books of registry of the bank. But as between the parties to a sale, it is enough that the certificate is delivered with authority to the purchaser, or any one he may name, to transfer it on the books of the company, and the price is paid. If a subsequent transfer of the certificate be refused by the bank it can be compelled at the instance of either of them. *Bank v. Lanier*, 11 Wall. 369; *Webster v. Upton*, 91 U. S. 65; *Bank of Utica v. Smalley*, 2 Cow. 777; *Gilbert v. Manchester Iron Co.*, 11 Wend. 628; *Commercial Bank of Buffalo v. Kortright*, 22 id. 362; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90.

The transferability of shares in the National banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies. The power of attorney indorsed on the certificate is usually written or printed, with a space in blank for the name of the attorney to be inserted, for the accommodation of the purchaser. The subsequent filling up of the blank by him with another name, instead of his own, as it may suit his convenience, does not so connect the vendor with the party named as to charge him with the latter's knowledge and thus affect the previous transaction. A different doctrine would put a speedy end to the signing of powers of attorney in blank. And instruments of that kind are of great convenience in the sale of shares of incorporated companies, and are in constant use. The name with which the blank may be subsequently filled up by the purchaser is not, in practice, regarded as affecting the previous sale in any respect, but as a matter which concerns only the purchaser. It would be a source of disturbance in business if any other result were attached by the law to the proceeding.

The further position of the receiver, that the assets of the bank constituted a trust fund for the benefit of its creditors, and where wrongfully diverted, can be followed in whosoever hands they can be traced, may, as the statement of a general doctrine, be admitted. But it has no application to the case at bar. Here no assets of the bank were received by Laffin. What he received came from the broker, the only person with whom he dealt or whom he knew as principal in the negotiation. The circumstance that the purchase was actually in the interest of the bank—though of that fact the broker was ignorant—cannot affect the latter's character as principal, so far as Laffin was concerned, which he bore in the negotiation.

The whole transaction, on the part of Laffin, was free from any imputation of fraud. He sold his shares to a person competent to purchase and hold them, and received the stipulated price. It would be a perversion of justice and of the ordinary rules governing men in commercial transactions, to hold the sale, under such

circumstances, vitiated by the relations of the purchaser to others, of which the seller had no knowledge or any grounds to entertain a suspicion. The validity of the sale of stock cannot be made to depend upon the accident of the immediate purchaser, or of the party to whom he may transfer the certificate, in filling up the blank in the power of attorney with the name of a person, to make the formal transfer, who is acquainted with the secret interests of others in the shares purchased. The validity of a sale and its completeness must be determined by the relation which the contracting parties at the time openly bear to each other.

Of course the whole case here would be changed if the sale by Laffin had not been made in good faith, but was made merely to evade his just responsibility as a stockholder, or to work a fraud upon other stockholders or creditors of the bank.

Decree affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

ACTION—FOR BREACH OF CONTRACT WITH STATE OFFICERS MAINTAINABLE BY INDIVIDUAL INJURED—NEW YORK REPORTS—DAMAGES AND PENALTY—EVIDENCE.—A contract made by the defendant, a law book publisher, with the New York State officers authorized to make it, for the publication of the New York Reports, provided among other things that defendant should at all times keep the volumes published for sale at retail at the price named in the contract in one or more law bookstores in the city of Albany and the city of New York, and it declared: "And should any other law bookseller in either of said cities apply to purchase any of said volumes the same shall be supplied to such law booksellers upon application in quantities not exceeding 100 copies to each applicant; unless said party of the second part shall choose to deliver a greater number when applied for, which he shall be at liberty to do; and the said party of the second part shall thereupon, at intervals not exceeding ten days, furnish the said law booksellers copies of any of such volumes when required in quantities not exceeding fifty volumes at a time." It also provided that "the said volumes shall be published and kept on sale as aforesaid at the price of \$1.10 per copy and shall be simultaneously placed on sale in each of said bookstores in the cities of New York and Albany, and as to the time when copies of said volumes or any of them may be purchased," etc., there shall be no discrimination, etc. It was provided that for failure to keep the contract, defendant should forfeit to the people of the State \$5,000 damages to be sued for in the name of the people, and also that he should for a failure to keep and deliver the volumes or any of them at the price stated, forfeit and pay \$100, not as a penalty, but as "the liquidated damages suffered by the person or persons aggrieved thereby, the same to be sued for and recovered by the person so aggrieved." The plaintiffs, who are law booksellers, applied on six different occasions for copies of some of the volumes published at the bookstore of the defendant and demanded the same, and upon refusal brought action for six different sums of \$100 each. *Held*, that the State officers had a right to make the contract in question and to provide therein for the amount to be recovered in case of a failure to keep and sell the reports as the contract provided. 3 R. S. (6th ed.) 188, § 44. An agreement made for a valid consideration by one party with another to pay money to a third can be enforced by such third party in his own name. *Lawrence v. Fox*, 20 N. Y. 268; *Coster v. Mayor*, etc., 43 id. 309; *French v. Donaldson*, 57 id. 496. Contractors with the State who assume for a consideration received from the sovereign power to do certain things are liable in case of neglect

to action by a private individual injured, and such contract inures to the individual who is interested in its performance. *Weet v. Brookport*, 16 N. Y. 161, note; *Robinson v. Chamberlain*, 34 id. 389; *Fulton Fire Ins. Co. v. Baldwin*, 37 id. 648; *Johnson v. Belden*, 47 id. 130; *City of Brooklyn v. Brooklyn City R. Co.*, id. 476; *McMahon v. Second Ave. R. Co.*, 75 id. 231; *Conroy v. Gale*, 5 Lans. 344. If the plaintiffs have been injured by a violation of such a contract, no reason exists why an action would not lie on their behalf against defendant for the recovery of damages. *Arnold v. Nichols*, 64 N. Y. 117; *Claffin v. Ostrom*, 54 id. 581. While if the demand made by plaintiffs was in any way speculative or unreasonable, an action to recover the amount fixed as damages perhaps could not be maintained, direct evidence of damages was not required. From the fact of the violation of the contract, it is to be presumed that the party sustained a loss. Whether in such a contract the amount fixed is a penalty or is to be regarded as damages is to be determined by the actual intention of the parties so far as it can reasonably and fairly be ascertained from the language of the contract and from the nature of surrounding circumstances. *Colwell v. Lawrence*, 38 N. Y. 71; *Cothel v. Talmage*, 9 id. 551; *Noyes v. Phillips*, 60 id. 408; *Lampman v. Cochran*, 16 id. 275. The intention cannot be entirely determined by the use of the word "penalty" or the words "liquidated damages." *Staples v. Parker*, 41 Barb. 648; *Beale v. Hayes*, 5 Sandf. 640. Nor is the word "forfeit" conclusive. In this case, as under the circumstances, there would be considerable difficulty in making proof of the actual damage by a refusal to sell; the inference is that the sum fixed was intended to be as damages. Under the terms of the contract the determination of number of volumes to be furnished did not rest with the defendant. The applicant might fix the number to the extent of 100 volumes. Plaintiff was entitled to recover interest from the time of the breach of the contract. Judgment affirmed. *Little v. Banks*. Opinion by Miller, J. [Decided May 10, 1881.]

SHERIFF—NOT LIABLE FOR RELEASE OF IMPRISONED DEBTOR UPON JUDGE'S ORDER SHOWING JURISDICTION—REPEAL—2 R. S. 28. —A sheriff who releases an imprisoned debtor upon an order of a county judge exempting such debtor from imprisonment by reason of any prior debt (2 R. S. 28, § 1; id. 34, § 1) is not liable in an action by the creditor for an escape, if the order contains recitals of all the facts needed to give jurisdiction to the judge granting it, and if the order does not contain those recitals the sheriff will be protected if he can show outside the order of discharge that the needed facts existed. *Ballymore v. Cooper*, 46 N. Y. 236. Three things are needed to give the judge in such a case jurisdiction: First. Power by law to act on the general subject-matter, that is, the discharge of an insolvent debtor, which is given by 2 R. S. 28, § 1; id. 34, § 1; Second. Jurisdiction of the person of the particular insolvent, who must reside or be imprisoned in the same county as the judge. Proof of residence may be made preliminary to presenting a petition by the affidavit of some one other than the petitioner. In *re Wrigley*, 8 Wend. 134, 138. And the petition verified alone is enough, and the discharge is proof of the place of residence if it state the fact. *Jenks v. Stebbins*, 11 Johns. 224; *Stanton v. Ellis*, 12 N. Y. 575. A recital in the discharge, "F. of the town of S. in the county of S." has been held sufficient in collateral proceedings. *Barber v. Winslow*, 12 Wend. 102. A petition of an insolvent commenced, "the petition of F. of the town of S. in the county of S.," etc., and was accompanied by an affidavit that it "is true in all respects." Held, not enough to make proof of residence in the county. *Staples v. Fairchild*, 3 N. Y. 41; *Payne v. Young*, 8 id. 158. The judge had jurisdiction if the debtor was

imprisoned in the county (2 R. S. 35, § 2), and although he was in the liberties he was so imprisoned. Being out of jail in the liberties is in the judgment of the law being in prison. *Holmes v. Lansing*, 3 Johns. Cas. 75; *Peters v. Henry*, 6 Johns. 121; and this notwithstanding *Bylandt v. Comstock*, 25 How. Pr. 429. Third. Jurisdiction of the particular case. If the discharge by its recitals shows the presentation of a proper petition, account and inventory, and there is proof *altunde* that the proper affidavit was annexed to the petition and schedule, it is enough to protect the sheriff, though as between the debtor and his creditors it might be objected that the statute was not complied with in the proceedings. See *Bennett v. Burch*, 1 Den. 141; *Potter v. Meroh. Bk. of Alb.*, 28 N. Y. 641. The provisions of the 5th article, 2 R. S. 28, have not been repealed by Laws 1831, ch. 300, or by old Code, § 179. Judgment affirmed. *Devlin v. Cooper*. Opinion by Folger, C. J. [Decided March 8, 1881.]

NEGLIGENCE—VIOLATION OF CITY ORDINANCE NOT NEGLIGENCE PER SE.—In an action to recover damages for the death of plaintiff's intestate through the negligence of defendant, it appeared at the trial that defendant's driver left the horses which caused the accident, attached to a vehicle standing in a street in the city of Brooklyn without any person attending them, and without tying them, and that this was done in violation of a city ordinance. Plaintiff asked the judge to charge that a violation of an ordinance of the city is necessarily negligence, and the judge replied: "It is; I have so told the jury it is negligence." Held, that there was error in the charge so made. The judge went too far in holding that a violation of the ordinance was negligence of itself. The result of the decision is, that the violation of the ordinance is some evidence of negligence, but not necessarily negligence. See *Brown v. Buff. & S. L. R. R. Co.*, 22 N. Y. 191, the doctrine of which is repudiated in *Jetler v. Hudson Riv. R. R. Co.*, 2 Abb. Ct. Ap. Dec. 458; *Beisiegel v. New York Cent. R. R. Co.*, 14 Abb. Pr. N. S. 20; *McGrath v. New York Cent. R. R. Co.*, 63 N. Y. 522; *Massoth v. Del. & Hud. Can. Co.*, 64 N. Y. 524. Judgment reversed and new trial granted. *Knupfle v. Knickerbocker Ice Co.* Opinion per curiam. All concur except Miller and Danforth, JJ., dissenting, and Rapallo, J., absent. [Decided March 15, 1881.]

SURETYSHIP—CONTRIBUTION—ESTATE OF DECEASED SURETY LIABLE TO CONTRIBUTE.—Where one of two joint sureties dies and the remaining surety is compelled to pay the debt, he can maintain an action for contribution against the personal representative of the deceased surety. It was held in *Bradley v. Burwell*, 3 Den. 61, that the death of one of two sureties did not relieve his estate from liability to contribute, upon the ground that the law implies a contract between co-sureties to contribute ratably toward discharging the liability they incur, such contract originating at the time they execute the original undertaking, and that in case of death of either, this obligation devolved upon his legal representatives, and is like any other contract made by one in his life time. The doctrine in cases where the creditor pursues a supposed remedy against the estate of a deceased surety, does not apply to the liability of the sureties between themselves. This court has often held that, as between the creditors and the estate of a deceased surety, the joint obligation of the latter ended with his death, but it is not yet proposed to decide that his several obligation originating at the date of the common signature also terminates with his death. In *Norton v. Coons*, 3 Den. 130, it was held that while contribution between sureties was founded on a general principle of equity and justice, yet what had been an equitable had be-

come a legal right, and that in such case the law will for all the purposes of a remedy imply a promise of payment. In *Tobias v. Rogers*, 13 N. Y. 66, the surety was held not liable to contribute, because relieved in his life-time from liability by a discharge in bankruptcy. Judgment affirmed. *Johnson v. Harvey*. Opinion by Finch, J. [Decided March 1, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

AGENCY — AGENT CANNOT ACT IN HIS OWN BEHALF AS TO A TRANSACTION FOR PRINCIPAL — CORPORATE DIRECTORS INTERESTED IN ANOTHER COMPANY DEALING WITH THEIR CORPORATION. — The same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting. Thus a person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and as we said on a former occasion, "constituted as humanity is, in the majority of cases duty would be overborne in the struggle." *Marsh v. Whitmore*, 21 Wall. 183. The law, therefore, will always condemn the transaction of a party on his own behalf when, in respect to the matter concerned, he is an agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all other persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits. Hence all arrangements by directors of a railroad company, to secure an undue advantage to themselves at its expense, by the formation of a new company as an auxiliary to the original one, with an understanding that they, or some of them, shall take stock in it, and then that valuable contracts shall be given to it, in the profits of which they, as stockholders in the new company, are to share, are so many unlawful devices to enrich themselves to the detriment of the stockholders and creditors of the original company, and will be condemned whenever properly brought before the courts for consideration. *Great Luxembourg Co. v. Magnay*, 25 Beav. 586; *Benson v. Heathorn*, 1 Y. & C. 826; *Flint & Pere Marquette R. Co. v. Dewey*, 14 Mich. 477; *European & N. American R. Co. v. Poor*, 59 Me. 277; *Drury v. Cross*, 7 Wall. 299. Decree of U. S. Circ. Ct., Nebraska, affirmed. *Wardell v. Union Pacific Railroad Co.* Opinion by Field, J. [Decided March 28, 1881.]

APPEAL — WHEN SECOND APPEAL TO THIS COURT ALLOWED. — Upon an appeal from the United States Circuit Court, this court made a decision in which among other things H. was allowed a specified sum for his services as receiver. Thereafter H. caused a suit to be reinstated in a State court and an allowance to him as receiver was made in that court. He then filed an intervening petition in the United States Circuit Court, asking that the allowance by the State court be paid him out of the fund in the possession of the Circuit Court. This petition was refused and from an order to that effect an appeal was taken to this court. *Held*, that the appeal was allowable. Second appeals have always been allowed to bring up proceedings subsequent to the mandate and not settled by the terms of the mandate itself. *Supervisors v. Kennicott*, 94 U.

S. 498; *Tyler v. Maguire*, 17 Wall. 283. This case comes clearly within that rule, and the motion to dismiss is therefore denied. The case differs from *Stewart v. Salamon*, 97 U. S. 361. The order of the United States Circuit Court, Southern District Illinois, was affirmed, on the ground that the liability of the fund in the hands of that court, for the receiver's services, had been fully discharged. *Hinkley v. Morton*. Opinion by Waite, C. J. [Decided March 21, 1881.]

BANKRUPTCY — PREFERENCE OF ONE IGNORANT OF INSOLVENT'S CONDITION, VALID. — C. was the administrator of the estate of the deceased husband of B., held in his hands about \$24,000, which it was his duty to pay over to her for herself and as guardian of the minor children of the husband. To secure the payment of this amount, on the 1st of October, 1873, C. executed mortgages upon his property to B. On the 1st of November, 1873, a petition was filed, upon which he was adjudicated a bankrupt. These facts were established, viz., that when C. made the mortgages he was insolvent and knew he was in that condition; that he intended by them to give B. a preference over his other creditors, and that B. did not know or have reasonable cause to believe that C. was insolvent at that time: *Held*, that the mortgages were not invalid under the provisions of the bankrupt laws of 1867, then in force. In *Grant v. National Bank*, 97 U. S. 80, this court said: "The act very wisely, as we think, instead of making a payment or a security void for mere suspicion of the debtor's insolvency, requires for that purpose that his creditor should have some reasonable cause to believe him insolvent. He must have knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man." Decree of U. S. Circ. Ct., N. D. Ohio, reversed. *Barbour v. Priest*. Opinion by Miller, J. [Decided March 21, 1881.]

JURISDICTION — OF SUIT BY NATIONAL BANK — NEGOTIABLE INSTRUMENT — WHAT IS — PRACTICE — UNINJURIOUS ERROR NOT GROUND OF APPEAL. — (1) Under the provision of United States Revised Statutes, section 629, giving the Federal Circuit Courts original jurisdiction of all suits by or against any banking association established in the district in which the court is held under any law providing for National banking associations, those courts have jurisdiction of suits brought by or against a National bank, without regard to the citizenship of the parties, and it has been so held by this court. *Kennedy v. Gibson*, 8 Wall. 498. (2) A bond issued by a county in aid of a railroad company set forth that the county was indebted to the railroad company, "or the holder hereof if this bond is transferred by the signature of the president of said company." The bond was indorsed, "For value received this bond is transferred to bearer," which indorsement was signed by the president of the company mentioned. *Held*, that the bond was a negotiable instrument. In order to make a promissory note or other obligation, for the absolute payment of a sum certain, on a certain day, negotiable, it is not essential that it should in terms be payable to bearer or order. Any other equivalent expressions demonstrating the intention to make it negotiable will be of equal force and validity. *Com. Dig., Merchant, F. 5; 3 Kent's Com. 77; Chitty on Bills*, 180 (8th ed.); *Bayley on Bills*, 120 (5th ed.); *Story on Prom. Notes*, § 44. (3) Defenses in pleas to which demurrers were allowed were set up in other pleas to which demurrers were overruled. *Held*, on defendant's appeal, that whether the court was right or wrong in its judgment on the demurrers was immaterial. "There must be some injury to the party to make the matter generally assignable as error." *Greenleaf's Lessee v. Birth*, 5 Pet. 132; *Randon v. Toby*, 11 How. 493. Judgment of U. S.

Circ. Ct., M. D. Tennessee, affirmed. *County of Wilson v. Third National Bank of Nashville*. Opinion by Woods, J.
[Decided April 4, 1881.]

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

NOVEMBER, 1880.

CONSTITUTIONAL LAW - STATE LAW REGULATING FLOATING OF LOGS IN RIVER NOT AN INTERFERENCE WITH COMMERCE. — A State law requiring that logs floated down a navigable river passing through the State shall be formed into rafts and attended by persons, held, not invalid as interfering with the power of Congress to regulate commerce among the several States. This statute does not attempt to deprive the river of the character of a highway. It does not interfere with any use of it as such, and all inter-state commerce may be conducted over its waters with the same freedom as over its roads, bridges and other highways. That it is competent for the Legislature of a State to prescribe the mode in which its ways shall be used to avoid collision and conflict, and to prevent injury to persons or property rightfully thereon, and to prevent obstructions therein cannot be questioned; and such legislation has no relation to and does not interfere with commerce between the States. Neither a log nor any number of logs floating upon the surface of a stream, uncontrolled and uncontrollable, is navigation or commerce. Cases referred to, *Railroad Co. v. Husen*, 96 U. S. 405; *Treat v. Lord*, 42 Me. 552; *Carter v. Thurston*, 53 N. H. 104. *Harrigan v. Connecticut River Lumber Co.* Opinion by Lord, J.

CRIMINAL EVIDENCE - DECLARATIONS OF THIRD PERSONS, WHEN ADMISSIBLE AS PART OF RES GESTÆ. — At the trial of an indictment charging that defendant "did own, possess, keep and train a certain bird, to wit, a cock, with the intent then and there that said bird should be engaged in an exhibition of fighting," a police officer testified that he with others of the police went into a place where they found defendant and others, and a game-cock with a steel gaff on and its wings trimmed, etc.; that when the police entered the others endeavored to rush out but were prevented. Witness then stated that he heard some one of the men found in the place say in defendant's presence, "you come too soon." Another police officer testified to the same facts and that he heard some one of the same men say in defendant's presence: "Let them go to h—l; they can't find any thing and can't do any thing; if they had been five minutes sooner they might have seen something." Held, that the declarations testified to were admissible as part of the *res gestæ*. All the discoveries which the officers made, all the conduct of the parties found there, their ejaculations and their taunts, the game-cock with his trimmed wings and steel gaff, were all competent evidence, not to prove that the defendant owned the game-cock, but to show the character of that assemblage, and tending to show whether or not the intent of the owner of the cock was that he "should be engaged in an exhibition of fighting." *Commonwealth of Massachusetts v. Rutcliffe*. Opinion by Lord, J.

INTEREST — IN ACTION UPON FOREIGN JUDGMENT. — In an action upon a foreign judgment, plaintiff, without proving any demand, is entitled to recover interest by way of damages upon the judgment sued on from the date of that judgment to the date of judgment in this action, computed at the ordinary legal rate of interest in this Commonwealth. *Williams v. American Bank*, 4 Met. 315; *Barringer v. King*, 5 Gray, 9. *Hopkins v. Shepard*. Opinion by Gray, C. J.

MAINE SUPREME JUDICIAL COURT ABSTRACT.

DECEMBER, 1880.*

APPURTENANCES — BY DEVISE OF LAND, RIGHT OF WAY THEREFROM PASSES. — By the devise of a house and lot, a right of way held and enjoyed by the devisee, to and from the same over adjoining premises, will pass to the devisee although it is not named in the will. *White v. Crawford*, 10 Mass. 187; *Barnes v. Lloyd*, 112 Id. 232. *Bungs v. Parker*. Opinion by Symonds, J.

ASSIGNMENT FOR CREDITORS — IN ANOTHER STATE VALID HERE AS TO NON-RESIDENTS AND AS TO THOSE ASSENTING CONSTITUTIONAL LAW — CORPORATION — RESIDENCE OF — ACTION — EQUITY MAY PREVENT CLOUD ON TITLE. — (1) A general assignment for the benefit of creditors made in another State is valid here so far as to protect the assigned real estate here situated from attachment by a non-resident creditor who has assented to the assignment, and received in part the benefits thereby secured to him. The statutes of this State do not apply to foreign assignments, but leave them to be governed by those principles of comity which have heretofore been recognized as existing in this State, and ought to prevail in all the States. The recognized rule in this State is to uphold foreign assignments except as against our own citizens; and this discrimination is not unconstitutional. It is a general rule that those who assent to an assignment for the benefit of creditors cannot repudiate it. Knowingly receiving payments or dividends thereby secured to them is conclusive evidence of assent. An exception to the general rule is where an assignment is declared void by the law of the place where it is made. If declared absolutely void, no ratification or assent of the creditors can make it valid; but if it is only void as to the election of such creditors as choose to avoid it, it will be sustained as to such creditors who assent to it or afterward ratify it. When a creditor to whom the law secures the right to avoid an assignment (not void absolutely) made by his insolvent debtor, assents to the assignment or knowingly avails himself of the benefits thereby secured to him, he waives his right to treat the assignment as void. See *Ockerman v. Cross*, 54 N. Y. 29; *Bentley v. Whittemore*, 19 N. J. Eq. 432; *Bholen v. Cleveland*, 5 Mason, 174; *Fox v. Adams*, 5 Me. 245; *Todd v. Backman*, 11 Id. 41; *South Boston Iron Co. v. Boston Locomotive Works*, 51 Id. 585, 589; *Felch v. Bugbee*, 48 Id. 9; *Paul v. Virginia*, 8 Wall. 168; *Clay v. Smith*, 3 Pet. 411. *Bodley v. Goodrich*, 7 How. 276; *Adlum v. Yard*, 1 Rawle, 163; *Rapalle v. Stewart*, 27 N. Y. 310. (2) A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although by comity it may be allowed to do business in other jurisdictions through its agents. *Bank of Augusta v. Earle*, 13 Pet. 519; *Runyan v. Coster*, 14 Id. 122; *Tombigbee R. Co. v. Kneeland*, 4 How. 16. (3) A court of equity has jurisdiction to remove a cloud from title to real estate. There is a still stronger reason for taking jurisdiction to prevent a cloud from being placed upon the title. Thus a court of equity will enjoin a non-resident creditor who has assented to an assignment for the benefit of creditors, made in another State, from laying upon the assigned real estate situated in this State. *Gerry v. Stinson*, 60 Me. 186. *Chaffee v. Fourth National Bank of New York*. Opinion by Walton, J.

DEED — OF PART OF HOUSE. — A deed of the westerly part of a dwelling-house and one-half of the cellar conveys the land under the part of the dwelling-house conveyed. See *Jamaica Pond Aq. Co. v. Chandler*, 9 Allen, 159; *Allen v. Scott*, 21 Pick. 25; *Esty v. Carrier*, 98 Mass. 500; *Cunningham v. Webb*, 60 Me. 98;

* To appear in 71 Maine Reports.

Moulton v. Trafton, 64 id. 218. *Hatch v. Brier*. Opinion by Appleton, C. J.

MARITIME LAW — AUTHORITY OF PART OWNER TO BIND OWNERS FOR SUPPLIES IN HOME PORT. — Where necessary materials and supplies for a vessel are ordered by one who is the agent for that purpose of the part owner in possession and control, they will be considered as ordered by such part owner. It is the act of the part owner by his servant. The part owner of a vessel in undisputed possession will be regarded as having implied authority to bind the other owners for things necessary for the vessel and its employment, unless the evidence discloses something to indicate that such implication of agency is contrary to the fact. As to one who furnishes materials to make the vessel seaworthy, upon the order of a part owner in possession, the presumption of the authority of such part owner to bind all the owners for such goods remains even if it be in the home port, unless there is something more than the single fact of the place of registry or enrollment, or of the owner's residence to remove it. The ground of the liability of the owners under such circumstances is the possession and management of the vessel by one part owner without dissent by the others, and without anything to show that his conduct of the business was not, and was not understood to be, for all. See *Hutchins v. State Bank*, 12 Metc. 427; *Jordan v. Young*, 37 Me. 276; *Dyer v. Snow*, 47 id. 254; *Read v. Hull of a New Brig*, 1 Story, 244; *The General Smith*, 4 Wheat. 438; *Peyroux v. Howard*, 7 Pet. 324; *The Edith*, 4 Otto, 518; *Benson v. Thompson*, 27 Me. 470; *Hardy v. Sproul*, 31 id. 71; *Elder v. Larrabee*, 45 id. 590; 1 Pars. on Ship. & Adm. 101; *Hall v. Thing*, 23 Me. 463; *King v. Lowry*, 20 Barb. 532; *Stedman v. Feidler*, 25 id. 606; 20 N. Y. 437. Compare *Hardy v. Sproule*, 29 Me. 258; *Robinson v. Stuart*, 68 id. 61. See, also, *Call v. Houdlette*, 70 id. 312; *Brodie v. Howard*, 17 C. B. 109. *Bowen v. Peters*. Opinion by Symonds, J.

NEGLIGENCE — RESPONDEAT SUPERIOR — ONE EMPLOYING TEAM AND DRIVER. — If one agrees to furnish another with a team and suitable driver, he is guilty of negligence if he does not furnish such a driver, and he must bear all loss or damage occasioned to the team in consequence of the incapacity and negligence of the driver. The employer would be liable for the acts of the driver done in pursuance of his orders, but the owner would be liable for the results of his incompetency. *Ames v. Jordan*. Opinion by Appleton, C. J.

STATUTE OF FRAUDS — CONTRACT NOT WITHIN YEAR — CONTRACT VOID BY, NOT DEFENSE. — An oral contract wherein a laborer agrees that he will not leave the service of his employer for two years nor in the summer nor without two weeks' notice, is within the statute of frauds. It is a clear rule of law that an oral contract within the statute of frauds can no more be made the ground of defense than demand. The obligation of the plaintiff to perform it is no more available to the defendant in the one case, than the obligation of the defendant to perform it would be to the plaintiff in the other. *Hill v. Hooper*, 1 Gray, 131; *Doyle v. Dixon*, 97 Mass. 212. *Bernier v. Cabot Manufacturing Co.* Opinion by Symonds, J.

PENNSYLVANIA SUPREME COURT ABSTRACT.

CORPORATION — RETAINING BENEFIT OF ACT CANNOT CLAIM IT TO HAVE BEEN UNAUTHORIZED. — J. became surety upon a note given to a building association then unincorporated, upon a verbal assurance by the secretary of the association that he would be held liable only until the debtor should obtain a policy of insurance on his house and deposit it with the association.

Upon the deposit of such policy by the debtor with the association, J. demanded a release from his liability. *Held*, that the association was estopped from setting up against such release, that the secretary had no authority to give the assurance mentioned. Whether the association was incorporated or unincorporated; whether the secretary was or was not authorized to make the representations to J., the association could not have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. No principle of law is better settled than that a man cannot reap the fruits of his agent's fraud. *Musser v. Hyde*, 2 W. & S. 314; *Hunt v. Moore*, 2 Barr, 105; *Mundorff v. Wickersham*, 13 P. F. S. 87; *Keough v. Leslie*, 8 W. N. C. 172. The association took this security *cum onere*, and the maxim *qui sentit commodum sentire debet et onus* applies. *Jones v. National Building Association*. Opinion by Paxson, J. [Decided May 3, 1890.]

MASTER AND SERVANT — NEGLIGENCE — BOSS OF GANG OF MEN FELLOW-SERVANT WITH MEN. — P. was the manager of a corporation; under him was the assistant manager, S. The next in authority was R., who was the general foreman of a particular branch of work and of the laborers, and who was under the direction of P. and S. Workmen employed by the corporation were under the immediate direction of W., but W. and the men were under the control of R., who fixed the number of men to work with W., which number varied from time to time. W. and two workmen under his directions, made a truss plank. This plank gave way while plaintiffs, who were working under W., were passing over, carrying a heavy weight, causing injury to plaintiffs. *Held*, that W. was a fellow-servant of plaintiffs, and not such a representative of the corporation as would make it liable for his negligence. See *Lehigh Valley Coal Co. v. Jones*, 5 N. Y. 433; *Del. & Hud. Can. Co. v. Carroll*, 8 id. 374. In *Caldwell v. Brown*, 3 P. F. S. 456, in which it was held that an engineer was a fellow-employee, for whose acts the employers were not liable, *Reed, J.*, quotes *Gilman v. Eastern R. Co.*, 10 Allen, 233, as follows: "In case of an injury to one servant by the negligence of another, it is immaterial whether he who causes and he who sustains the injury are or are not engaged in the same or similar labor or in positions of equal grade or authority. If they are acting together under one master in carrying out a common object, they are fellow-servants." See, also, *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 565; *Morgan v. Vale of Neath R. Co.*, 35 L. J. Q. B. 23, and *Weger v. Pennsylvania R. Co.*, 5 P. F. S. 463. *Keystone Bridge Co. v. Newberry*. Opinion by Green, J. [Decided Jan. 3, 1881.]

RECENT ENGLISH DECISIONS.

TRADE-MARK — SIMILARITY IN CORPORATE NAMES OF INSURANCE COMPANIES. — A limited company, incorporated in 1877 for the purpose of carrying on a business of insuring horses and vehicles against accidents under the style of the "Guardian Horse and Vehicle Assurance Association," with offices at 31 Lombard street, went into voluntary liquidation and transferred its good-will and business to a new company which was registered under the style of the "Guardian and General Insurance Company, Limited," with offices likewise at 31 Lombard street. In the memorandum of association of the new company were contained powers of adding a fire and life insurance business to the old business. In an action by a company incorporated in 1821, and since that date carrying on a business of fire and life assurance at 11 Lombard street, under the style of the "Guardian Fire and Life Assurance Company," *held*, that the



style of the "Guardian and General Insurance Company, Limited," was a style calculated to deceive, and was in fraudulent imitation of the style "Guardian Fire and Life Assurance Company." Held, also, that the assumption by the defendants of the style "Guardian Horse, Vehicle and General Insurance Company, Limited," would be permissible. In such an action the question to be determined between the parties is whether the style complained of has been assumed with the intention of appropriating the plaintiffs' business. See *Merch. Bk. Co. of London v. Merch. Joint-Stk. Bk., L. R., 9 Ch. D. 560. Ch. Div., June 25, 1880. Guardian Fire & Life Assurance Co. v. Guardian & General Ins. Co. Opinion by Jessel, M. R., 43 L. T. Rep. (N. S.) 791.*

WILL—REQUEST OF PERSONAL PROPERTY ON FARM INCLUDES GROWING CROPS.—A testatrix devised all her real estate to her daughter and gave all the household furniture, farming stock, goods, chattels, and effects which should be in or about F. (a freehold farm) at the time of her decease to her granddaughter. Held, that the growing crops on the farm at the time of the death of the testatrix passed to the granddaughter. The case of *Valsey v. Reynolds*, 5 Russ. 12, not followed. See *Cox v. Godsalve*, 8 East, 604, n; *West v. Moore*, 8 id. 339; *Blake v. Gibbs*, 5 Russ. 12, n; *Rudge v. Winnall*, 12 Beav. 357. Ch. Div., Dec. 6, 1880. *Re Hoose*; *Evans v. Williamson*. Opinion by Jessel, M. R., 43 L. T. Rep. (N. S.) 719.

NEW BOOKS AND NEW EDITIONS.

5 FEDERAL REPORTER.

Cases Argued and Determined in the Circuit and District Courts of the United States. December, 1880 to March, 1881. Peyton Boyle, Editor. Saint Paul: West Publishing Co., 1881. Pp. xxv, 998.

WE have often commended this excellent series. It is the only comprehensive report of the decisions of these courts, has many cases of general interest and importance, is indispensable to practitioners in these courts, and is in every way worthily executed.

ABBOTT'S NEW FORMS.

New Supplement to Abbott's Forms, enlarged and completed. A Collection of Forms of Practice and Pleading in Actions, whether for legal or equitable relief, and in special proceedings of all kinds in courts of record. Especially adapted to the Code of Civil Procedure of the State of New York. With notes and authorities. By Austin Abbott. New Edition. New York: Baker, Voorhis & Co., 1881. Pp. xliii, 225.

There are some men whose names on the title-page of a law book are a guarantee of the value of the book. Austin Abbott is one of these men. He is one of the most useful authors who have ever served our profession. On this particular subject he is a veteran author. Commencing with the old Code, he made the best book of forms. Then with the new Code, the same may be said of his forms for the first thirteen chapters. And now he has revised the latter and extended it so as to cover the entire new Code. As a practitioner we can speak of his first book from experience and actual use. Nothing but trial can test such a book, but we have no doubt, judging from our acquaintance with the former works, that this will stand *facile princeps*. It is a very important thing to have a trustworthy book of forms. No lawyer, however experienced and able, can afford to do without one. Our profession have in former times been afflicted with miserable works of this class. We can have no hesitation in recommending the present. The book is well printed.

CORRESPONDENCE.

Editor of the Albany Law Journal:

Will you please inform me through the columns of your excellent JOURNAL, whether a justice of the peace is invested with the power to cause a person to be brought before him and to be committed for disorderly, contemptuous, or insolent behavior toward him, while engaged in the trial of an action or criminal proceeding, without issuing a warrant in the first instance, to cause his arrest?

You will perceive that section 2872 of the new Code, states that "A person shall not be punished by a justice of the peace for a contempt, until an opportunity has been given him to be heard in his defense, and for that purpose the justice must issue a warrant, directed, etc., requiring the constable to bring the offender before him."

Is the above section to be construed in connection with the two next preceding it?

Yours truly, F. H. BRANDON.

COXSACKIE, N. Y., April 23, 1881.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, May 10, 1881:

Motion denied with ten dollars costs in each—*Boardman v. The Lake Shore & Michigan Southern Railway Co.* (and five other cases).—Motion granted without costs—*Boone v. The Citizens' Savings Bank of New York*.—Motion denied with ten dollars costs—*Muldoon v. Blackwell*; *Low v. Hart*.—Motion denied—*McKenna v. The People*.—Judgment affirmed with costs—*Little v. Banks*; *Dardenville v. Lewis*; *Dammann v. Schulting*; *Hardt v. Schulting*; *Proulx v. Lake Shore & Michigan Southern Railway Co.*; *Searles v. Curtis*; *Ring v. City of Cohoes*; *Benedict v. Benedict*.—Order affirmed with costs—*Marvin v. The Universal Life Insurance Co.*; *In re Brady*, to vacate, etc.—Order of General Term reversed and that of Special Term affirmed, without prejudice to petitioner's right to bring an action, and without costs to either party—*In re June Knapp*.—Order modified by limiting it to expunging those parts of the answer not relating to the \$4,600 claim or to the defense founded upon the non-payment by the plaintiffs of the taxes claimed to be recovered and their payment by the mortgagees, and in other respects affirmed, without costs to either party—*Waller v. Fowler*.

NOTES.

IN a recent English case the respective solicitors were Owles and Knight. One would not suppose that they could shed much light on the case. But one side had Witt with them. —The *Australian Law Times*, a comely octavo, published, fortnightly, at Melbourne, and now in its second year, has reached us, and is a very creditable publication. —We have received a pamphlet entitled "Reasons why the Civil Code should be Adopted," by Mr. John G. Agar. It is written upon the same scientific principles upon which Messrs. Matthews and Ivins have written their *Reasons why the Civil Code should not be adopted*. Mr. Agar is learned, profound, abstruse; but Mr. Agar is vague and not conclusive. These deep pamphlets are not calculated to make converts on either side. On Mr. Agar's title-page, in five short sentences from Bentham, he gives a better reason for the adoption of the Civil Code than all his researches and abstractions. It is a concretion of an idea that everybody can understand and remember, and no one can refute; and the substance of it is that as law now is, every judge makes the law of the case to suit himself for the time, and no one can do more than guess at it beforehand.

The Albany Law Journal.

ALBANY, MAY 21, 1881.

CURRENT TOPICS.

THE newspapers are in great tribulation over the case of *Shanks v. American News Company*. The newspaper *Truth* published a libel on Mr. Shanks, a lawyer, and Mr. Shanks, laying his axe to the root of the tree, sued the News Company, in the Brooklyn city court, as vendors and disseminators of the libel, and a jury gave him \$2,500 damages. The newspapers now in chorus insist that this is new and strange law, or if it is old law, it is very unjust and ought to be changed. The law is as old as the hills. There was never a time when the disseminator of a malicious libel, by publication and circulation, was not amenable to punishment. The question is merely one of the degree of punishment. The innocent disseminator of a libel is not to be punished with the infliction of exemplary damages, but he is not in every case to be let off with nominal damages. In this case the jury probably gave what they considered actual damages. This is right. On the one hand it is not a case for exemplary or punitive damages; on the other it is not a case for mere nominal damages. Citizens are not to be injured by men who sell libels to make money, although ignorant of the libel, without adequate reparation. A. is not to suffer unlawfully that B. may be enriched. "But the News Company is innocent." So is Shanks. And where one of two innocent must suffer, let him suffer who caused the injury, says ancient law. "But this will break up or incommode a great necessary business." On the other hand, the News Company may break up or incommode the innocent Shanks in the pursuit of his necessary business. "But the newspaper is no longer a luxury. It is one of the essential elements and conditions of a popular government." Well, but libel on citizens is not essential to good government. The News Company is in a hazardous business, and must run its risks. A druggist is not excused for selling a deadly poison for an innocuous drug, although he bought it as harmless, and supposed it harmless. So if the News Company wrongfully, although ignorantly, injures a citizen, in its attempts to make money, it must be judged by a jury as to the proper reparation. In this case, the jury probably took the notorious character of the newspaper into account. The News Company must be careful how it sells a notoriously libellous newspaper — one that came very near defeating a president by a libel. No doubt the Company's profits are large from the sales of such newspapers, but so should be its responsibility when it thereby scatters a libel broadcast. And as very many newspaper proprietors are impecunious, the News Company must not be surprised if the libelled look to it rather than to the writers of the libels.

VOL. 23.— No. 21.

Is not the above legal doctrine perfectly just? The newspaper men say no. They say that the modern establishment and enormous growth of newspapers, and the modern demand for news, should work a change in the law. That is to say, because great communities are greedy of news, gossip and scandal, and great newspapers make a great deal of money by supplying the just demand for news, and the prurient demand for gossip and scandal, therefore innocent individuals must suffer, and have no remedy. This will never do. The law is just right just as it is. The measure of reparation should be in the amount of damages. A jury should judge every case by its merits. Damages should be exemplary, actual, or nominal, according as the publication is malicious or innocent, careful or negligent, and the result is serious or practically harmless. Where is the hardship of this law? It amounts simply to this, that where the innocent publisher or vendor harms the innocent citizen the former must respond in a reasonable manner. The newspaper would like to throw the burden of malice on the injured. This would be contrary to just rules of evidence. If a man assaults us, we have not to prove that he did not do it in self-defense or in defense of his child. These things are for him to show. The newspapers would have the offense atoned for by apology or retraction. This may be shown in mitigation of damages, but is no justification. The newspapers are mistaken in supposing that the truth justifies the publication. The truth may be given in evidence; and if it shall appear that the publication was with good motives and for justifiable ends, the jury may acquit in a criminal case, and the damages may be mitigated in a civil case. If a newspaper, with malicious motives, ridicules a hunchback, it cannot get off by saying, "he is a hunchback." (By the way, the newspapers are wrong in attributing the authorship of this doctrine of justification by truth in this State to *Alexander Hamilton*. Although he eloquently argued for it in the *Crowell* case, in 1805, yet *Andrew Hamilton*, a Philadelphia lawyer, in the famous *Zenger* case, in this State, in 1735, had as eloquently contended for the same.) The newspapers have power enough — many think, too much. There are very few verdicts against newspaper publishers, for libel. Any more power would be license, pleasant and profitable, no doubt to the cruel and wanton boys with stones in their fists, but death to the poor croakers in the pool.

Mr. Matthews is now Mr. Justice Matthews, as we predicted he would be. Only one member of the judiciary committee was in favor of the nomination; the best men and the best lawyers of the Senate opposed and voted against him; and he was finally confirmed by a majority of one. It is a significant fact that of the twenty-four who voted to confirm, sixteen were of the opposite party from Mr. Justice Matthews and the president who nominated him. The three senators who are accepted as representing the best elements of parties and independents —

Messrs. Edmunds, Bayard, and David Davis — were opposed. We consider the result as a serious encroachment upon the spirit of the Federal Constitution, which would have this semi-political institution selected from all parts of the country, with no preponderating influence from any particular State.

Mr. Hitchcock's paper, at the convention of the Social Science Association, is the most learned and exhaustive essay that we have ever seen on this subject. He confesses his resort to Wells on Married Women. Those who, like ourselves, have been accustomed to regard New York as the pioneer in the amelioration of the married woman's rights of property, will be surprised to see how far down the list she stands. The first step, Mr. Hitchcock shows, was taken by Mississippi, in 1839, which was a merely promissive act. Next came an act in Maryland, in 1841. "In 1844 to 1846 the movement thus commenced was joined by the States of Maine, Michigan, Rhode Island, Connecticut, Massachusetts, New Hampshire, Kentucky, Arkansas, and the then Territory of Florida, but with unequal steps." Maine seems to have been the boldest, for in 1844 she destroyed all the common-law rights of the husband in the wife's property not already vested. The Michigan act in the same year was very similar. "Between 1846 and 1850, inclusive, the following States began to enact laws changing or setting aside the common-law rules of marital property rights, namely: Vermont, New York, Pennsylvania, North Carolina, Alabama, Tennessee, Wisconsin, and California. Between 1850 and 1860, similar legislation was begun — in some of them boldly, in others very gingerly — in Indiana, Missouri, New Jersey, Oregon, Kansas; followed by Ohio and Illinois in 1861, and by other States successively in subsequent years. In 1869, Congress enacted, for the benefit of married women in the District of Columbia, one of the most radical of the laws on this subject." "The last State to fall into line was Virginia — noted by Mr. Bishop in 1875 as the only State then adhering to the common-law system without change." Mr. Hitchcock gives a succinct statement of the scope of these various enactments. He notes that with one exception they leave the husband still bound as at common law to support the wife and children, that exception being Nevada, where the able wife must support the indigent husband. (Such too is the provision in our proposed Civil Code.) He also notes the fact that in this State the husband's common-law liability for torts by the wife has not been changed — "whence it would seem that in New York a married woman's tongue is no part of her separate estate." This is different everywhere else except in Minnesota. Mr. Hitchcock seems to favor the making the wife solely liable for her own torts, and for the support of her husband and children in case of the husband's inability. In this we perfectly agree with him, and with his concluding remarks: "It can hardly be wholesome or wise for the State to inculcate, by general and positive law, the doctrine that what-

ever burden the husband may bear, the wife should be privileged and protected from sharing; that she may judiciously postpone family cares and duties to the ventures and anxieties of a sole trader, or prudently relieve the tedium of the domestic partnership by a business alliance with some shrewd capitalist. Certain it is that no legislation can elevate or purify society which even remotely tends to impair the sacred confidence of the marriage relation, or to destroy its unity and peace by suggestions and temptations most adverse to that loving and unselfish spirit which, alike for husband and for wife, converts into blessings even the burdens jointly borne."

The English law journals are still claiming Beaconsfield as a lawyer. When chancellor of the Exchequer he sat as judge. The *Law Journal* says: "His disciples in the legal profession may well have found internal evidence of an acquaintance with legal processes. Mr. Disraeli's statements of the law were always precise and singularly accurate; while he had a remarkable facility for taking in the effect of proposed legislation, however complicated. His appreciation of the legal bearings of political questions was sound; and his presence in the House of Commons at the time of the Bradlaugh incident would probably have saved the House from a ridiculous situation." On the other hand, the *Solicitors' Journal* points out the fact, that like many great lawyers, he could not get his own will right. His will contained this language: "Except any articles belonging to me *which I may* by any memorandum in my own handwriting, or by any paper signed by me, designate as intended for personal remembrances to my friends, and which memorandum or paper I direct may have the same force and effect as if it had formed part of this my will." No such memorandum has yet been discovered, but the *Solicitors' Journal* remarks: "It may be doubted whether, if discovered, it will be of any legal validity. In order to give effect by a will to a memorandum or paper signed by the testator, but not itself a testamentary writing, it is necessary that such memorandum should 'be shown to have been in existence at the time when the will was executed' (*per* Lord Cairns in *Singleton v. Tomlinson*, L. R., 3 H. L. 414)." "With regard to the direction at the end of the clause, however clear may be the wish of a testator to incorporate in his will, and have read as part of it, an unattested future writing, it is certain that he cannot thus create for himself a power of testamentary disposition unfettered by the safeguards which the law has thrown round the execution of wills (see *Countess Ferraris v. Marquis of Hertford*, 3 Curt. 468)." As to D'Israeli's own probable idea of the law we may quote Vivian Grey: "The Bar; pish! law and bad jokes till we are forty; and then, with the most brilliant success, the prospect of gout and a coronet. Besides, to succeed as an advocate, I must be a great lawyer, and to be a great lawyer I must give up my chance of being a great man." The young man was wrong all around. The bar are the best jokers in the

world. A great advocate need not be a great lawyer. And a great man may be a great lawyer—witness Brougham and Webster—although, we admit, every thing depends on the exact meaning of “great” in this connection. It need not mean profoundly learned. Let us add, that in our comparative estimate of D’Israeli and Gladstone, last week, we did allow ourselves to be swayed by the alleged fact that the former was friendly and the latter unfriendly to our government during our civil war.

Assemblyman Bogan has introduced a bill providing that in actions for slander and libel, malice shall not be presumed, and unless proved, only actual damages shall be recovered. The objection to this is that it is generally impossible to prove either actual malice or actual damage, and yet in most cases actual damage ensues.

Senator Fowler proposes an amendment to section seven of article six of the Constitution, by striking out the provision requiring the holding of the General Term in each judicial district. This is designed to limit the place of holding the General Terms to one locality in each Department.

NOTES OF CASES.

IN *Thomas v. City of Hot Springs*, 34 Ark. 553, a city ordinance prohibited “drumming” or soliciting patronage for hotels, boarding-houses, bath-houses, physicians, quacks, and vendors of nostrums. *Held*, void as to competent physicians; and, so it seems, as to hotels, boarding-houses, and bath-houses. The court said: “A drummer is one who solicits custom. Webster. Drummers are, and have been for ages, a large and active class of commercial and business agents. They, it must be presumed, were as familiar to the law-makers, as brokers, hawkers, peddlers, pawnbrokers, and others mentioned in the above act; and yet they are not named, nor has our Legislature, by any act, thought proper—if it might do so in the exercise of the police power—to require drummers to obtain license from any source, or undertaken to make it a criminal offense to drum for any lawful business.” “No doubt a corporation may make it a penal offense for any person to drum customers to gaming-houses, gambling-tables, banks, etc., strumpet-houses, and other occupations which are immoral and pernicious in their character and tendencies, such as it has power under its charter to suppress. But the keeping of hotels, boarding-houses, bath-houses, and the practice of medicine by competent persons, are ordinary, lawful, and useful occupations, and to make it a crime to solicit custom for them is an unwarranted interference with constitutional rights and privileges of citizens under our form of government. In this case appellant was charged and convicted for soliciting a patient to a physician, who was a graduate of medicine, and skilled, it must be admitted, in his profession. It may be in bad taste,

and a violation of the ethics of his profession, for a physician to employ a drummer to procure patients for him, but appellee had no legal power to make such drumming a crime, and punish it as such.”

The Imperial Appellate Court of Austria decides that a promissory note executed in England can be sued upon in Austria as a bill of exchange, it being proven by the testimony of English lawyers and an English notary, and also by the certificate of the attorney-general, the Austrian legation and the consulate-general, and by the acts of Parliament, that bills of exchange and promissory notes stand on an equal footing in England. The court further decides that a married woman, a citizen of Hungary, who under the laws of Hungary is incapable of executing a binding bill of exchange, is not bound by a promissory note executed by her in England, because “a subject of a State remains tied to the laws of his country even beyond the limits of the land.”

In *re Smith's Will*, Wisconsin Supreme Court, April 19, 1881, 8 N. W. Rep. 602, should be read in connection with *Brown v. Ward*, 52 Md. 376, *ante*, 262. It holds that a mere belief in “spiritualism” does not destroy testamentary capacity, although united with peculiar eccentricities. The court thus describe the testator: “It satisfactorily appears that the deceased was a gentleman of excellent moral character, and that his intellectual powers were of a high order. His mind was cultivated by reading and study, and his general information was very extensive and varied. One witness says, no doubt truly, that he was a first-class mechanic and scientist; that he had a good theory of mechanics, and was a well-read man. He seemed to have some talent for invention, and did invent several articles which he sought to bring into use. He attempted other inventions, and failed. He possessed great self-reliance and firmness, and was not easily swerved from a purpose deliberately formed. Some of the witnesses say he was very conceited and self-willed.” “In short, the deceased was a person of vigorous intellect and will, had unbounded faith in the accuracy and soundness of his own judgment, and was moved to action by an earnest, sanguine temperament. In such a man we should naturally expect some peculiarities or eccentricities of conduct, but we find fewer of these disclosed in the evidence than might reasonably be looked for. It appears that for a short time—perhaps two or three months, but during what year is not shown—he advertised one of his callings by wearing on the front of his hat a small paper on which were printed the words, ‘Solicitor of Patents.’ Also, that he was seen at different times on skates in a public street of the city. It seems, however, that he was testing a new kind of skate which he had invented. Thus far we find no evidence that the deceased was not of sound mind when he executed the instrument propounded as his last will and testament. But there was another peculiarity of the deceased which will now be considered. He was what is commonly called a

piritualist. He had come to believe, that through certain mediums, he could communicate with the spirits of deceased persons. He received, through one of these mediums, what purported to be a message from his deceased wife, advising him to marry the appellant, to whom he was then paying his addresses. He doubtless believed the message was from his deceased wife. He also consulted mediums quite frequently concerning his business and proposed inventions. He once engaged in wheat speculations on advice from such sources. At first he was successful, but later operations were not so successful. It does not appear that he persisted in these speculations very long after fortune turned against him. During the French and German war he believed reports of the condition of the contest which he received from mediums, although different from the current newspaper reports. But when the evidence of the truth of the newspaper reports became strong, his confidence in the infallibility of the other reports was weakened. He received a communication purporting to be from his deceased wife after his last marriage, and after he had trouble with some of his children, approving of what he had done. This was evidently after he had executed his will. It does not appear whether or not he regarded the communication as genuine, but probably he did so regard it. But the intense faith of the deceased in the accuracy of his own judgment was a counterpoise to his belief in the possibility of obtaining direct messages from the other world. It led him to admit another element in his belief which would leave him free to follow his own judgment in a given case, no matter how strongly he might be pressed by supposed supernatural advice or entreaty to act against it. So he came to believe, as one witness states it, 'that there was more than one kind of spirits—some might try to fool him, and others might not.' It is perfectly obvious from the whole testimony that the infallible test which he applied to determine from which of these classes of spirits a given message came was this: If it accorded with his judgment it came from the reliable class; if not, then it came from the other class and was to be disregarded."

DOCTRINE OF ACCOUNT STATED—BETWEEN WHOM IT APPLIES.

IN *Anding v. Levy*, 57 Miss. 51; S. C., 34 Am. Rep. 435, it was held that the doctrine of liability from retaining a stated account without objection is only applicable between merchants, but between other parties such retention is a circumstance for the consideration of the jury.

The court, by George, C. J., said: "The earliest mention we have been able to find of this rule is in *Sherman v. Sherman*, 2 Vern. 276, decided in the year 1692, where the rule is stated by Lord Hutchins thus: that 'among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post.' Lord Hardwicke, in *Willis v. Jernegan*, 2 Atk.

251, spoke of the rule thus: 'Even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent, keeping it by him any length of time, without making any objection, which shall bind him, and prevent his entering into an open account afterward.' Chancellor Kent, in *Murray v. Toland*, 3 Johns. Ch. 569, mentioned the rule in these words: 'It has been often held, that if a party receives a stated account from abroad, and keeps it by him for any length of time (one case says two years) without objection, he shall be bound by it;' citing *Willis v. Jernegan*, *ubi supra*, and *Tickel v. Short*, 2 Ves. 239, in which last case Lord Hardwicke said: 'If one merchant sends an account current to another in a different country, on which a balance is made due to himself, the other keeps it by about two years without objection, the rule of this court and of merchants is, that it is considered as a stated account.' The Supreme Court of the United States, in *Freeland v. Heron*, 7 Cr. 147, spoke of the rule as 'a rule of the Chancery Court and of merchants,' and defined it to be thus: 'When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him.' It is thus seen, that in its inception, the rule that the reception of an account rendered, and the keeping of it for any considerable time without objection, made it an account stated—that is, an account so admitted to be just and correct that it relieved the party rendering it from the necessity of proving it, and cast the burden on the party receiving it to show by affirmative evidence that it was unjust—was a rule of the Chancery Court applied only in controversies between merchants.

"The rule has been extended further in some States, so as to embrace transactions between other parties. In this State, there has as yet been no recognition of it except in cases between merchant and merchant, and when it has been referred to it has been in that way." "In Virginia, in *Townes v. Birchett*, 12 Leigh, 173, the opinion of the majority of the court applying the rule proceeds on the assumption that both parties were merchants, though Judge Allen dissented upon the ground that this character of the parties was not shown. He said that he had not been able to find a single case, not between merchant and merchant, in which the rule had been applied. And this view was sustained by the Court of Appeals of Virginia in *Robertson v. Wright*, 17 Gratt. 534, 541. It is stated in Cowen and Hill's Notes to Phillips on Evidence, note 191, that the rule is inapplicable except as to transactions between merchant and merchant.

"In some of the late authorities the rule that the rendition of an account, and its retention without objection, makes it a stated account, is applied to

transactions between other parties than merchants. It has been so recognized in the following cases, among others: *Lockwood v. Thorne*, 11 N. Y. 170; *Stenton v. Jerome*, 54 id. 480; *Case v. Hotchkiss*, 1 Abb. (N. Y.) 324; *Towsley v. Denison*, 45 Barb. 490; *Terry v. Sickles*, 13 Cal. 427; *White v. Hampton*, 10 Iowa, 238; *Tharp v. Tharp*, 15 Vt. 105; *White v. Campbell*, 25 Mich. 463; *Phelps v. Belden*, 2 Edw. Ch. 1. On consideration of the authorities, we have concluded not to extend the rule, making the rendition of an account, and its retention without objection a stated account, beyond its original limits, viz.: controversies between merchant and merchant.

"On the other hand, we do not follow some of the authorities, which hold that such rendering and retention is no evidence of the correctness of the account. The rendering of an account and its retention without objection, as between other parties than merchants, is admissible to show an implied admission and acquiescence in its correctness. What weight should be given to it is for the consideration of the jury, under all the circumstances of the case."

This point does not seem to have been raised or passed upon in *Lockwood v. Thorne*, 11 N. Y. 170. That was a case between tanners and leather merchants. The same is to be said of *Stenton v. Jerome*, 54 id. 480, a case between a stock broker and a customer. So of *Case v. Hotchkiss*, 1 Abb. Ct. App. Dec. 324, a case between attorney and client. So of *Towsley v. Denison*, 45 Barb. 490, a case between a vendor of stone and a canal contractor. So of *Terry v. Sickles*, 13 Cal. 427, where it does not appear that the parties were merchants. *White v. Hampton*, 10 Iowa, 238, is not at all in point. The question does not seem to have been raised in *Tharp v. Tharp*, 15 Vt. 105. All these cases, however, enforce the doctrine of account stated between others than merchants as an estoppel.

In *White v. Campbell*, 25 Mich. 463, the court said: "The rule itself is said to have been founded originally on the practice of merchants, and in Lord Hardwicke's time it was stated to be a rule among merchants." But the doctrine was there applied to others.

Wharton (2 Ev., § 1140) speaks of the doctrine as prevailing in regard to transactions between "business men."

In *Townes v. Birchett*, 12 Leigh, 173, the transactions were between a merchant and an auctioneer, the account being of auction sales.

In *Shepard v. Bank of Missouri*, 15 Mo. 141, this question was directly passed upon, and decided contrary to the principal case. The court said: "It is true these cases are between merchant and merchant, and are generally found in chancery proceedings; but there is no reason why the same doctrine should not prevail between any other persons with whom are accounts current or accounts of transactions in the ordinary course of business. There is a presumption of correction, of fairness and of truth, in the account thus kept, which becomes strong and forcible after the acquiescence of the party charged with it for months or years. The

same reasons which adopt this rule among merchants will apply it to banks and their depositors."

In *Brown v. Kimmel*, 67 Mo. 430, the same was approved *obiter* in an action for professional services. The court said: "The point discussed by the counsel in this case is, whether on stated accounts or *in simul computassent* the rules of evidence in regard to such actions are confined to dealings between merchants. That question was decided by this court in *Shepard v. Bank of Missouri*, 15 Mo. 143, and that decision was recognized in the recent decision in *Powell v. P. R. R. Co.*, 65 id. 658. The rule of evidence no doubt originated in mercantile dealings and the reported cases usually relate to such dealings, but the principle seems to have been extended to all cases where the relation of debtor and creditor exists. *Wiggins v. Burkham*, 10 Wall. 129. The rule at best is a very flexible one, and undoubtedly depends in its application on the circumstances of each case, to be judged by the nature of the transaction, the habits of the business in which it occurs and the course of trade. *White v. Hampton*, 10 Iowa, 238. In a general way an account rendered by a creditor to his debtor, and not objected to within a reasonable time, is regarded as evidence of an account stated—that is of an account conceded by both parties to be correct. And it has been held that what is a reasonable time in which to make objections is a question of law to be determined by the court. There are cases in which this presumed acquiescence, arising from lapse of time and failure to object within a reasonable time, has been considered very slight evidence of the correctness of the account. *Kellam v. Preston*, 4 W. & S. 16; *Spangler v. Springer*, 22 Penn. St. 454; and others again where the courts have regarded it as conclusive, except where fraud or mistake is clearly shown. *Lockwood v. Thorne*, 11 N. Y. 170. It will readily be perceived, on an examination of the numerous cases reported on this subject, that they have been decided on the peculiar circumstances attending each case, and most generally in proceedings in equity. In no case has such implied admission been held to be an estoppel, but simply a *prima facie* case throwing the burden of contradiction or explanation on the adverse party. The case of *Phillips v. Belden*, 2 Edw. Ch. 1, and *Hutchinson v. Market Bank of Troy*, 48 Barb. 324, contains quite an extensive discussion of the subject. But it is unnecessary to examine the subject here, as the pleadings do not present the question. The action in this case is not on an account stated."

We do not find that the citation of Cowen and Hill's Notes, in the principal case, is supported by the reference.

REMOVAL OF CAUSE—CITIZENSHIP OF PARTIES.

UNITED STATES SUPREME COURT, MAY 2, 1881.

BLAKE V. MCKIM.

Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not distinctly provided for the removal from a State court of a suit in which there is a controversy not wholly be-

tween citizens of different States, and to the full and final determination of which one of the necessary or indispensable parties, plaintiffs or defendants, seeking the removal, is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked.

IN error to the Circuit Court of the United States for the District of Massachusetts, to review a decision in an action brought by John W. McKim, judge of the Probate Court of the county of Suffolk, Massachusetts, against George Baty Blake and others. The opinion states the case.

HARLAN, J. This action was commenced in one of the courts of Massachusetts by a citizen of Massachusetts for the use of citizens of that State, against the executors of George Baty Blake, two of whom are citizens of Massachusetts and one a citizen of New York. It is upon a probate bond executed in the penalty of \$50,000 by James M. Howe, as trustee under the will of Henry Todd, with two sureties, one of whom was the testator of the defendants. Its object is to recover from the estate of the deceased surety the sum of \$5,000 for alleged breaches upon the part of the trustee of the bond sued on.

The executors filed a joint answer which presented a common defense, and subsequently, in proper time, filed their joint petition for the removal of the case into the Circuit Court of the United States for the District of Massachusetts. The petition was dismissed by the State court. The transcript of the record was nevertheless filed in the Circuit Court. By the latter court the case upon motion of plaintiff was remanded to the State court. From that order this writ of error is prosecuted.

We are of opinion that the case as made by the plaintiffs is not one of which the Circuit Court of the United States can take jurisdiction.

In the *Removal* cases, 100 U. S. 468, we had occasion to construe the first clause of the second section of the act of March 3, 1875, which declares that *either party* may remove to the Circuit Court for the proper district any suit of a civil nature at law or in equity pending in a State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, and in which there is "a controversy between citizens of different States." We held that clause to mean "that when the controversy about which a suit in the State court is brought is between citizens of one or more States on one side and citizens of other States on the other side, either party in the controversy may remove the suit to the Circuit Court without regard to the position they occupy in the pleadings as plaintiffs or defendants;" that upon arranging the parties on opposite sides of the real and substantial dispute, if it appears that those on one side are all citizens of different States from those on the other, the suit may be removed — all those on the one side desiring a removal uniting in the application therefor. In that case an Iowa corporation represented one side of the dispute while the other was represented by citizens of Ohio and Pennsylvania. The controversy was as broad as the suit.

In *Barney v. Latham*, decided at the present term, we held (construing the second clause of the second section of the act of March 3, 1875) that one or more of the plaintiffs or defendants actually interested in a controversy wholly between citizens of different States and which can be fully determined as between them, can remove from the State court the entire suit of which that separable controversy forms a part, provided it involves the amount prescribed as necessary to Federal jurisdiction.

The executors of Howe — each of them having qualified and acted in the execution of the trust — were all indispensable parties to the suit. Gould's Pleadings, § 73, ch. 4; Dicey on Parties to Actions, s. p. 322; 1

Chitty's Pl., s. p. 52. They all appeared and submitted to the jurisdiction of the court. The present case is therefore one in which the suit embraces only one indivisible controversy. It is not wholly between citizens of different States and fully determinable as between them because some of the defendants are citizens of the same State with the plaintiffs.

The contention upon the part of counsel for the executors is that the suit is removable upon their joint petition, under the first clause of the second section of the act of 1875. We are unable to concur in that view. There is undoubtedly some ground for such a construction, but we are not satisfied that Congress intended to enlarge the jurisdiction of the Circuit Courts to the extent that construction would imply. The principal reason assigned in its support is that the first clause of the second section of the act of 1875 follows the words of the Constitution when giving jurisdiction to the Circuit Court of a suit in which there shall be "a controversy between citizens of different States" — language which it is claimed does not necessarily require that such controversy must be wholly between citizens of different States. But that consideration was pressed upon our attention in the case of the *Sewing Machine Companies*, 18 Wall. 553, which arose under the act of March 2, 1867 (14 Stat. 558). That act authorizes the removal of a suit involving the requisite amount "in which there is a controversy between a citizen of a State in which the suit is brought and a citizen of another State," upon an affidavit by the latter, whether plaintiff or defendant, showing that he has reason to believe and does believe that from prejudice or local influence he would not be able to obtain justice in the State court. The argument there, by counsel of recognized learning and ability, was that a controversy between citizens of different States is none the less a controversy between citizens of different States because others are also parties to it; that to confine the Federal jurisdiction to cases wherein the controversy is between citizens of different States *exclusively*, is to interpolate into the Constitution a word not placed there by those who ordained it and one which materially limits or controls its express provisions. We declined to adopt that construction of the statute and held that Congress did not intend by the act of 1867 to confer the right of removal where a citizen of a State other than that in which the suit is brought is united as plaintiff or defendant in the controversy with one who is a citizen of the latter State. The construction for which counsel for plaintiffs in error here contend cannot well be maintained without overruling the principles announced in the case of the *Sewing Machine Companies*.

It is to be presumed that Congress, in enacting the statute of 1875, had in view as well previous enactments regulating the removal of causes from the State courts, as the decisions of this court upon them. If it was intended by that act to invest the Circuit Courts with jurisdiction of *all* controversies between citizens of different States, although others might be indispensable parties thereto, such intention would have been expressed in language more explicit than that found in the act of 1875. We are not disposed to enlarge that jurisdiction by mere construction. We are of opinion that Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different States, has not distinctly provided for the removal from a State court of a suit in which there is a controversy not wholly between citizens of different States, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked.

The judgment of the Circuit Court remanding the cause to the State court is therefore affirmed.

PASSING COUNTERFEIT TRADE DOLLARS NOT INFAMOUS CRIME.

UNITED STATES DISTRICT COURT, E. D. NEW YORK,
MAY 2, 1881.

UNITED STATES V. YATES.

Passing counterfeit trade dollars is not an infamous crime under the Federal Constitution, and the offense may be prosecuted by an information instead of an indictment.

PROSECUTION for the offense of passing counterfeit trade dollars. The opinion states the case.

A. W. Tenney, United States District Attorney, for the United States.

Noah Tebbetts, for defendant.

BENEDICT, J. Andrew Yates was charged by an information with having passed counterfeit trade dollars with intent to defraud, in violation of the statute of the United States in such case made. U. S. R. S., § 5457, as amended by act of January 16, 1877, 19 U. S. Stat. at Large, 223. Upon arraignment he pleaded not guilty. Having been tried and convicted upon such information and plea, he now moves in arrest of judgment upon the ground that a prosecution upon an information filed by the district attorney instead of an indictment by the grand jury, for the crime charged against him, is in violation of the Constitution of the United States. The language of the Constitution relied on is found in the fifth amendment, and is as follows. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury. The question for determination, therefore, is whether the crime of passing counterfeit trade dollars is an infamous crime within the meaning of the fifth amendment of the Constitution. The act of passing counterfeit money with intent to defraud was one of common occurrence in England prior to and at the time of our adoption of the Constitution, and the character of the act, as fixed by the statutes of England in force at the time of the adoption of the fifth amendment, will furnish a good test by which to determine whether the offense was intended to be covered by the words "infamous crime" in the fifth amendment. By the law of England from an early period a clear distinction between the act of coining and the act of passing counterfeit coin had been maintained. The former was by the statutes of Elizabeth (1 Hale, P. C. 224), placed in the highest class of crimes and punished with death, upon the ground that the royal majesty of the crown was affected by such act in a great prerogative of government (1 Russ. on Crimes, p. 54); the act of passing counterfeit coin was nothing more than a cheat. Prior to the statute 15 Geo. 2a28, there does not appear to have been any statute of England whereby the mere act of passing counterfeit coin with intent to defraud was made a crime. It was punishable as a cheat at common law, but not otherwise. 1 Russ on Crimes, p. 75. The statute 15 Geo. 2a28, made it a statutory offense to utter or tender in payment counterfeit coin in gold or silver, and this statute, after reciting that "whereas the uttering of false money, knowing it to be false, is a crime frequently committed all over the kingdom, and the offenders therein are now deterred, by reason that it is only a misdemeanor and the punishment often but small," provides that the offender, for the first offense, shall suffer six months' imprisonment and give sureties for good behavior during six months; that upon conviction a second time for a like offense, the offender shall suffer two years' imprisonment and give sureties for good behavior during two years; and that upon a third conviction for a like offense, the offender shall be deemed a felon. The provisions of this statute, taken in connection with the prior condition of the

law upon this subject in England, are sufficient to show that at the time of the adoption of the fifth amendment the act of passing counterfeit coin was not, by the laws of England, included among the infamous crimes. Judging from the law of England, as it was understood to be at the time of the adoption of the fifth amendment, the conclusion would therefore be that the act of passing counterfeit coin was not intended to be included among infamous crimes within the meaning of the fifth amendment. The same conclusion is reached by applying the principles of the common law to the act here charged against the defendant. The rule of the common law by which to determine whether an act was infamous or not is given in *United States v. Block*, 4 Sawyer, 214, where it is said that at common law a crime involving a charge of falsehood must, to be infamous, not only involve a falsehood of such a nature and purpose as makes it probable that the party committing it is devoid of truth and insensible to the obligation of an oath, but the falsehood must be calculated to injuriously affect the public administration of justice. Tried by this test the act of passing counterfeit coin with intent to defraud is manifestly not infamous. The rule of the common law, as above stated, seems to be recognized in the statutes of the United States, inasmuch as section 5392 contains a specific provision that a conviction for perjury shall render the offender incapable of giving testimony in any court of the United States, and so far as I have discovered, a similar effect has not been given by statute to any other crime. But I do not see why the question under consideration must not be considered as disposed of by the decision of the Supreme Court of the United States in the case of *Fox v. State of Ohio*, 5 How. 410, where the power of a State to punish the act of passing a counterfeit coin of the United States, with intent to defraud, was called in question and upheld upon the ground that it was a mere cheat. It will not be pretended, I think, that any act, such as the act of passing counterfeit coin is described to be by the Supreme Court, in the case of *Fox v. State of Ohio*, was, by the common law, deemed to be an infamous crime. The effect of the decision of the Supreme Court in *Fox v. State of Ohio* is in no wise modified by the subsequent decision of the same court in *United States v. Marigold*, 9 How. 264, where the power of the United States to punish the act of passing counterfeit coin of the United States was upheld upon the ground that the court traced "both the offense and the authority to punish it to the power given by the Constitution to coin money, and to the correspondent and necessary power and obligation to protect and preserve in its purity this constitutional currency for the benefit of the nation," for in *United States v. Marigold*, the court is careful to reaffirm in express terms all the doctrines declared in *Fox v. State of Ohio*. So that according to the laws of the United States, as expounded by the Supreme Court of the United States, the act of passing counterfeit coin, with intent to defraud, is in its nature nothing more than a mere cheat. Authority in the United States to punish this form of cheating results from the obligation cast upon the United States by the grant of power to coin money, but the character of the act is not changed thereby. It is still a cheat and nothing more. It is pushing the argument too far to say that the Supreme Court, in upholding the authority of the United States to punish the passing of counterfeit coin upon the ground that the effect of such an act was to interfere with the government in the discharge of its obligations under the Constitution, has placed the act of passing counterfeit coin in the same category with coining; and that because coining was infamous at common law, passing counterfeit coin must now be held infamous. This mode of reasoning would lead to the conclusion that all crimes punishable by the United States are in-

famous and must be prosecuted upon the indictment of a grand jury, for except in a single instance (Const., art. 1, § 8), all the power to create offenses possessed by the United States is a resulting power derived from the obligations created by the Constitution. The act of passing an unstamped check is plainly enough an interference with the government in the discharge of its obligation to levy and collect taxes, and probably nothing else. But a prosecution of such an act by information has passed under the consideration of the Supreme Court without objection (*United States v. Isham*, 17 Wall. 496), and many offenses of a character to touch the prerogatives of the government have been prosecuted by information, both in the Circuit and the District Courts of the United States. *United States v. Maxwell*, and cases cited, 3 Dill. 275. Before dismissing the subject it is proper to add that it is not seen that the question under discussion is affected by the circumstance that the statute creating the offense prescribes imprisonment at hard labor and does not declare the offense to be infamous or a felony. The omission to declare the crime a felony furnishes, no doubt, a reason for considering the crime a misdemeanor, but the fact that the offense is a misdemeanor is not conclusive of the question whether it be an infamous crime or not, nor can the crime be held infamous from the fact that it is punishable by hard labor. By the statutes of many States any crime punishable by hard labor is a felony, but no such test is furnished by the statutes of the United States. Indeed, a provision declaring that a "felony, under any law of the United States, is a crime punishable by death or by imprisonment at hard labor," and that "every other crime is a misdemeanor," submitted by the revisers of the statutes in their draft, was rejected. See draft Revised Statute, vol. 2, p. 2561, title, Crimes. In early times the character of the crime was determined by the punishment inflicted, but in modern times the act itself, its nature, purpose and effect, are looked at for the purpose of determining whether it be infamous or not (*People v. Whipple*, 9 Cow. 708; 2 Starkie on Ev., part 4, p. 715), and while under our Constitution the legality of an information may be affected by the nature of the punishment to this extent, that by virtue of the fifth amendment an information is not legal in any case where the punishment is death—and such was the punishment prescribed for the act of passing counterfeit money by the act of 1790, repealed by the act of March 3, 1825—in all other cases the legality of a prosecution by information, not prohibited by positive statute, must, as I conceive, depend upon the judicial question whether the nature, purpose and effect of the act made criminal is such as to bring it within the meaning of the term "infamous crime," as that term was understood at common law, and cannot be determined by reference to any declaration on the subject contained in the statute, or by the nature of the punishment which the statute prescribes. Any other rule would place it in the power of the Legislature to nullify the provision in the Constitution by declaring that no offense against the United States shall be an infamous crime. But if the rule be otherwise, and it be competent for the Legislature to designate what offenses against the United States are infamous crimes, or to make a crime infamous by declaring it to be a felony, the result here would be the same, because the statute is silent on the subject, and in the absence of some positive provision the presumption is against an intention to make an offense an infamous crime. *United States v. Cross*, 1 McArthur, 149.

For these reasons, I am of the opinion that the prosecution of the accused for the crime of passing counterfeit trade dollars by an information, instead of by an indictment, is legal, and that judgment may properly be pronounced upon the verdict rendered.

In order to prevent the delay attendant upon a removal of the case to the Circuit Court by writ of error, under the statute of March 3, 1879 (20 U. S. Stat. at Large, 354), Judge Blatchford consented to listen to the argument made upon this motion, and I am authorized to say that he concurs in this opinion.

SERVANT LIABLE TO CO-SERVANT FOR NEGLIGENCE.

MASSACHUSETTS SUPREME JUDICIAL COURT,
JAN., 1881.

OSBORNE V. MORGAN.

For a negligent act in the performance of his duties, causing injury, a servant is liable to his fellow-servant. *Albro v. Jaquith*, 4 Gray, 99, overruled.

ACTION for damages for personal injuries caused by defendant's negligence. The court below sustained a demurrer to the declaration. The facts appear in the opinion.

H. L. Parker and George F. Verry, for plaintiff.

W. S. B. Hopkins and F. T. Blackmer, for defendants.

GRAY, C. J. The declaration is in tort, and the material allegations of fact, which are admitted by the demurrer, are that, while the plaintiff was at work as a carpenter in the establishment of a manufacturing corporation, putting up, by direction of the corporation, certain partitions in a room in which the corporation was conducting the business of making wire, the defendants, one the superintendent, and the others, agents and servants of the corporation, being employed in that business, negligently, and without regard to the safety of persons rightfully in the room, placed a tackle-block and chains upon an iron rail suspended from the ceiling of the room, and suffered them to remain there in such a manner, and so unprotected from falling, that by reason thereof they fell upon and injured the plaintiff. Upon these facts, the plaintiff was a fellow-servant of the defendants. *Furvell v. Boston, etc., R. Co.*, 4 Metc. 49; *Albro v. Agawam Canal*, 6 Cush. 75; *Gilman v. Eastern Railroad*, 10 Allen, 233, and 13 id. 433; *Holden v. Fitchburg Railroad*, 129 Mass. 268; *Morgan v. Vile of Neath R. Co.*, 5 B. & S. 570, 736, and L. R., 1 Q. B. 149.

The ruling sustaining the demurrer was based upon the judgment of this court, delivered by Mr. Justice Merrick in *Albro v. Jaquith*, 4 Gray, 99, in which it was held, that a person employed in the mill of a manufacturing corporation, who sustained injuries from the escape of inflammable gas, occasioned by the negligence and unskillfulness of the superintendent of the mill in the management of the apparatus and fixtures used for the purpose of generating, containing, conducting and burning the gas for the lighting of the mill, could not maintain an action against the superintendent. But, upon consideration, we are all of opinion that that judgment is supported by no satisfactory reasons, and must be overruled.

The principal reason assigned was, that no misfeasance or positive act of wrong was charged, and that for nonfeasance, which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer, an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does any thing toward carrying out his contract with his principal, but

wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons, which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly. *Ulpian*, in Dig. 9, 2, 27, 9; *Parsons v. Winchell*, 5 Cush. 592; *Bell v. Josselyn*, 3 Gray, 309; *Novell v. Wright*, 3 Allen, 166; *Horner v. Lawrence*, 8 Vroom, 46. Negligence and unskillfulness in the management of inflammable gas, by reason of which it escapes and causes injury, can no more be considered as mere nonfeasance, within the meaning of the rule relied on, than negligence in the control of fire, as in the case in the *Pandects*; or of water, as in *Bell v. Josselyn*; or of a drawbridge, as in *Novell v. Wright*; or of domestic animals, as in *Parsons v. Winchell*, and in the case in New Jersey.

In the case at bar, the negligent hanging and keeping by the defendants of the block and chains in such a place and manner as to be in danger of falling upon persons underneath, was a misfeasance or improper dealing with the instruments in the defendant's actual use or control, for which they are responsible to any person lawfully in the room and injured by the fall, and who is not prevented by his relation to the defendants from maintaining the action. Both the ground of action and the measure of damages of the plaintiff are different from those of the master. The master's right of action against the defendants would be founded upon his contract with them, and his damages would be for the injury to his property, and could not include the injury to the person of this plaintiff, because the master could not be made liable to him for such an injury resulting from the fault of fellow-servants, unless the master had himself been guilty of negligence in selecting or employing them. The plaintiff's action is not founded on any contract, but is an action of tort for injuries which, according to the common experience of mankind, were a natural consequence of the defendant's negligence. The fact that a wrongful act is a breach of a contract between the wrong-doer and one person does not exempt him from the responsibility for it as a tort to a third person injured thereby. *Hawkesworth v. Thompson*, 98 Mass. 77; *Norton v. Sewal*, 106 id. 143; *May v. Western Union Telegraph*, 112 id. 90; *Grinnell v. Western Union Telegraph*, 113 id. 299, 305; *Ames v. Union Railway*, 117 id. 541; *Mulchey v. Methodist Religious Society*, 125 id. 487; *Rapson v. Cubitt*, 9 M. & W. 710; *George v. Skivington*, L. R., 5 Ex. 1; *Parry v. Smith*, 4 C. P. D. 325; *Foulkes v. Metropolitan Railway*, id. 267; 5 id. 157. This case does not require us to consider whether a contractor or a servant who has completed a vehicle, engine or fixture, and has delivered it to his employer, can be held responsible for an injury afterward suffered by a third person for a defect in its original construction. See *Winterbottom v. Wright*, 10 M. & W. 109; *Collis v. Seiden*, L. R., 3 C. P. 495; *Albany v. Cunliff*, 2 Comst. 165; *Thomas v. Winchester*, 2 Seld. 367, 408; *Coughtry v. Globe Woolen Co.*, 68 N. Y. 124, 127.

It was further suggested in *Albro v. Jaquith*, that many of the considerations of justice and policy, which led to the adoption of the rule that a master is not responsible to one of his servants for the injurious consequences of negligence of the others, were equally applicable to actions brought for like causes by one servant against another. The only such considerations specified were that the servant, in either case, is presumed

to understand and appreciate the ordinary risk and peril incident to the service, and to predicate his compensation, in some measure, upon the extent of the hazard he assumes; and that "the knowledge that no legal redress is afforded for damages occasioned by the inattention or unfaithfulness of other laborers engaged in the same common work, will naturally induce each one to be not only a strict observer of the conduct of others, but to be more prudent and careful himself, and thus by increased vigilance to promote the welfare and safety of all." The cases cited in support of these suggestions were *Farwell v. Boston, etc., R. Co.*, 4 Metc. 49, and *King v. Boston, etc., R. Co.*, 9 Cush. 112, each of which was an action by a servant against the master; and it is hard to see the force of the suggestions as applied to an action by one servant against another servant.

Even the master is not exempt from liability to his servants for his own negligence; and the servants make no contract with, and receive no compensation from each other. It may well be doubted, whether a knowledge on the part of the servants, that they were in no event to be responsible in damages to one another, would tend to make each more careful and prudent himself. And the mention by Chief Justice Shaw, in *Farwell v. Boston, etc., R. Co.*, of the opportunity of servants, when employed together, to observe the conduct of each other, and to give notice to their common employer of any misconduct, incapacity or neglect of duty, was accompanied by a cautious withholding of all opinion upon the question whether the plaintiff had a remedy against the person actually in default; and was followed by the statement (upon which the decision of that case turned, and which has been affirmed in subsequent cases, some of which have been cited at the beginning of this opinion) that the rule exempting the master from liability to one servant for the fault of a fellow-servant, did not depend upon the existence of any such opportunity, but extended to cases in which the two servants were employed in different departments of duty and at a distance from each other. 4 Metc. 59-61.

So far as we are informed, there is nothing in any reported case in England or in this country which countenances the defendants' position except in *Southcote v. Stanley*, 1 H. & N. 247; S. C., L. J. (N. S.), Ex. 339, decided in the Court of Exchequer in 1856, in which the action was against the master, and Chief Baron Pollock and Barons Alderson and Bramwell severally delivered oral opinions at the close of the argument. According to one report, Chief Baron Pollock uttered this dictum: "Neither can one servant maintain an action against another for negligence while engaged in their common employment." 1 H. & N. 250. But the other report contains no such dictum, and represents Baron Alderson as remarking that "he was not prepared to say that the person actually causing the negligence" (evidently meaning "causing the injury" or "guilty of the negligence") "whether the master or servant, would not be liable." 25 L. J. (N. S.), Ex. 340. The responsibility of one servant for an injury caused by his own negligence to a fellow-servant, was admitted in two considered judgments of the same court, the one delivered by Baron Alderson four months before the decision in *Southcote v. Stanley*, and the other by Baron Bramwell eight months afterward. *Wiggett v. Fox*, 11 Exch. 832, 839; *Degg v. Midland Railway*, 1 H. & N. 773, 781. It has since been clearly asserted by Barons Pollock and Huddleston. *Swatnson v. Northeastern Railway*, 3 Ex. D. 341, 343. And it has been affirmed by direct adjudication in Scotland, in Indiana, and in Minnesota. *Wright v. Roxburgh*, 2 Ct. of Sess. Cas. (3d series) 748; *Hinds v. Harbon*, 58 Ind. 121; *Hinds v. Overacker*, 66 id. 547; S. C. 32 Am. Rep. 114; *Griffiths v. Wolfram*, 22 Minn. 185.

WAIVER OF FORFEITURE OF CONTRACT FOR SERVICE.

WISCONSIN SUPREME COURT, MARCH 24, 1881.

BAST V. BYRNE.

Defendant hired plaintiff to work for one year at a specified price. During the year plaintiff was absent from work on several occasions, amounting to nine days. After each absence he resumed work without objection on the part of defendant. Held, that defendant waived all claim of forfeiture by reason of plaintiff's absences, and that he was liable to plaintiff at the close of the year for the price agreed upon, and could not insist that plaintiff make up the lost time by further work.

ON the 19th of January, defendant agreed in writing to pay plaintiff \$360 for one year's work for him in his store. Plaintiff began work under this agreement January 26th, and left on the evening of January 25th, of the following year. In an action upon the contract, plaintiff asked to recover the amount agreed upon, less certain sums paid, and \$9 for lost time. Defendant, in his answer, alleged payment, and that the plaintiff had forfeited his wages by leaving his employment many times without leave, and by altogether absenting himself from the defendant before he had completed the working of his year. There was an objection at the trial, by defendant, to any evidence on the part of plaintiff, on the ground that it appeared from the complaint that plaintiff had failed to work out his time under the contract. Other facts appear in the opinion. From a verdict for plaintiff defendant appealed.

A. A. Douglass, B. Dunwiddie and S. U. Pinney, for appellant.

P. J. Clawson, for respondent.

CASSODAY, J. There is no dispute but that it was a year from the time the plaintiff began the work until he quit. Had he lost no time he would have fully complied with his contract. It is urged, however, that whenever the plaintiff, from his own fault or necessity, lost any time, it became optional with the defendant to allow him to resume work or not, and that when he did "choose to allow him to resume work," then the plaintiff became bound to make up the days so lost by working after what would have otherwise been the end of the year. In other words, it is claimed that the clause, "agrees to pay * * * the sum of \$360 for one year," does not refer to a definite period of time, but a definite number of days of service, and that until the number of days of service were in fact rendered, either during the year or subsequently, no recovery could be had upon the contract. In support of this theory we are referred to *Winn v. Southgate*, 17 Vt. 355, and *Lamburn v. Cruden*, 2 Man. & Gr. 253. In *Winn v. Southgate* the contract was that the plaintiff should labor six months for the defendant. He commenced work May 17th, and during the term, with the consent of the defendant, was absent on a journey sixteen days, but returned October 5th, and continued to work until October 30th, when he quit, being seventeen days before the end of the six months, and then insisted that his time was out, claiming that twenty-four working days was a month, and thereupon sued for the balance of his wages, and the court held that he could not recover. It is evident from this statement that the question here involved did not there arise. In *Lamburn v. Cruden* the plaintiff had been engaged by the defendant at a yearly salary, payable quarterly. The last year of service expired September 29, 1837, and his salary up to that time had been duly paid. Before the expiration of the year a misunderstanding had arisen. October 20th the plaintiff tendered his resignation, which was accepted December

13th. In the meantime he had performed no service, except upon one occasion, and then against the assent of the defendant. The action was for services between September 29th and December 13th, but the plaintiff was nonsuited, and the rule for a new trial was made absolute on the ground that the court should have submitted to the jury the question as to whether there was a new agreement.

The question there involved seems to have been foreign to the question here presented. There the subsequent services were claimed under a new agreement; here subsequent services were demanded by virtue of the old agreement. Of course it was competent for the parties in this case to have made a new agreement whereby the plaintiff should work a certain number of days in lieu of the nine and one-half days which he had lost, but there is no claim that any such new agreement was ever made, and the question is, can the court expand an agreement which by its terms was limited to "one year," so as to require a party under it to render services after the expiration of the year, in lieu of certain days of service which he failed to perform during the year? No case has been cited going to that extent, and we have no disposition to furnish one. A party contracting to labor for a limited period cannot be required, after the expiration of the period, to render additional services under such contract, without any new agreement, merely because he had lost certain days during the term. The court charged the jury on the theory that it was competent for the defendant, during the contract, to waive a strict performance of any particular day's work, and that when the plaintiff from time to time lost a day, and the defendant, with knowledge of the fact, received him back into his employ, it was such waiver; at least to the extent of preventing the defendant from enforcing a forfeiture of payment for the services actually performed. It is true the charge in this respect is not very full nor explicit, but if the defendant desired to have it more definite he should have so requested. We are convinced that the theory upon which the cause was submitted to the jury was correct. Such acts of the defendant, without objection, we regard as a *prima facie* waiver of the breach. They presume condonation. The loss of a half day, a day or two days, at intervals, and long prior to the termination of the contract, without objection on the part of the defendant, should not, upon principle, operate so harshly as to work a forfeiture of payment for services subsequently rendered in good faith, and with no notice that such forfeiture would be insisted upon.

There may be adjudged cases going to that extent, but we should be very slow to follow them. In *Ridgway v. Hungerford*, 3 Ad. & El. 171, Lord Denman, C. J., declared that where the servant was guilty of misconduct in June, and the master knowing it, retained him until November, "a condonation might be presumed." This was *dicta*, to be sure, but we think it was good law. In *Prentiss v. Ledyard*, 28 Wis. 131, although the contract was for no definite time, yet it was held that "where the employee was to receive payment at a specified rate, if he continued temperate and faithful in the employer's service, the fact that he was occasionally intemperate and discontinued the service for short periods would not prevent his recovering the stipulated rate for the time actually spent in such service, if he was received back into it, and continued therein, without any new arrangement being made, or any intimation given that the old one was terminated." We see no difference in principle between the waiver of the conditions of a contract in respect to personal habits, and in respect to interruptions of service, or any other stipulation. The question of waiver of the breach, by the retention of the employee for eleven or twelve days after the master's knowledge of the existence of the causes, was held

properly submitted to the jury, in *McGrath v. Bell*, 33 N. Y. Super. 195. It is certainly equitable, and we think, according to well-established principles of law, to hold that where an employee, for a fixed period and without any fault of his employer, absents himself for a short time, and then the employer, with knowledge of the fact, receives him back into his service without objection, and retains him until the termination of the contract, he thereby waives the right to declare the contract forfeited as to the services actually rendered. This is not going as far as the opinion of the court in *Britton v. Turner*, 6 N. H. 481. It is true that case has frequently been disapproved, but it is also true that it has been frequently approved. *Elliott v. Heath*, 14 id. 131; *Laton v. King*, 19 id. 280; *Davis v. Barrington*, 30 id. 517; *Ptizer v. Nichols*, 8 Iowa, 106; *Byrtee v. Mendel*, 39 id. 382, and cases there cited, in which last case it was held, that "where a party hires himself to another for a fixed period of time, and leaves the service before the expiration of the term, without any fault on the part of the employer, the former may recover the value of his services performed as upon a *quantum meruit*, without showing that he left the service of his employer for good cause." *Britton v. Turner*, was also followed in *Fenton v. Clark*, 11 Vt. 560; *Gilman v. Hall*, id. 510; *Blood v. Enos*, 12 id. 625. There are strong equitable reasons to sustain the doctrine of the above cases, but they would seem to be in conflict with the weight of authority, and we therefore cite them merely because they furnish strong reasons in favor of the conclusions which we have reached in this case.

There is still another reason why this judgment should by sustained. Prior to the first trial there was a dispute as to the amount due, and the defendant offered and tendered judgment for the amount which he considered due, with costs of action. Such offer and tender were competent evidence, and authorized a verdict of waiver of all forfeiture under the contract. *Cahill v. Patterson*, 30 Vt. 592; *Seaver v. Morse*, 20 id. 620; *Patnote v. Sanders*, 41 id. 66; *Boyle v. Parker*, 40 id. 343. A party who proposes to insist upon a technical forfeiture should act promptly, and consistently with the right claimed.

The judgment of the Circuit Court is affirmed.

MASTER NOT LIABLE FOR UNAUTHORIZED ACT OF SERVANT.

ENGLISH HIGH COURT OF JUSTICE, COMMON PLEAS DIVISION, FEBRUARY 25, 1881.

STEVENS v. WOODWARD, 44 L. T. Rep. (N. S.) 153.

The plaintiff, a publisher and bookseller, occupied the ground floor of the same house in which the defendant, a solicitor, occupied the first floor. One evening when the defendant was absent from his office his clerk went to a lavatory in the defendant's room, and left the water tap turned on. The water overflowed the basin and penetrated through the floor into the plaintiff's premises. A separate lavatory was provided for the clerk, and he had strict orders from the defendant not to enter the room in his absence. The plaintiff brought an action for damages for negligence against the defendant in the mayor's court, and obtained a verdict for 15l. damages. *Held*, on appeal, that the negligent act of the clerk which caused the damage was neither within the scope of his authority nor incident to his employment, and there was no evidence to be left to the jury. The court directed the verdict to be entered for the defendant.

THIS was an appeal from the mayor's court. It was an action for damages alleged to have been caused by the defendant's negligence in using a lavatory, and neglecting to turn off the water tap, whereby water overflowed the basin, and penetrated and burst through the basement occupied by the plaintiff. The jury found

a verdict for the plaintiff, with 15l. damages, and the defendant subsequently moved pursuant to leave reserved for a rule calling on the plaintiff to show cause why the verdict should not be set aside, and a nonsuit entered on the ground that there was no evidence of negligence to go to the jury, or why a verdict should not be entered for the defendant on the ground that the recorder ought to have directed a verdict for the defendant.

Candy, for the plaintiff, showed cause. The question was properly left to the jury. In these cases the question is whether the servant was engaged in his master's business at the time of the negligent act, and that is for the jury; the plaintiff could only make out a *prima facie* case, that is, prove the damage and trace it to its source. [Grove, J.—The difficulty here is that the clerk had no authority to go to the lavatory, he was a mere trespasser.] Is not that the question for the jury? [Grove, J.—I doubt it. The case is for the jury if there is a conflict of evidence as to whether it was within the scope of the authority or not. If it is clearly out of the scope of the authority the jury cannot bring it within.] I do not admit that it was clearly out of the scope of the clerk's authority. I only say that I had no means of contradicting it, and it was a question for the jury whether they believed the defendant's evidence. But I submit it is not necessary that the act or omission should be within the scope of the servant's express authority; it is enough if it was within that authority which the master led the servant to suppose he had, or, if it was within the scope of authority usually given to clerks in a similar employment. I bring my case within the last of those propositions; the business of a solicitor's clerk is much wider than that of a domestic servant, and he often has to represent his master when absent. He cited *Whitman v. Pearson*, 18 L. T. Rep. (N. S.) 290; L. Rep., 3 C. P. 422; 37 L. J. 156, C. P.; *Storey v. Ashton*, L. Rep., 4 Q. B. 476.

Petheram, Q. C. and *G. G. Kennedy* (Witt with them), for defendant.

GROVE, J. I am of opinion that the verdict should be entered for the defendant. No doubt the question is a very nice one, and may come very near the line as to whether what was done was within the scope of the servant's authority. I quite agree with Mr. Candy that there are cases where a prohibition by the master would have no effect to relieve him from liability, or where at all events the question was one for the jury. I cannot give a precise definition, but I think it is not an inappropriate expression to say that the act or omission of the servant for which the master is liable must be something incident to the employment. The two cases cited point out very clearly that line of distinction. What possible part of the clerk's employment could it be to go into his master's room and use the lavatory? How is it incident to his employment? It was no more a portion of his employment than if he had gone up two pair of stairs to his master's bedroom and washed his hands there. He had no business to be there at all; it was neither within the scope of his authority, nor incident to the normal duties of his employment. But then it is said it is a question for the jury. That is so when there is a conflict of evidence; but there is none here. The plaintiff's evidence was only a case of probability; that water was found to flow from the tap having been left open on the premises of the defendant. It was nothing more than a *prima facie* case of implied liability, and if there is positive evidence to dispose of that it is a sufficient answer. It is uncontradicted evidence. There was nothing to leave to the jury. The defendant's evidence was quite consistent with the general evidence of the plaintiff, and I think the verdict should be entered for the defendant.

LINDLEY, J. I am of the same opinion, and very much for the same reasons, and I will only add that I cannot understand on what principle one man is to be made liable for the negligent act of another who is really a trespasser on his premises. For this reason, and also the reasons more fully expressed by my brother Grove, I think the verdict should be entered for the defendant.

Rule absolute and verdict entered for defendant.

NEW YORK COURT OF APPEALS ABSTRACT.

ATTACHMENT—UNDER OLD CODE, SECTION 227 INVALID IF SERVICE OR PUBLICATION NOT MADE WITHIN THIRTY DAYS—APPEAL.—(1) Where an attachment was granted under old Code, section 227, on the ground that defendant was a non-resident, and vacated for the reason that the summons was not personally served or publication commenced within thirty days from the issuing of the warrant, the decision is appealable as involving a question of jurisdiction. (2) In such a case the right to the process is conferred by statute and is limited by its provisions, and plaintiffs must bring the case within its authority. They must show the issuing of a summons and that thirty days therefrom had not elapsed, or that within thirty days they had personally served the summons or had commenced publication. Failing this they were no better off than if the statute did not exist. Section 139 does not affect this. The two sections are satisfied by a construction which treats the action as existing for the purpose of supporting the attachment during the time specified, liable to be continued upon defined terms, but ending by lapse of time if those terms are not complied with, and therefore incapable of supporting any further proceedings. See *Waffle v. Goble*, 53 Barb. 517; *Taddiken v. Cantrell*, 1 Hun. 710; *Kelly v. Countryman*, 15 id. 97; *Taylor v. Truogoso*, 76 N. Y. 509; *Mojarieta v. Luenz*, 80 id. 548. The cases, *Gere v. Gundlach*, 57 Barb. 13, and *Simpson v. Burch*, 4 Hun. 315, are not necessarily in conflict with this view. Order affirmed. *Blossom v. Estes*. Opinion by Danforth, J.

[Decided March 26, 1881.]

CHATTEL MORTGAGE—FOR ANTECEDENT DEBT VALID AGAINST CREDITOR—RENEWAL BY NEW MORTGAGE—EXECUTION—DELIVERY WITHOUT LEVY AND SALE DOES NOT AVOID LIEN.—(1) In an action by a receiver appointed under a judgment to set aside a chattel mortgage as fraudulent, it appeared that the judgment debtor made a mortgage which was filed before the judgment was docketed; that after the judgment was docketed a second mortgage was given and filed, in renewal of the other one. The mortgagees had no knowledge of the debt or the judgment. The first mortgage was given for money loaned in part on the day it was made and in part before. *Held*, that the fact that the mortgage was for an antecedent debt did not render it invalid as to the judgment creditor of the mortgagor. *Held*, also, that the giving of a new mortgage instead of resiling and renewing the other, did not affect the lien of the mortgage, except that the mortgagee ran the risk of a levy upon an execution, after the first mortgage ceased to be a lien and before a new one was filed. *Lee v. Hunton*, 1 Hoff. Ch. 447. The second mortgage did not extinguish the debt. *Gregory v. Thomas*, 20 Wend. 17; *Hill v. Beebe*, 13 N. Y. 556. (2) An execution on the judgment was given to the sheriff before the second mortgage was filed, and was not returned until afterward, no levy being made. *Held*, that this would not aid plaintiff. For the enforcement of a lien of an execution, a levy and sale is necessary, and such levy should be during the life of the execution, and no constructive levy can arise from the mere delivery of the execution, and the

goods cannot be seized after the return day. *Hathaway v. Howell*, 54 N. Y. 97. Judgment affirmed. *Walker v. Henry*. Opinion by Miller, J. [Decided April 19, 1881.]

FIRE INSURANCE—CONDITION AVOIDING POLICY—VACANT OR UNOCCUPIED DWELLING—DIFFERENT PARCELS IN SAME POLICY.—A fire policy insured different buildings and chattels therein; the different properties and the different amounts put at risk were each specifically named with minuteness. The policy contained a condition that if "the premises" should become "vacant or unoccupied" and so remain for more than thirty days, etc., the policy would be void. A part of the property was destroyed, being the dwelling-house and contents and four outhouses convenient or essential for use with the dwelling. In an action on the policy, *held*, that there was a difference in the meaning of the words "vacant" and "unoccupied" as applied to a dwelling-house. By the first was intended an empty house, one in which such inanimate objects as are usually in such a place are not present; by the second, one in which there is not habitually the presence of human beings. For a dwelling-house to be in a state of occupation there must be in it the presence of human beings as at their customary place of abode, not absolutely and uninterruptedly continuous, but that must be the place of usual return and habitual stoppage. In this case the dwelling which was used in the summer as a residence by plaintiff was at other times visited fortnightly by him and his wife, and there were weekly tours of inspection through it by a farmer and his family living on the same grounds and supervision by the farmer from his residence near by. *Held*, that at such times the house was unoccupied within the condition of the policy. *Held*, also, that the occupation of some of the other buildings on the place, included in the same policy, did not save the dwelling-house from the operation of the condition. See *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452. *Held*, further, that the outhouses being appurtenant to the dwelling and the use of them concurrent therewith, could not be said to be occupied when that was not. Judgment reversed. *Herrman v. Adriatic Fire Ins. Co.* Opinion by Folger, C. J. [Decided April 19, 1881.]

PRACTICE—EXCEPTIONS TO RULINGS MUST BE NOTED IN CASE—STIPULATIONS AT TRIAL.—At the beginning of a trial, upon an objection being overruled and an exception taken, the court directed that to whatever should be objected to the stenographer should enter an exception. To this direction there was no dissent. *Held*, that this entitled the defeated party on appeal on the settlement of the case to have exceptions entered to such rulings as he might desire to have reviewed. It could not be given effect as intended to govern the action of the appellate tribunals and require them to review rulings to which no exception was entered in the case. The provisions of law which require a party desiring to review rulings upon a trial to take exceptions in proper form are established for the convenience of the courts as well as for the protection of parties, and the latter cannot by stipulation have their cases heard on appeal without regard to these provisions. It was the duty of the appellant to see that all exceptions on which he intended to rely were properly noted. Motion denied. *Briggs v. Waldron*. Opinion by Rapallo, J.

[Decided April 16, 1881.]

STATUTE OF FRAUDS—SALE OF GOODS WORTH \$50—PAYMENT BY CHECK OF PART OF PRICE—TENDER—DAMAGES—EVIDENCE.—(1) In an action for the price agreed to be paid by defendant for a quantity of hops sold him by plaintiff to be delivered when defendant should direct, it appeared that the contract of sale was for more than \$50 worth and was verbal, and no money

was paid at the time. The defendant afterward, the contract being restated between the parties at the time, gave plaintiff a check upon a bank for a part of the purchase-price. *Held*, that the check accepted and paid was a sufficient payment to render the contract valid under the statute of frauds. The delivery, presentment and payment of the check should be taken as one transaction. The statute does not mean rigorously *eo instante*. It does not contemplate that the contract and the payment shall be at the same time in the sense that they constitute parts of one and the same continuous transaction. The check was a payment "at the time," and the contract valid. *Archer v. Zeh*, 5 Hill, 200; *Hawley v. Keeler*, 53 N. Y. 114; *Bissell v. Balcom*, 30 id. 275. (2) There was no necessity on the part of plaintiff to make a tender of the hops before action. As defendant was to name the place of delivery, a notification that the hops were ready and an offer to deliver were enough. *Story on Sales*, § 314. (3) The purchase-price of the hops less the payments received was a proper measure of damages. Plaintiff was not bound to sell the hops at auction after due notice on account of the vendee, but was at liberty to abandon the property, treat it as the vendee's and sue the latter for the price. *Pollen v. LeRoy*, 30 N. Y. 556. (4) Defendant, as a witness for himself, contradicted plaintiff's evidence as to whether there was or not a restatement of the contract at the time of the payment. *Held*, that evidence that the price of hops had fallen was not immaterial as it showed defendant's interest, and plaintiff would not be precluded from showing such fact on account of calling defendant as a witness to prove the payment by the check. See *Thompson v. Blanchard*, 4 N. Y. 311; *Lawrence v. Baker*, 5 Wend. 305; *McArthur v. Hurlburt*, 21 id. 190. Judgment affirmed. *Hunter v. Wells*. Opinion by Finch, J. All concur except Danforth, J., dissenting and Rapallo, J., absent. *Folger, J.*, concurs in result. [Decided March 22, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

MARCH, 1881.

APPEAL—IN ADMIRALTY—DECISION OF FACTS IN DISTRICT AND CIRCUIT COURTS PREVAILS.—In an appeal in admiralty, where both the Circuit and District Court have upon the same evidence reached the same conclusion, this court will not, except in a clear case, reverse. In *The Marcellus*, 1 Black, 417, it is said: "We have had occasion to remark more than once that when both courts below have concurred in the decision of questions of fact, * * * parties ought not to expect this court to reverse such a decree by raising a doubt founded on the number or credibility of witnesses. The appellant in such a case has all presumptions against him, and the burden is cast on him to prove affirmatively some mistake made by the judge below in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered." This rule, thus stated from the preceding cases, was uniformly followed afterward until the act of 1875 (18 Stat. 315, ch. 77) relieved us from the labor of weighing evidence. *Newell v. Norton and Ship*, 3 Wall. 267; *The Hypodame*, 6 id. 223; *The S. B. Wheeler*, 20 id. 386; *The Lady Pike*, 21 id. 9. It is true that notwithstanding this rule we were required "to re-examine the facts as well as the law of the case" (*The Baltimore*, 8 Wall. 382), but we did not reverse except in a clear case. Such was the well-established rule of decision. Petition for rehearing dismissed. *Steamboat Sabn v. Steamboat Richmond*. Opinion by Waite, C. J.

BANKRUPTCY—FIDUCIARY DEBT NOT DISCHARGED BY COMPOSITION PROCEEDINGS.—The provisions of the bankrupt law, passed in 1875, that a composition "shall be binding on all the creditors whose names and addresses and the amounts of the debts due to them are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed," will not relieve a bankrupt who has obtained a discharge under a composition proceeding for liability, from a fiduciary debt. The provision that no debt created by a fraud shall be discharged by any proceedings in bankruptcy is a very positive and clear statement of a principle applicable as well to such proceedings authorized after as before this special one was enacted. The resolution of composition is a proceeding in bankruptcy. There is no injustice nor any difficulty in restraining the language of the composition section, as regards its binding force, to persons whose debts are capable of being discharged by the bankrupt law. If a certain class of debts cannot be discharged by proceedings in bankruptcy, then they cannot be discharged by this proceeding, for it is a proceeding in bankruptcy. If all other debts may be discharged by a composition in bankruptcy, then the debtor and the other creditors get its benefit and are bound by it, while the one whose debt may not be thus discharged does not. He neither takes its benefit nor is he bound by it. Judgment of Superior Court of Massachusetts affirmed. *Wilmot v. Mudge*. Opinion by Miller, J.

PRACTICE—IN ADMIRALTY—NEW RULE IN LIMITED LIABILITY PROCEEDINGS.—In admiralty cases, where proceedings are necessary upon appeal to secure a limited liability, the court announces a general rule extending to the Circuit Courts on appeal the regulations which have heretofore been adopted for the District Courts in cases of proceeding to obtain the benefit of a limited liability under the act. It is undoubtedly the general rule that an appeal in admiralty, like all appeals derived from the practice of the civil law, carries the whole cause to the appellate court in which it is to be tried anew upon the same and such additional proofs as the parties may propound. While this is the general rule there is also no doubt that the Legislature may authorize the appellate court, after hearing the cause and determining the questions raised thereon, to remand it to the court *a quo* for further proceedings. The late practice under the bankrupt law exhibited an instance of this mode of proceeding. The entire history of appeals in admiralty as well as in equity in this court is another instance of the same practice. But on appeals in admiralty from the District to the Circuit Court, the latter has always retained the cause for trial and final disposition without remanding to the District Court. But in the late revision of the statutes of the United States (Revised Stat., § 636) it is declared as follows: "A Circuit Court may affirm, modify or reverse any judgment, decree or order of a District Court, brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the District Court, as the justice of the case may require." But whilst this seems to be the law, namely, that the Circuit Court, after hearing a cause on appeal, has power to remand with directions; it may not be advisable to resort to it in ordinary cases where the Circuit Court can as well dispose of the whole case. The Supreme Court therefore make the rule above set forth. *Steamship Benefactor v. Mount*. Opinion by Bradley, J.

CALIFORNIA SUPREME COURT ABSTRACT.

JANUARY 1881.

FIXTURES—ENGINE BOILER IN MILL—LESSOR OF ENGINE AND MILL OWNER.—Plaintiff, the owner of a

steam engine and boiler, leased them to one Lampson, with a privilege of purchasing. Lampson placed them in a mill belonging to defendants, of which Lampson had possession under a contract of purchase. The engine and boiler were affixed to the mill by bolts, timbers and masonry, so as to become permanently attached, and could not be removed without destroying masonry and injuring some of the timbers of the mill. Lampson thereafter abandoned the mill and defendants took possession. *Held*, that plaintiff was, upon default of Lampson, entitled to replevy the engine and boiler from defendants. It is well settled, as said in *Tift v. Horton*, 53 N. Y. 380: "That chattels may be annexed to the real estate and still retain their character as personal property. See *Voorhees v. McGinnis*, 48 N. Y. 278, and cases cited. Of the various circumstances which may determine whether in any case this character is or is not retained, the intention with which they are annexed is one, and if the intention is that they shall not by annexation become a part of the freehold, as a general rule they will not. The limitation to this is where the subject or mode of annexation is such as that the attributes of personal property cannot be predicated of the thing in controversy (*Ford v. Cobb*, 20 N. Y. 344), as when the property could not be removed without practically destroying it, or where it or part of it, is essential to the support of that to which it is attached." *Id.* In the present case there can be no doubt that as between the plaintiff and Lampson the engine and boiler remained personal property, notwithstanding the fact that it was by him attached to the mill, for, as said in *Ford v. Cobb*, 20 N. Y. 352: "They were not so absorbed or merged in the realty that their identity as personal chattels was lost; and unless such an effect has been produced, there is no reason in law or justice for refusing to give effect to the agreement by which they were to retain their original character." See, also, *Eaves v. Estes*, 10 Kan. 314; *Plerce v. Emery*, 32 N. H. 484; *Haven v. Emery*, 33 *id.* 66; *Curtis v. Riddle*, 7 Allen, 185. Under the circumstances the defendants must be held to stand in the shoes of Lampson, and the property in question treated as personalty in their hands as in his. *Smith v. Benson*, 1 Hill, 176; *Tift v. Horton*, 53 N. Y. 377. *Hendy v. Dickerhoff*. Opinion by Rose, J.

NEGLIGENCE—CHILD ASLEEP ON RAILROAD TRACK—COMPARATIVE NEGLIGENCE.—A child six years of age, living with its parents, near defendants' railway track, when attempting to cross the same near the highway, became dizzy and fell down upon the track, where he remained dizzy or asleep until he was run over and injured by a train of defendants' cars, which were negligently run. The child could have been seen from the train for 350 yards. The mother of the child was aware that he had on previous occasions fallen on the ground dizzy, and then asleep. *Held*, that there was not such contributory negligence as would preclude a recovery against defendant for the injury. *Needham v. San Francisco, etc., R. Co.*, 37 Cal. 409; *Kline v. Cent. Pac. R. Co.*, *id.* 400. In the former case it is said: "No more in law than in morals can one wrong be justified or excused by another. A wrong-doer is not an outlaw, against whom every man may lift his hand. Neither his life, limbs nor property are held at the mercy of his adversary. On the contrary, the latter is bound to conduct himself with reasonable care and prudence, notwithstanding the fault of the former; and if by so doing he can avoid injuring the person or property of the former, he is liable, if he does not, if by reason thereof injury ensues." Referring to the rule adopted in New York, the court proceeds: "The error of the New York courts lies in the fact that they ignore all distinction between cases where the negligence of the plaintiff is proximate, and where it is remote, and in not limiting the rule, which they an-

nounced, to the former." In *Isabel v. New York, etc., R. Co.*, 27 Conn. 404, it is said: "A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity demands this, and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs." *Meeks v. Southern Pacific Railroad Co.* Opinion by Rose, J.

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

JANUARY, 1901.

CONSTITUTIONAL LAW—CRIMINAL NOT IN JEOPARDY IN TRIAL STOPPED BY REASON OF INCOMPETENCY OF JUROR.—After a trial of several defendants for assault and battery had commenced, it was discovered that one of the jurors was surety on the bail bond of one defendant and the trial was thereupon stopped by the court, without defendant's consent. *Held*, that defendants had not been in jeopardy so as to preclude a second trial. When a jury has been sworn to try the issue and the trial has been commenced, the jeopardy to which the defendant is exposed is held to have begun, and the prosecuting officer will not, pending the trial, when a verdict is demanded by the prisoner, be permitted to enter a *nolle prosequi* for the purpose of subjecting him to another trial for the same cause. *Commonwealth v. Scott*, 121 Mass. 33; *Commonwealth v. Tuck*, 20 Pick. 356; *Commonwealth v. Kimball*, 7 Gray, 330. The government chooses its own time and cannot for its own convenience discontinue the proceedings and still hold the prisoner for trial. The principle is embodied in the common-law maxim that no man is to be brought into jeopardy more than once for the same offense. It is a rule which has been applied with manifest justice by the courts in this country for the protection of persons charged in prosecutions for either felonies or misdemeanors, and it has been said that its true meaning is that no man shall be twice tried for the same offense. *People v. Goodwin*, 18 Johns. 187, 201; *United States v. Forez*, 9 Wheat. 579. From the necessity of the case, however, there must be many exceptions to the rule. See *King v. Edwards*, 4 Taunt. 306; *United States v. Haskell*, 4 Wash. C. C. 402; *Nugent v. State*, 4 Stew. & Port. 72; *Regina v. Newton*, 13 Q. B. 716; *Commonwealth v. Bowden*, 9 Mass. 494; *Commonwealth v. Purchase*, 2 Pick. 521; *Commonwealth v. Scholey*, 13 Allen, 659. In short, the rule is held not to apply whenever the case cannot be proceeded with by reason of some physical or moral necessity arising from no fault or neglect of the government. When such is the case, the trial may be stopped, and the defendant will not be protected from being afterward tried upon the same indictment. *Commonwealth of Massachusetts v. McCormick*. Opinion by Colt, J.

STATUTORY CONSTRUCTION—LIQUOR LICENSES—DRUGGIST SELLING LIQUOR COMPOUNDED WITH MEDICINE NEED NOT TAKE.—A statute forbidding the sale or keeping for sale without authority, of spirituous or intoxicating liquors, *held*, not to apply to a druggist who kept the liquors only for the purpose of mixing them with other ingredients, according to prescriptions of physicians, to be used as medicines, and also for the purpose of manufacturing such compounds as are commonly used by druggists, to be sold for the purpose of being used as medicines for remedies for sickness and disease. In order to determine whether the statute applies to a sale, the true test is to inquire whether the article sold is in reality an intoxicating liquor. If it

is, the sale is illegal, although it is sold to be used as a medicine or it is attempted to disguise it under the name of a medicine, or it is a mixture of liquor and other ingredients. *Commonwealth v. Hallett*, 103 Mass. 452; *Commonwealth v. Butterick*, 6 Cush. 247; *Commonwealth v. Sloan*, 4 id. 52. But if the article sold cannot be used as an intoxicating drink, it is not within the prohibition of the statute, although it contains as one of its ingredients some spirituous liquor. The sale of such articles is not within the mischief intended to be remedied by the statute, nor within the fair meaning of its language. *Commonwealth of Massachusetts v. Ramsdell*. Opinion by Morton, J.

SURETYSHIP—CONDITIONAL AGREEMENT TO EXTEND TIME, UNPERFORMED, WILL NOT DISCHARGE SURETY.—A conditional agreement by a creditor with a principal debtor to extend the time of payment of a note, made without the knowledge of the sureties, will not discharge them, the condition not being complied with. The indorser or the surety upon a note is discharged by agreement made without his consent between the holder and the maker to give time to the maker. But to have this effect it must be a valid agreement founded upon a good consideration, such as can be enforced either at law or in equity. *Veazie v. Call*, 3 Allen, 14; *Potter v. Green*, 6 id. 442; *Jennings v. Chase*, 10 id. 526. *Wilson v. Powers*. Opinion by Morton, J.

GEORGIA SUPREME COURT ABSTRACT. MARCH, 1881.

CARRIER—LIMITATION OF LIABILITY BY SPECIAL CONTRACT—CONSIDERATION—PUBLIC POLICY.—A railroad company which transports live stock as freight is a common carrier as to such freight, and is liable as in other cases except for damages resulting from the act of God, the public enemy, or of the animals themselves, unless the carrier has further protected itself by contract. A common carrier of such freight may limit this liability in respect thereto by special contract. But the liability cannot be limited by a mere notice in the bill of lading; though if a special contract be incorporated in the bill of lading, and signed by both parties, it is sufficient. A contract by a shipper of live stock that in consideration of a free pass for himself over the road, he would assume all risk of loss or damage to the stock, except such as might be caused by collision or running off the track, is neither unreasonable nor contrary to public policy. *Spears v. Georgia Railroad Co.* Opinion by Crawford, J.

GUARDIAN—WHEN NOT LIABLE FOR LOSS BY UNFORTUNATE INVESTMENT.—H. died, leaving a policy of insurance on his life; his widow being unable to give the bond necessary for administration, desired the assistance of the banking company, filed a petition and obtained an order that the bank should collect the insurance and hold it as trustee for herself and children; this was done, and \$4,000 held on deposit, drawing seven per cent interest; subsequently on the joint petition of herself and the bank and under order of the chancellor, after appointing her as guardian *ad litem* for the minor children, to better the investment, the money was invested in the capital stock of the bank. Held, that such purchase was legal, though subsequently the bank failed, it being solvent at that time. It is immaterial whether an officer of the bank advised her of its financial condition at the time or not, there being no fraud. *Haddock v. Planters' Bank of Fort Valley*. Opinion by Crawford, J.

REMOVAL OF CAUSE—ESSENTIALS TO AUTHORIZE, UNDER ACT OF 1866 AND ACT OF 1867—AMENDMENT.—(1) Under the act of Congress of 1866, omitting the case of aliens, the following conditions are necessary to a removal of a cause from the State to the Federal

courts: The suit in the State court must be by a plaintiff who is a citizen of the State in which the suit is brought; it must be against a citizen of the same State and of another State as defendants; the amount in dispute must exceed \$500 besides costs; the removal must be applied for before the trial or final hearing of the cause in the State court. These elements concurring, the non-resident defendant—not the resident defendant—may have the cause removed, not wholly, but only so far as relates to himself, provided also it is a suit brought for the purpose of restraining or enjoining him, or is a suit in which there can be a final determination of the controversy so far as concerns him without the presence of the other defendants as parties to the cause. (2) Under the "Local Prejudice" act of 1867, the following conditions are necessary to the exercise of the right of removal: that the controversy shall be between a citizen of the State in which the suit is brought and a citizen of another State; that the matter in dispute shall exceed the sum of \$500, exclusive of costs; that the party citizen of such other State shall file the required affidavit stating the "local prejudice," etc.; that the requisite security for appearing in the Federal court shall be given. (3) If the right of removal has once become perfect, it cannot be taken away by any subsequent amendment by the opposite party in State or Federal court. *Jones v. Foreman*. Opinion by Speer, J.

SALE OF PERSONAL PROPERTY—DELIVERY.—Where a contract is made for the sale of cotton then stored in a warehouse, within the knowledge of both parties, who agree upon a price, and the vendor delivers the warehouse receipts to the purchaser and takes a check for the purchase-price, delivery may be inferred without any positive agreement. In such a case, if the vendor delivers the check to a bank, has the amount placed to his credit in a pass-book by the officers of the bank, and takes charge of the pass-book as his own, the sale becomes complete, and the relation of debtor and creditor exists between the vendor and the bank. *Rawles v. Saulsbury*. Opinion by Stewart, J.

MICHIGAN SUPREME COURT ABSTRACT. JANUARY, 1881.

CORPORATE STOCK—SHARES ASSIGNED NOT LIABLE ON PROCESS AGAINST ASSIGNOR.—Shares of corporate stock are not seizable upon attachment or execution against one who has actually assigned them, although such assignment was made to defraud creditors. See *Greenvault v. Farmers & Mech. Bk.*, 2 Doug. 498; *Buckley v. Lowrey*, 2 Mich. 419. Such shares are not leviable at common law, and positive provisions are requisite to enable a court of common law to apply its power to them. They are intangible entities and incapable of caption by the gross methods of that system. In order that they may be safely proceeded against without going into a court of equity it is indispensable that the Legislature provide specifically therefor and prescribe in detail or at least in substance all the means necessary for the object. *Blair v. Compton*, 33 Mich. 414; *Denton v. Livingston*, 9 Johns. 96; *Howe v. Starkweather*, 17 Mass. 240; *Williamson v. Smoot*, 7 Martin (La.) 131; *James v. Pont. & Grov. P. Co.*, 8 Mich. 91. *Van Norman v. Jackson*, Circuit Judge. Opinion by Graves, J.

LIBEL—PRIVILEGED COMMUNICATION.—A communication made by persons interested in a school to the town superintendent of schools, charging an applicant for a license to teach with improper conduct, when made without malice and with a belief in its truth, solely for the purpose of preventing the issue of the license applied for, is privileged. In such cases no action can be maintained even if the complaint is un-

true, if not maliciously made. *Foster v. Scripps*, 39 Mich. 376; *Dickerson v. Hilliard*, L. R., 9 Exch. 79; *Harrison v. Bush*, 5 El. & B. 344. *Weiman v. Moble*. Opinion by Campbell, J.

LOST PROPERTY—REWARD OFFERED—FINDER HAS LIEN ON—REFUSAL TO DELIVER TO CLAIMANT NOT KNOWN TO BE OWNER NOT CONVERSION.—(1) The finder of a lost article for which a reward is offered by the owner has a lien on the article for such reward. According to the common law the finder of goods lost on land becomes proprietor in case the true owner does not appear. And meanwhile his right as finder is a perfect right against all others. But if the true owner does appear whatever right the finder may have against him for recompense for the care and expense in the keeping and preservation of the property, his status as finder only does not give him any lien on the property. Yet if such owner offer a reward to him who will restore the property, a lien thereon is thereby created to the extent of the reward so offered. This doctrine in favor of a lien in such circumstances is so laid down in *Preston v. Neale*, 12 Gray, 222, and authorities are cited for it. Among them is the leading case of *Wentworth v. Day*, 3 Metc. 352, which is approved and followed in *Cummings v. Gann*, 52 Penn. St. 484, and adopted as correct by Story (*Story on Bailments*, § 121 a, 621 a), *Parsons* (3 *Parson on Cont.* 239 [6th ed.]) and *Edwards* (*Edw. on Bailm.*, § 20, 68 [2d ed.]). (2) A refusal by the finder to deliver up property found on the ground that he does not know the claimant is the owner is not conversion. In *Isaac v. Clark*, 2 Bulst. 306, Lord Coke states the law in this wise: "When a man doth find goods, it hath been said and so commonly held, that if he do dispossess himself of them, by this he shall be discharged; but this is not so, as appears by 12 Edw. IV, 13, for he which finds goods is bound to answer him for them who hath the property; and if he deliver them over to any one, unless it be unto the right owner, he shall be charged for them; for at the first it is in his election whether he will take them or not into his custody; but when he hath them, one only hath then right unto them, and therefore he ought to keep them safely. A man therefore which finds goods, if he be wise, will then search out the right owner of them, and so deliver them unto him. If the owner comes unto him and demands them and he answers that it is not known unto him whether he be the true owner of the goods or not, and for this cause he refuseth to deliver them, this refusal is no conversion if he do keep them for him. *Wood v. Pterson*. Opinion by Graves, J.

APRIL 18, 1881.

CHAMPERTY—WHEN NOT DEFENSE TO ACTION.—That a champertous contract exists with reference to the prosecution of an action will not defeat it, plaintiff having a good cause of action. In *Hilton v. Woods*, L. R., 4 Eq. Cas. 432, Malvin, V. C., said: "I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that when the right of the plaintiff, in respect of which he sues, is derived under a title founded in champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that when a plaintiff has an original and good title to property he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise." See, also, *Elborough v. Ayers*, L. R., 10 Eq. Cas. 367; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robinson v. Beale*, 26 Ga. 17. *Small v. Chicago, Rock Island & Pacific Railroad Co.* Opinion by Rothrock, J.

SURETYSHIP—PREVIOUS DEFAULT OF PRINCIPAL ON OFFICIAL BOND UNDISCLOSED BY OBLIGEE.—Where one becomes surety upon the bond of an employee given to an employer for the faithful performance of his duties as employee, the fact that the employer does not inform the surety that the employee has previously been in default in the performance of his duties in the same employment, no inquiry being made, will not discharge such surety. See *Ætna Life Ins. Co. v. Mabett*, 18 Wis. 667. In *Roper v. Trustees Saugamon Lodge*, 91 Ill. 518, it is said: "Where a party becomes surety upon the bond of a treasurer of a secret society for the faithful application of moneys in his hands, payable to the society, from the fact that the officers and members of the society knew of his previous misappropriation of the funds intrusted to him during the prior year, and with such knowledge re-elected him, and failed to communicate such fact to his sureties, no inquiry being made of them by the sureties, and they doing no act to put the sureties off their guard or prevent them from ascertaining the facts, no fraud can be imputed to the society which can be set up in avoidance of the sureties' liability on the bond." See, also, *Ham v. Grove*, 34 Ind. 18; *Atlantic & Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385; *Remington Sewing Machine Co. v. Kezertee*, 5 N. W. Rep. 809, 2 Wis. 527; *Atlas Bank v. Brownell*, 11 Am. Rep. 231, 9 R. I. 166. A surety is not discharged from liability from the mere fact that the principal is continued in the master's employment after he has failed to make payments promptly, of which fact the surety has not been advised. See *P. v. Ft. W. & C. Ry. Co. v. Schaffer*, 59 Penn. St. 350; *Albany Dutch Church v. Vedder*, 14 Wend. 166; *Bush v. Critchfield*, 4 Ohio, 736; *Jones v. United States*, 18 Wall. 662; *Board of Sup'rs v. Otis*, 62 N. Y. 89; *McKenzie v. Ward*, 58 id. 541; *A. & P. Tel. Co. v. Barnes*, 64 id. 385. *Home Ins. Co. of New York v. Holway*. Opinion by Day, J.

WISCONSIN SUPREME COURT ABSTRACT.

MARCH 24, 1881.

BOND—RECITALS IN, LIMIT LIABILITY.—An indemnifying bond given to a sheriff recited that "Whereas Casper M. Sanger, sheriff, is about to seize and levy on certain personal property, about which there is a reasonable doubt as to the ownership, or its liability to be taken on the said writ of attachment." The condition of the bond was to indemnify and save harmless Sanger, and those acting under his authority as such sheriff, "against all suits, actions, judgments, executions, troubles, costs, charges and expenses arising or which may be had or made against him, or any of them, or which may be suffered or sustained by him, them, or any of them, by reason or in consequence of such levy and seizure, or of the subsequent proceedings thereon." Held, that the recital in the bond limited and modified its condition and that the sureties could not be held liable for the attorney's fee, judgment and costs, in a suit for rent of the store in which the attached goods were kept by the sheriff after seizure, there being no question of the ownership of the property or its liability to be taken by attachment. In *Bell v. Brown*, 1 How. (U. S.) 169, it is said: "The general rule is well settled in controversies arising on the construction of bonds, with conditions for the performance of duties, preceded by recitals, that when the undertaking is general it shall be restrained, and its obligatory force limited within the recitals." *Arlington v. Merrick*, 2 Sand. (Part II) 408; *Liverpool Water Works Co. v. Harpley*, 6 East, 507; *Wardens v. Bastock*, 2 Bos. & Pull. 175; *Leadly v. Evans*, 3 Bing. 32; *Pepin v. Cooper*, 2 Barn. & Ad. 431. *Sanger v. Baumberger*. Opinion by Orton, J.

CORPORATION—TRANSFER OF STOCK ON BOOKS NECESSARY FOR VALIDITY AGAINST ATTACHING CREDITORS.—The statute of Wisconsin provides that "the capital stock of every corporation, divided into shares, shall be deemed personal property, and when certificates thereof are issued, such shares may be transferred by indorsement of the owner, his attorney or legal representatives, and delivery of the certificates; but such transfer shall not be valid, except between the parties thereto, until the same shall have been so entered on the books of the corporation as to show the names of the parties by and to whom transferred, the number and designation of the shares, and the date of the transfer." *Held*, that the transfer of shares not entered on the books of the corporation in accordance with the statute is invalid, as to execution or attachment creditors of the assignor, as well as to the corporation and all parties interested except the parties to the transfer. See *Fiske v. Carr*, 20 Me. 301; *Showkagan Bank v. Cutler*, 49 Id. 315; *Weston v. Bear River, etc., Min. Co.*, 6 Cal. 186; *Strout v. Natoma, etc., Co.*, 9 Id. 78; *Nagles v. Pacific Wharf Co.*, 20 Id. 339; *Fisher v. Essex Bank*, 5 Gray, 373; *Union Bank v. Laird*, 2 Wheat. 300; *Rock v. Nichols*, 3 Allen, 342. *In re Murphy*. Opinion by Orton, J.

NEGLIGENCE—IN ACTION FOR DEATH BY, DAMAGE MUST BE ALLEGED AND SHOWN.—In an action by a personal representative, under the statute for death caused by negligence, some facts should be stated showing that a pecuniary injury or loss, either present or prospective, has resulted to the relatives of deceased. Merely showing that deceased left surviving his wife and several children is not enough, and a complaint that alleges only these facts is demurrable. *Whitton v. Chicago & N. W. R. Co.*, 21 Wis. 308; *Woodward v. Chicago & N. W. R. Co.*, 23 Id. 400; *Quinn v. Moon*, 15 N. Y. 432. It is well settled that under this statute it is only for a pecuniary loss that the action is maintainable, and not for loss of society, or damages in the way of solatium. *Potter v. Chicago & N. W. R. Co.*, 21 Wis. 373; *Blake v. Midland R. Co.*, 10 Eng. L. & Eq. 437; *Duckworth v. Johnson*, 4 Hurl. & N. 653. And it seems that correct pleading requires that facts should be stated in the complaint showing that the beneficiaries have sustained some pecuniary loss or damage by the death, and that this should not all be left to inference from the fact of killing. See *Safford v. Drew*, 3 Duer, 627; *Kelly v. Chicago, M. & St. P. R. Co.*, 7 N. W. Rep. 291. It is true there are cases which intimate or hold that merely nominal damages are recoverable. *Chapman v. Rothwell, Ellis, B. & E.* 168; *Oldfield v. N. Y. & Harlem R. Co.*, 14 N. Y. 310. But we think the better rule is stated in *Duckworth v. Johnson*: "If there was no damage the action is not maintainable. It appears to me that it was intended by the act to give compensation for damages sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." *Regan v. Chicago, Milwaukee & St. Paul Railway Co.* Opinion by Cole, C. J.

CRIMINAL LAW.

EVIDENCE—OF MOTIVE BY ACTS DISTANT FROM TIME AND PLACE OF CRIME—EXPERT—OPINION BY NON-EXPERT AS TO INSANITY.—(1) In a prosecution for an assault with a deadly weapon with intent to kill, where the question of motive was important, evidence was admitted for the State as to what occurred between defendant and the prosecuting witness about a week before the assault and at a distant place in another State. *Held*, no error, the facts proved having some bearing upon the question of motive. *Kunkle v. State*,

32 Ind. 320. The rule is well stated by Roscoe (Cr. Ev., p. 82) where he says: "There are cases in which much greater latitude is permitted and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of." (2) A witness for the accused (not an expert; was asked whether the complainant was "considered partially deranged." *Held*, that there was no error in ruling out the inquiry, though the accused might show that the complainant was insane by a proper question to a proper witness. There are authorities entitled to much weight holding that the opinion of a non-expert witness is not admissible in evidence to prove mental condition, although formed from personal observation of the appearance and conduct of the individual, except in the case of subscribing witnesses to a will. *Boardman v. Woodman*, 47 N. H. 120; *State v. Pike*, 49 Id. 309; *State v. Archer*, 64 Id. 408; *Commonwealth v. Fairbanks*, 2 Allen, 511; *Commonwealth v. Wilson*, 1 Gray, 337. But this stringent rule has been somewhat relaxed in other cases, as in *Durham's Appeal*, 27 Iowa, 192, in which it was held that "where the insanity of a person is the matter in dispute, a non-expert witness may give his opinion, accompanied by a statement of facts within his own knowledge upon which he bases it, in regard to the sanity of the person in question." The court said: "The mere opinion, without knowledge, of a non-expert is opinion still. It is an inference from hypothetical facts formed by a person who avowedly has no qualification or legal competency to form an opinion. In the nature of the case it must be so." To the same effect is *Hardy v. Merrill*, 56 N. H. 227, which overruled *Boardman v. Woodman*, *State v. Pike*, and *State v. Archer*, *supra*, and followed the dissenting opinion by Doe, J., in *State v. Pike*. The rule as stated in *Durham's Appeal*, *supra*, is fully sanctioned in *Clapp v. Fullerton*, 34 N. Y. 194, 195; *Hewlett v. Wood*, 55 Id. 634; *Clary v. Clary*, 2 Ired. L. 78; *Potts v. House*, 6 Ga. 324; *Gibson v. Gibson*, 9 Yerg. 329; *In re Vananaken*, 2 Stockt. Eq. 191; *Titlow v. Titlow*, 54 Penn. St. 223. The opinion of this court, written by the present chief justice in *Burnham v. Mitchell*, 34 Wis. 128, seems to be in accord with the weight of authority as above indicated. It must be held that the question put was incompetent even under the most liberal rule. *Wisconsin Sup. Ct.*, March 2, 1881. *Yanke v. State of Wisconsin*. Opinion by Casaday, J.

EVIDENCE—CONFESSION, CORPUS DELICTI CANNOT BE ESTABLISHED BY.—When the evidence on a trial of one charged with murder fails to establish the *corpus delicti*, the jury cannot convict the accused upon his mere confession made out of court, uncorroborated by any facts and circumstances showing the truth of such confession, but it is otherwise when the *corpus delicti* is proved by other evidence in the case. *Illinois Sup. Ct.*, March 21, 1881. *South v. People of Illinois*. Opinion by Craig, J.

EXAMINATION—ACCUSED AND GOVERNMENT ENTITLED TO—GRAND JURY—DISCLOSURE OF PROCEEDINGS BEFORE—REVIEW BY COURT BY INDICTMENT FOUND BY.—It is the duty of the court, in the control of its proceedings, to see to it that no person shall be subjected to the expense, vexation and contumely of a trial for a criminal offense unless the charge has been investigated and a reasonable foundation shown for an indictment or information. It is due also to the government to require, before the trial of an accused person, a fair preliminary investigation of the charges against him. Therefore, whenever it becomes necessary to the protection of public or private rights, any person may disclose in evidence what transpired before a grand jury. *Low's case*, 4 Greenl. 439; *U. S. v. Cool-*

edge, 2 Gall. 363; *Burdick v. Hunt*, 43 Ind. 381; *Huidekoper v. Cotton*, 3 Watts. 56; *Thomas v. Commonwealth*, 2 Robin. (Va.) 795; *State v. Offutt*, 4 Blackf. 355; *State v. Fassett*, 16 Conn. 457; *Commonwealth v. Hill*, 11 Cush. 137; *State v. Broughton*, 7 Ired. 96; *Way v. Butterworth*, 106 Mass. 75; *Burdick v. Hunt*, 43 Ind. 381. The rule is that whenever it becomes essential to ascertain what has transpired before a grand jury it may be shown no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations (*People v. Shattuck*, 6 Abb. N. C. 34; *Commonwealth v. Mead*, 12 Gray, 167) because this cannot serve any of the purposes of justice. It is not the province of the court to sit in review of the investigations of a grand jury as upon the review of a trial when error is alleged; but in extreme cases, when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence as to indicate that the indictment resulted from prejudice or was found in willful disregard of the rights of the accused, the court should interfere and quash the indictment. *Dodd's case*, 1 Leach, 184; *People v. Resenblatt*, 1 Abb. Pr. 268; *State v. Froiseth*, 16 Minn. 298. U. S. District Ct., N. D. New York, Jan. 1881. *United States v. Farrington*. Opinion by Wallace, D. J.

TRIAL—QUESTIONS TO SHOW PREJUDICE OF JUROR AGAINST RACE OF ACCUSED.—On the trial of a Chinaman for robbery, the following questions put to each juror on behalf of defendant upon the impanelling of the jury, were excluded: "Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man?" "If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person under the same circumstances?" *Held*, that the exclusion was error. *Watson v. Whitney*, 23 Cal. 375. California Sup. Ct., Dec. 21, 1880. *People of California v. Gar Soy*. Opinion by Morrison, C. J.

INSURANCE LAW.

LIFE INSURANCE—CONFLICT OF LAW—POLICY ISSUED BY WISCONSIN COMPANY ON LIFE OF PERSON IN OREGON, DELIVERED THERE, OREGON CONTRACT—FRAUDULENT OBTAINING OF MONEY ON VOID POLICY—JURISDICTION—FEDERAL COURT.—(1) A policy was issued from the office of the plaintiff in Milwaukee, Wisconsin, upon the life of M. E. in Portland, Oregon, and forwarded to the local agent there for delivery, containing a clause to the effect that the policy was not binding upon the company until countersigned and delivered there and the premium paid accordingly. *Held*, that the contract was completed in Oregon, that its validity must be determined by the laws of Oregon, and that the plaintiff being then prohibited from doing business in Oregon, the contract was null and void. In re Comstock, 3 Sawy. 218; *Temple v. Bank of Brit. Columbia*, 5 id. 88; *Bank of Brit. Col. v. Page*, 6 Or. 431; *Pomeroy v. Manhattan L. Ins. Co.*, 40 Ill. 400; *Thwing v. Great Western Ins. Co.*, 111 Mass. 109; *Wood on F. Ins.* 189 and n. 2; *Hardy v. St. Louis M. L. Ins. Co.*, 26 La. Ann. 242; *St. Louis M. L. Ins. Co. v. Kennedy*, 6 Bush, 450. (2) J. E., the assignee of the aforesaid policy, obtained from the plaintiff thereon the sum of \$7,931.97 upon the false and fraudulent representation that the assured was dead. *Held*, that notwithstanding the illegality of the contract of insurance the plaintiff might maintain a suit against J. E. to obtain the money so fraudulently obtained by him. *Catts v. Phalin*, 2 How. 376. (3) A prohibition by a State that a corporation of another State shall not do business therein does not prevent such corporation

from suing in a National court in the former State, because a State cannot prevent a foreign corporation from suing in such tribunal. U. S. Circ. Ct., Oregon, Dec. 9, 1880. *Northwestern Mut. Life Ins. Co. v. Elliott*. Opinion by Deady, D. J., 5 Fed. Rep. 225.

—PARTIES TO SUE ON POLICY—INTEREST—FALSE ANSWERS INSERTED BY AGENT IN APPLICATION.—(1) When a life policy of insurance contains an express promise and agreement to pay the sum insured to the "assured, his executors, administrators or assigns, ninety days after due notice and proof of the death" of the assured, the executrix of the assured is the proper party to bring suit upon the same, and a subsequent provision that the sum insured is for the express benefit of the wife of the assured and their children will not change the rule. (2) Interest is recoverable on the amount of a life insurance policy from the time it is due and payment is refused. (3) When the assured makes a full and complete statement of all facts that materially affect the risk, and the agent of the company, acting in its behalf, in preparing the application of his own accord writes false answers to the usual questions propounded to be signed by the applicant, with the advice to him that the omitted facts are immaterial, and the assured in good faith adopts the application as prepared, the company will be estopped from denying its liability on the policy after receiving premiums, when loss may occur. Illinois Supreme Court, March, 1881. *Massachusetts Mutual Life Ins. Co. v. Robinson*. Opinion by Scott, J.

MARINE INSURANCE—CUSTOM OF CAPTAINS TO INSURE, BINDS OWNERS FOR PREMIUM.—A custom of captains of steamboats at a large river port to insure their boats and give premium notes therefor, held to be one to which there was great necessity to give effect, the perils of navigation being so well known that a due regard for some indemnity against loss is justly recognized as a necessary precaution. If such custom has clearly and distinctly proved to have existed so long as to be generally known, the owners of a steamboat so insured would be liable upon the notes given for the insurance. "*Consuetudo*," said Coke, "is one of the main triangles of the laws of England; those laws being divided into common law, statute law and particular customs, for if it be the general custom of the realm it is part of the common law." Co. Lit. 113-15. "A custom used upon a certain reasonable cause depriveth the common law." Littleton, 112, § 169. In *Vauheath v. Turner*, Winch. 24, Chief Justice Hobart said: "The custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice, and if any doubt arise to them about the custom they may send for the merchants to know their custom." That a custom so general and notorious may exist as to authorize the captain of a steamboat to effect an insurance on it for the benefit of the owners without their express directions is well settled by authority. It would not be in conflict with any statute, nor would it be unreasonable or contrary to public policy. See *Vanness v. Pacard*, 2 Pet. 148; *Gordon v. Little*, 2 S. & R. 353; *Eyre v. Marine Ins. Co.*, 5 W. & S. 116; *Snowden v. Warder*, 3 Rawl. 101; *McMaster v. Pennsylvania Railroad Co.*, 19 P. F. Smith, 374; *Carter v. Philadelphia Coal Co.*, 27 id. 286; 1 Phill. on Ins. 80, 83; *Smith v. Wright*, 1 Cal. 43. It was held in *Oliver v. Green*, 3 Mass. 134, that a part owner of a vessel who had chartered the other part with a covenant to pay the value in case of a loss, might insure the whole vessel as his property, without disclosing that he had a special property only, in a moiety thereof. In *De Forest v. Fulton Fire Ins. Co.*, 1 Hall, 94, it was held that a commission-merchant might recover on a policy of insurance for goods in his possession destroyed by fire, beyond the value of his property therein, without any express orders from the consignors of the goods

to effect such insurance, on proof that such was the usage of commission merchants in the city of New York. *Pennsylvania Sup. Ct., Nov. 1, 1880. Adams v. Pittsburgh Ins. Co.* Opinion by Mercur, J.

RECENT ENGLISH DECISIONS.

CARRIER—CONTRACT EXEMPTING FROM LIABILITY.—Clover seed consigned to the plaintiff by the defendants' railway was mis-delivered by the defendants, and the plaintiffs did not receive it till after a fortnight's delay, too late for the season's market. The goods had been forwarded at the defendants' lower rate of charge, and therefore by special contract "solely at the risk of the sender, with the exception that the company shall be responsible for any willful act or willful default of the company or their servants if proved, for fraud or theft by their servants, and for collision of trains conveying the goods within the company's limits." *Held*, that under the circumstances there was nothing in the special contract to free the defendants from their ordinary liability as carriers. *Q. B. Div., Mar. 21, 1881. Goldsmith v. Great Eastern Railway Co.* Opinion by Lindley, J., 44 L. T. Rep. (N. S.) 181.

CONTRACT—FOR SALE OF PERSONAL PROPERTY—"ABOUT" A WORD OF ESTIMATE.—The plaintiffs, having been informed by S., a commission agent, that the defendants had a quantity of old iron in their yard for sale ("about 150 tons") wrote to the defendants, "We are buyers of good wrought scrap iron, free of light and burnt iron, for our American house, and understand from Mr. S. that you have for sale about 150 tons. We can offer you 80s. per ton." There were three intermediate letters relating to the place of delivery and expense of carting, and then the defendants wrote, "We accept your offers of the 14th and 18th inst. for old iron, viz.: 80s. per ton. We delivering alongside vessel in one of the London docks. Please let us know when you can send a man here to see it weighed, and also inform us where to send it." Before S. saw the plaintiffs he had seen a heap of iron in the yard of defendants, who were builders, and said "You seem to have about 150 tons there." The reply was "Yes, or more." The defendants only delivered forty-four tons, that being the quantity of the heap in the yard, and the plaintiffs recovered 50l. damages in an action for short delivery. *Held*, that the words "about 150 tons" were merely words of estimate and expectation, and there was no warranty as to quantity, and therefore the defendants were not bound to deliver 150 tons; that the subject-matter of the contract was not 150 tons of iron, but the iron which S. had seen in the defendants' yard. *C. P. Div., Feb. 23, 1881. McLay & Co. v. Perry & Co.* Opinions by Grove and Lindley, JJ., 44 L. T. Rep. (N. S.) 152.

SHYLOCK v. ANTONIO.*

SHYLOCK }
vs. } *Suit for default on bond.*
ANTONIO. }

THIS case was originally tried in Venice and appears in Shakspeare's reports. Shylock, money-lender, loaned to one Antonio, a merchant of Venice, 3,000 ducats, on condition that if they were not repaid within a certain time Antonio should forfeit "one pound of flesh nearest his heart," the same to be taken by plaintiff. Default was made by defendant, who, however, before the judgment against him was recorded, tendered 6,000 ducats, which plaintiff refused.

Held, that his tender was too late.

Held, that Shylock could lawfully take the pound of flesh.

Held, that if in so doing he shed, spilled or caused to flow any of Antonio's blood, he was liable; and that he must take neither more nor less than a pound; and

Held, that by exacting the forfeit, plaintiff (an alien) was guilty of conspiracy against the life of a free citizen of Venice, hence that his property should be confiscated, one half to go to the State, the other half to plaintiff.

Judgment to this effect, as recorded. It is now up on appeal.

SHYLOCK, Plaintiff in error,
vs.
THE COMMONWEALTH OF VENICE,
Defendant in error. } *Motion for new trial.*

The undersigned, as counsel for the heirs and assigns of Shylock, plaintiff in error in the above-entitled action, respectfully represents as good and sufficient reasons for a reversal of judgment:

1st. That his client was not represented by counsel.
2d. Appellant excepts to the judge's charge in that he said:

"Upon my power, I may dismiss this court
Unless Bellario, a learned doctor,
Whom I have sent for to determine this,
Come here to day."

We claim that, being himself the authorized magistrate, he had no power to send for anybody. There is no evidence to show who Bellario was, why he should be sent for, or what he had to do with the case. He may have been the judge's aide-partner, or was perhaps a local "boas" in Venice; but the judge had no right to send for him. As an expert in matters of fact his evidence would be admissible only on subpoena from either side. Experts in law are never regarded with favor. If Bellario was judge of a higher court, the case would have reached him on appeal. To send for him was clearly irregular.

3d. The tender of 6,000 ducats was not sufficient, and we were justified in our refusal. The money should have been deposited with the judge pending hearing.

4th. Shylock's motion was for an attachment against the person of Antonio. The power of the judge to issue this was not discretionary but mandatory. Therefore it could be opposed only for irregularity in the bond. Defendant did not claim this. Therefore the order should have issued without parley.

5th. Bellario not arriving, the judge admitted a man from Rome named Balthasar, and permitted, contrary to all precedent in evidence, a letter of introduction to be read written by Bellario and dated Padua. It is clear from this that Bellario was running the court. We except to the letter of introduction as inadmissible and to Balthasar as irrelevant. Bellario wrote:

"I am very sick. Balthasar is furnished with my opinion. I leave him to your gracious acceptance."

We submit, from the irregularity of his action, that Bellario knew no more law than a police justice. No one asked his opinion, and it was clearly inadmissible when sent by word of mouth through Balthasar. The latter was not identified. Bellario's remark, "I am very sick," was probably a mistake of the stenographer. The context shows that it ought to have been "I am very fresh."

6th. We except to the introduction of Balthasar. There is nothing to show that he was summoned by either side. It is not claimed that he was a judge, and he does not seem to have been sworn as a witness. Being a lawyer in Rome, he had obviously no commission to practice in the Venice courts.

7th. The judge erred in greeting Balthasar: "Give me your hand. Come you from old Bellario?" This was entirely undignified, and in current parlance, is,

* See 5 Alb. L. J. 193; 20 id. 502.

we submit, equivalent to: "Shake! How's the old man?" or, "Shake! How's his ribs?" Clearly, again, Bellario was running the court.

8th. We except to Balthasar being examined by the judge, and also to the speech:

"Antonio and old Shylock, both stand forth."

9th. We object to Balthasar's question: "Is your name Shylock?" The direct examination was over, and this question could not be asked in rebuttal.

10th. We object and except to this evidence:

Bal. Do you confess the bond?

Ant. I do

Bal. Then must the Jew be merciful.

11th. We represent that as soon as the judge perceived that Balthasar had the ear of Bellario, he permitted him, contrary to law and right, to run the court to the disadvantage of appellant. We offer to show:

a. That Balthasar was an impostor, being in reality Portia.

b. That he (or she) not only was not a "young doctor of Rome," but never was in Rome, being a resident and freeholder of Belmont.

c. That "old" Bellario was either deceived in the person or else a party to, and abettor of, a conspiracy against Shylock.

d. That Portia was at the time the wife of Bassanio and an interested party in the suit, and hence estopped from judging in the matter.

e. That the State could not profit by this fraud. A new trial is therefore mandatory.

12th. We submit that when the judge saw—as he must have seen—that a woman had begun to argue the question, his only course was to adjourn the court, and thus save those present, since it is clear that a woman's arguments are subjects for exception, especially where money is concerned.

13th. The judge, for reasons which the appellant will hereafter show, permitted Balthasar to pronounce this decision of the court, to which we except:

"If thou cut'st more

Or less than a just pound, nay, if the scale do turn

But in the estimation of a fair,

Thou diest, and thy goods are confiscated."

Our grounds of objection are:

That in the cutting, not Shylock, but Antonio, would die. Question of fact.

That if Shylock died, they could not confiscate his goods, as they were already, by will, left to the State. Question of record.

That it was his privilege, as a judgment-debtor, to take less than a pound if he chose. Question of law.

14th. Shylock having made a motion for a writ of attachment and this not being granted, he was entitled to a mandamus against the judge, issued either by old Bellario or some magistrate of competent jurisdiction. He was right in refusing to a compromise.

15th. We will claim a new trial, first a reversal of the judgment; second, restitution of the amounts paid over by appellant, together with costs and interest to date; third, revocation of his testament, made under duress, giving the moiety of his possessions to Lorenzo, the sweet singer of Venice, and his son-in-law; and fourth, an order of inquiry respecting old Bellario, to ascertain what he made by the transaction.

16th and last exception: The failure of the judge to properly terminate the session, and his remark to Gratiano, one of Antonio's witnesses:

Bal. I entreat you home with me to dinner.

We conceive that on our showing we are entitled to a new trial, and petition for the same.

And your subscriber will ever pray.

—[Puck.

ERNEST HARVIER.

CORRESPONDENCE.

Editor of the Albany Law Journal:

Chapter 129 of Laws of 1881, as published in supplement to ALBANY LAW JOURNAL, purports to amend section 15 of chapter 482 of Laws of 1875. There is no section 15. The law is evidently intended to amend subdivision 15 of section 1 of said chapter 482.

LOCKPORT, May 9, 1881.

G.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Friday, May 13, 1881:

Orders affirmed with costs—*In re Kendall*; *In re Andrews*; *In re Stricker*; *In re N. Y. C. & H. R. R. Co.*, to acquire lands of Cox; *In re Lange*; *In re Clarke*; *In re Arnold*; *In re Sedgwick*; *Reed v. Sedgwick*; *In re assignment of Baildy*.—Order reversed with costs—*Carleton v. Carleton*.—Order affirmed and judgment absolute for defendant on stipulation, with costs—*Leach v. Anderson*.—Appeal dismissed with costs—*Tappan v. State Bank of New Brunswick*; *Langworthy v. Oswego & Onondaga Ins. Co.*; *Poerschke v. Kracht*; *McMichael v. Kilmer*; *The People ex rel. Ulster & Delaware Railroad Co. v. Smith*.—Motion denied with \$10 costs—*Caulfield v. Sullivan*.

NOTES.

IN *Tomline v. Tyler*, 44 L. T. 187, it was held by Lush and Manisty, JJ., sitting in an election case, that the post-office authorities (who in England conduct telegraphic communications) may be ordered to produce specified telegrams. "The Legislature," said Lush, J., "when they transferred the telegrams to the post-office, intended that the public should be just as well off as they were before, when they could always compel a telegraph company to produce the telegrams, just as they could compel any person to produce a letter." Baron Bramwell's decision to the contrary, in the *Taunton* election case, was declared to be overruled. This brings the English decisions on this topic in harmony with our own.—The California Supreme Court, in *People v. Cudman*, March 30, 1881, held that the right to prosecute an appeal is "property" within a statute punishing threats to extort money or property, the threats being designed to compel the abandonment of the appeal.—Texas is to have a capitol costing \$1,500,000.—Judge Walker, of the Illinois Supreme Court, had his pocket picked of \$300 recently, by two men who politely assisted him on board the cars.—*Black v. White*, is a recent South Carolina case.—The current number of Abbott's *New Cases* contains a note on commingling proceeds.

At the last English bar examination 42 of 102 students were plucked.—A competent juror.—Lawyer—Have you any fixed opinion about anything? Juror—No. Lawyer—Is your mind so porous that it can leach out all past facts, memory, impression and sense of justice? Juror—It can. Lawyer—Would you acknowledge on due evidence that you were not yourself, but somebody else? Juror—I would. Lawyer—Are you sure, without due legal proof, that it is I who am speaking to you now? Juror—I am not. Lawyer—You assume that this is the year 1881 A. D., but you are open to the conviction, on due and sufficient evidence, that it may be 1881 B. C., do you not? Juror—I do. Lawyer—You are of the masculine gender? Juror—I am. But on due and sufficient evidence being produced you would even in this respect be willing to admit you might be mistaken? Juror—I might. Lawyer—Swear this gentleman. He is the juror we long have sought and mourned because we found him not.—*Graphic* (N. Y.)

The Albany Law Journal.

ALBANY, MAY 28, 1881.

CURRENT TOPICS.

MR. HARTWELL'S review of the legal "dissection acts," read at the Social Science Convention, is very interesting. He discusses the difficulty arising from the abhorrence of dissection in society, and the demand for liberally-educated and skillful surgeons. He says, "with truth it may be said that in Massachusetts a student or teacher of anatomy cannot be found who is not indictable under the statute of 1815." He advocates the assignment of unclaimed dead bodies, and of those of persons killed in duels or capitally executed, to the medical schools instituted by the States. Such is the law in Massachusetts. The New York act of 1789 must be considered as the first American anatomy law. It was passed the year after the famous "doctors' mob" in New York city. The first section prohibits the removal of dead bodies for dissection, and the second section permits the courts in passing capital sentence to award the body to the surgeons for dissection. Mr. Hartwell continues: "Enactments similar to the New York act of 1789, section 1, have since been passed by the following States: Alabama, Arkansas, California, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin. Of the above-mentioned States, Kentucky, Oregon, Rhode Island, Texas and West Virginia have no anatomy acts; while Rhode Island, Texas and West Virginia have no medical schools. The laws of nine States, namely, Colorado, Delaware, Florida, Louisiana, Maryland, Nevada, New Jersey, North Carolina, and South Carolina, are, so far as the writer has been able to learn, silent regarding grave-robbing. While the Territories of Dakota, Utah, Washington, and Wyoming, have laws for the protection of sepulchres, the District of Columbia has no such law." "The second section of the New York act of 1789 has developed into the acts of twenty-four States. The following-named States have legalized dissection: *Alabama, *Arkansas, California, *Colorado, *Connecticut, *Georgia, *Illinois, *Indiana, Iowa, *Kansas, *Maine, *Massachusetts, Michigan, Minnesota, *Missouri, *Nebraska, New Hampshire, *New Jersey, *New York, Ohio, Pennsylvania, *Tennessee, Vermont, and Wisconsin. The States whose names are starred in the above list make specific provision for the dissection of the bodies of certain deceased criminals, chiefly murderers. It is to be remarked that some of them make no other provision for anatomical science. The acts of the following States may be termed fairly liberal: Arkansas, California, Connecticut, Illinois, Indiana, Iowa, Kansas, Massachusetts,

Michigan, Minnesota, New Hampshire, New York, Ohio, Pennsylvania, and Wisconsin. The acts of Alabama, Colorado, Georgia, Maine, Missouri, Nebraska, New Jersey, Tennessee, and Vermont, are illiberal."

The New York *Herald* has a communication from a member of the bar and something to say editorially concerning the recent "banquet" to Surrogate Calvin. We have felt impelled to say something on the same subject, and as there was no effort to keep the "banquet" a secret, we see no reason why we should not comment on it. It strikes us as a very improper, undignified, and unpleasant affair. Why should a judge be publicly fed and praised in speeches because he has done his duty? Especially, why should this feeding and puffing be done by the lawyers who are in the habit of practicing before him, and who are in some measure dependent on him for patronage? The surrogate has unquestionably been a remarkably faithful, intelligent, and impartial officer, but he should find his reward in private. Let him eat his own victuals and drink his own drink in the consciousness that he has done well; let his friends give him words of praise in private, if they will. Let us reserve these public demonstrations for the winners of boat-races and billiard matches, for acrobats, actors, singers, and the managers of political canvasses. This feature of our society is a disgusting one. If any one has an axe to grind with a public man he gets him up a public dinner, or gives him a cane, or a silver service, and thus assumes to take possession of the public man. In respect to a judge, it is difficult to say who deserves the severest blame—the lawyer who offers, or the judge who accepts such fulsome incense. We are glad to believe there are few of our judges who would so degrade themselves. If any lawyer should offer such an insult to Judge Davis, he would probably commit him for contempt, and for once in our lives we should be on his side. Imagine such an offer to Chief Justice Waite, or Chief Judge Folger! Again, if this sort of thing is proper, the omission in other cases is a tacit reflection on those who are not dined and flattered. If Surrogate Calvin deserves one dinner and so many speeches, how many, for example, does Judge Blatchford deserve? Those who practice in his court would say he should have a "banquet" at least once a month. In this banquet to the surrogate there is probably no consciousness of improper motive on either side, but the parties to it should know how it looks to the profession and the public. We hope it will be the last of its kind, as we believe it was the first.

We have received from Mr. John B. Gale, of Troy, a pamphlet entitled "Affinity no Bar to Marriage." It was called out by Bishop Doane's pamphlet entitled "God's Law of Marriage," and the action of the late Episcopal general convention, condemning marriage of a widower with the sister of his deceased wife. Mr. Gale is not only a learned lawyer,

and a remarkably acute and ingenious reasoner, but an unusually well-read theologian, and an incisive and elegant writer; and in consequence we feel rather sorry for the bishops and their adherents. Mr. Gale does not leave them a leg to stand on, it seems to us. Perhaps all our readers do not understand the basis of the idea that such marriages are immoral. It is this: In Leviticus, v., 6, it is said: "None of you shall approach to any that is near of kin to him." This, we are told by the theologians, is a mis-translation; it should be, "flesh of his flesh." Now what of that? Why, the Bible also says that husband and wife are "one flesh." Therefore the wife's sister is flesh of the husband! This is indeed a mystery! How the bishops get over the Levitical injunction that the man should espouse his brother's widow, and the fact that Christ did not rebuke his questioners for putting to Him the problem of the seven times repeated case of this kind, does not appear. And this is the foundation upon which the convention have grossly shocked the delicacy of many of the purest women in the land, and impugned the motives of their husbands in espousing them. And this is the foundation upon which the report of the convention declares, that where the wife's sister acts as nurse "in a long illness of the wife, relations are formed and pledges are prematurely interchanged as to prospective marriage, and guilt too commonly ensues!" Why guilt should be any more common where the nurse is the sister-in-law than where she is not, we are not instructed. We quite agree with Mr. Gale that the statement is too sweeping. It would be ridiculous to engraft on our system a fantastic superstition that England is rebelling against and struggling to throw off. Seven times have the House of Commons by enormous majorities voted to abolish this rule, and seven times have the House of Lords by narrow majorities preserved it. The last time, a year or two ago, the measure was saved by a majority of eleven, precisely the number of bishops in the upper house voting that way. It is due to the Episcopal convention to say that the English rule was recommended by a majority of only four of forty-four bishops, although — *horresco referens* — the names of some lawyers are appended to the majority report. We intend to review this subject more carefully hereafter.

The Michigan Legislature recently passed an act requiring the judges of the Supreme Court to prepare the head-notes to their opinions. The judges have addressed a letter to the governor on the subject, strenuously objecting to the law, on the grounds that it detracts from the dignity and importance of the office of State reporter, and renders the head-notes public property, free for publication by anybody, and thus infringes the rights of the present contractors for publishing the State reports. The *Central Law Journal* observes: "The judges might have added, as a reason against the expediency, that it would be productive of no little confusion from discrepancies which would inevitably arise in

the construction and comparison, by inquiring members of the bar, of the language of the syllabus and opinion respectively. Each would be a part of the record and the language of the court, and therefore entitled to equal credit; but in the nature of things, discrepancies would arise. It is very difficult, if not impossible, in a syllabus, to state the meaning and effect of an opinion so as to avoid the possibility of mistake. And if the opinion in some minor point seemed inconsistent with the syllabus, annoying difficulties would result." We cannot fully assent to this, because there are many States where the head-notes are written by the judges, and constitute the decision, the opinion being merely explanatory, and not always requisite. The other way, however, we think the best, and we agree that unless the judges are relieved from writing opinions, they should not be saddled with the reporter's peculiar duties. It would be an advantage, however, if the judges would always state the facts, and the reporter should be forbidden to re-state them. This duty can be performed by none so well as by the judges, and the statement by them must always assist them in the elaboration of the opinion. Our reports would be relieved from a good deal of padding if this course were adopted.

NOTES OF CASES.

THIS week we note a group of horse cases. In *Kellogg v. Lovely*, Michigan Supreme Court, April 27, 1881, 8 N. W. Rep. 597, the defendant, in October, 1878, sold plaintiff a mare, buggy, and harness, taking his note, with a mortgage upon the property, for the entire amount of the purchase price. At the time of the sale the mare was with foal, which was born in June following. July first the mortgage became due, and not being paid, the mortgagee took possession of all the property, including the colt. *Held*, that the mortgage gave him a right to the colt, and he was not guilty of trespass in so taking it. After commenting on the general doctrine that the young of animals under mortgage are subject to the mortgage, and observing that this holding may have originated in the doctrine that the increase belongs to the owner of the mother, and the mortgagee of chattels is the legal owner, the court observed: "The case before the court belongs to a peculiar and exceptional class, and it may be disposed of without bringing into question the general doctrine. As previously stated, the mare was carrying her colt when Lovely sold her, and the plaintiff, not paying any thing whatever, gave back at the same moment a chattel mortgage for the entire price. There was no interval of time between the sale and mortgage. Each took effect at the same instant. The whole was substantially one transaction. Now it is a rule of natural justice that one who has gotten the property of another ought not as between them to be allowed to keep any part of its present natural incidents or accessories without payment, and that the party entitled should have the right to regard the whole as being subject to his claim. The one ought

not to suffer loss, nor the other effect a gain, through a mere shuffle, and whatever fairly belongs to the thing in question, as the young the dam is carrying, belongs to her, ought to be as fully bound as the thing itself, unless indeed there are circumstances which imply a different intention. It is not unreasonable to construe the act of these parties by these principles and to consider that when Lovely sold the mare without receiving anything down, and Kellogg gave back the mortgage for the whole purchase price to be due before the colt, according to the ordinary course of things, would be old enough to be separated from the mare, it operated as well to hold the colt as to hold the mare herself. The intentment is a fair and just one that the security was to be so far beneficial to Lovely as to preserve to him the right to claim at the maturity of the mortgage the same property he would have had in case he had made no sale." That the mortgagee of animals with young is the owner of the increase was held in *Forman v. Proctor*, 9 B. Monr. 124; *Thorpe v. Cowles*, 7 N. W. Rep. 677.

The next case, *Gunderson v. Richardson*, Iowa Supreme Court, April 22, 1881, 8 N. W. Rep. 175, involved a horse trade on Sunday. It holds that an action for damages, under the statute, for knowingly offering to trade a horse diseased with glanders, cannot be maintained when the trade was made on Sunday. After laying down the doctrine that the law will not intervene between parties to an illegal contract, to help one to damages against the other for a matter growing out of it, the court observed: "Counsel for appellee contends, however, that this action is not for fraud or breach of warranty, but that it is an action for damages against the defendant for" "a crime," and that "the defendant cannot escape liability by asserting that his unlawful and criminal act was committed on Sunday." "It appears to us that by all the allegations of the petition the plaintiff bases his right to recover by reason of the contract for the exchange of the horses. To support these allegations it is absolutely essential that he show that the exchange was actually made. He could establish his damages in no other way. It was therefore incumbent on him to show the contract as he alleged it to be. This he could not do, for the law leaves the parties to such contracts where they place themselves. In other words, as appears from the petition, both these parties were active participants in violating the law by entering into a contract on Sunday. The plaintiff claims that, in making the contract, defendant defrauded him to his damage. The law will not afford him redress, and it will not avail the plaintiff to assert that the defendant, in making the Sunday contract, also violated another provision of the Criminal Code. The case, it appears to us, is essentially different from the case of one travelling on Sunday, and being assaulted by another, or injured by a defect in the highway. In the latter class of cases the plaintiff does not seek to enforce an illegal contract, or to recover damages growing out of such contract, to which he was an active

party; nor, as is said in *Schmid v. Humphrey*, 48 Iowa, 652; S. C., 30 Am. Rep. 414, 'is he seeking to enforce any right obtained by the breach of any law.'"

The next case also arose from a Sunday horse trade. In *Kinney v. McDermott*, Iowa Supreme Court, April 20, 1881, 8 N. W. Rep. 148, plaintiff and defendant made a horse trade on Sunday, defendant leaving his horse with plaintiff, and taking the horse of plaintiff with him. A day or so later defendant, without plaintiff's knowledge, returned the horse of plaintiff he had received and took his own from plaintiff's stable. Held, that as the original contract was an unlawful one, the court would render no aid to either, and as plaintiff's possession was *prima facie* evidence of ownership, he might, on the strength of that possession, and the trespass of defendant, maintain replevin for the horse so taken away by defendant. The court said: "If the defendant in this action had brought replevin for the horse, instead of taking him by force, he would have been defeated, because he would have been obliged to introduce evidence to overcome the presumption arising from plaintiff's possession. By the acts of the parties in violation of law the plaintiff became entitled to the possession of the horse. This possession was such that the defendant could not have recovered by action the price, if sold and not paid for, and could not maintain an action of replevin. He, however, wrongfully and by a trespass, deprived the plaintiff of the possession. The question is, will he be allowed to recover by force what the law would not have aided him to recover peaceably? It is insisted by counsel for appellant, that because the plaintiff claims title to the horse, he was bound to introduce evidence of such title, and could only do so by showing the Sunday contract. But according to the certificate of the trial judge, the plaintiff was in possession, and the defendant, by force, and without the knowledge of the plaintiff, removed the horse from plaintiff's stable. The question is, by what right did the defendant possess himself of the horse? The burden was on him to show his right. In doing so he would necessarily be compelled to introduce the Sunday contract in evidence. In *Smith v. Bean*, 15 N. H. 577, referring to a contract of sale made on Sunday, it is said: 'The transaction being illegal, the law leaves the parties to suffer the consequences of their illegal acts. The contract is void so far as it is attempted to be made the foundation of legal proceedings. The law will not interfere to assist the vendor to recover the price. The contract is void for any such purpose. It will not sustain an action by the vendee upon any warranty or fraud in the sale. It is void in that respect. The principle shows that the law will not aid the vendor to recover possession of the property if he has parted with it. The vendee has the possession as of his own property by the assent of the vendor, and the law leaves the parties where it finds them. If the vendor should attempt to retake the property without process, the law, finding that the vendee

had a possession which could not be controverted, would give a remedy for the violation of that possession.' See, also, 2 Pars. on Cont. 764, and notes. The author admits there is some conflict of authority upon the question whether a vendee will be allowed to retain the property without paying the price. In our opinion he should, upon the ground that the law will leave the parties where it finds them. It was held in *Pike v. King*, *supra*, that the plaintiff could not recover the value of the property aside from the price agreed upon, or, in other words, could not recover upon the *quantum valebat*. So, to punish two for horse-trading on the Lord's Day, the law gave one of them both the horses.

In *Harris v. White*, 81 N. Y. 532, Chief Judge Folger expounds the law of horse-racing in this State in an elaborate opinion. The action was by a jockey against his employer for wages. The defense was that the contract of employment was in violation of the statute, which declares that all wagers, bets, or stakes, on any race shall be unlawful. The testimony showed that the agreement was to drive in races for purses, prizes, or premiums, and the court holds that a purse, prize, or premium, is not a bet or stake within the statutory prohibition. In the case of a bet, as defined by the chief judge, "each party gets a chance of gain from others and takes a risk of loss of his own to them." But "a purse, prize, or premium, is ordinarily some valuable thing offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered, but must certainly lose it." It was argued that the payment of entrance fees by the owner of a horse was a staking of his money on the result. "So it might have been," say the court, "if the entrance fees went immediately to make up the purse trotted for; but they do not, certainly not specifically, make up the purse." The entrance fees and the gate-money go into the treasury of the association, and the prizes come out of that treasury; but this does not make the prizes stakes in law. Nor, said the court, does the fact that the owner of a horse fraudulently agrees to "sell out" the race make it a case of betting. This decision is contrary to that of the Pennsylvania Supreme Court, in *Comly v. Hillegar*, March, 1880, where the court said that a "trial of speed" of horses, for which a premium is offered by an agricultural society, is "in plain English, a horse-race" upon a wager. In *Harris v. Woodruff*, 124 Mass. 205; S. C., 26 Am. Rep. 658, it was held that a lien may be maintained for the expense and skill bestowed in training a horse for illegally running races for bets and wagers. This was put on the ground of *in pari delicto, potior est conditio possidentis*, but the court said it might well be doubted that the known purpose of the training would render the contract for training illegal.

But in Texas horse-races are lawful, and wagers upon them are recoverable. So held in *Walker v. Armstrong*, Texas Commission of Appeals, March 24, 1881, 4 Tex. L. J. 570. This was an action

against a stakeholder to recover a stake on a horse-race. The defense was that the race was unfair, because the stakeholder, who was to give the word "go," not imitating the considerateness of Bottom, gave the word in so loud a tone that Armstrong's horse was frightened, and could not come to the scratch, or to time, or to the pole, or whatever the horse phrase is, and did not play at all. The other horse having stronger nerves pulled over the course alone. Evidence was adduced to show that by custom in Western Texas owners took their risks of such occurrences, but the judge charged that if this evidence was believed the jury should find for the plaintiff. For this a new trial was granted. The court said: "If, then, the proof disclosed, as we think it did, tended to prove that by the rules of racing, upon the giving of the word by the person selected as the mutual agent of the parties to give it, the race was begun, that he had no power to recall the horses, that the horse that did not start lost the race, and the horse that run through won it, that the parties took all the risks of frightened horses, or imperfect or boisterous utterances, it was error to refuse to charge as asked by the defendants, and it was error to make the result of the case depend, as the judge makes it in his charge, to depend upon the manner in which the word was given, and whether a fair test was prevented of the speed of the horses by the manner of giving the word. Parchman, who gave the word, was the agent of the plaintiff as of the defendant to give it, and unless complicity or fraud upon his part were shown, we think, without regard to any racing rules, Armstrong cannot charge upon the defendants any wrong he has suffered from the negligence or unskillfulness of his own agent whereby his horse was hindered from starting. And it may be that the effect attributed to the giving the word among racing men, would have a tendency, as a general rule, to insure that the best horse should win. We can see how it would prevent vexations and worrying false starts by cunning jockeys, devised to insure that the race should not be to the swift and eager, but to the sluggish and cold blooded.* The objection made by to the judgment because of the immorality of horse-racing, was properly overruled. Horse-racing is not unlawful. Wagers are recoverable made upon them. If the practice leads to vicious causes it will not tend to mend the morals of the turf, to facilitate parties in escaping from the binding force of contracts deliberately entered into, not in violation of the law."

THIRTY-FOURTH AMERICAN REPORTS.

THIS volume of 858 pages contains selected cases from 62 Alabama, 38 Arkansas, 4 Colorado, 61 Georgia, 92, 93, 94 Illinois, 66 Indiana, 51 Maryland, 137 Massachusetts, 57 Mississippi, 78 New York, 8 Oregon, 12 Rhode Island, 8 Texas Court of Appeals, 82 Grattan, 1 Washington. The leading

**Vigilantibus, et non dormientibus, jura subeunt.*—*Am. ALB. L. JOUR.*

notes are on account stated, between whom it applies; liability of corporation for malicious prosecution; evidence, *res gesta*, declaration of deceased; infant, custody of, separation of parents; seduction, evidence, pregnancy; chance verdict.

The following cases are noteworthy:

ACCOUNT STATED.—The doctrine of liability from retaining a stated account without objection is only applicable between merchants, but between other parties such retention is a circumstance for the consideration of the jury. *Anding v. Levy*, 57 Miss. 54; p. 435.

AGENCY.—In an action for breach of warranty of a safe sold and warranted by an agent, *held*, that there must be proof of express authority from the principal, or of a custom to warrant. *Herring v. Skaggs*, 62 Ala. 180; p. 4.

ATTORNEY AND CLIENT.—An attorney's lien on a judgment does not authorize him to bring a suit thereon in his client's name without his authority. *Horton v. Champlin*, 12 R. I. 550; p. 722.

CARRIER.—A railway passenger had merchandise checked without disclosing its character. There was no evidence of any agreement to carry it as freight, nor that the baggage-master had any authority to receive it as freight or as personal baggage. *Held*, that the company were not responsible for its loss, although the baggage-master knew the character of the baggage, and received similar packages from other passengers. *Blumantle v. Fitchburg Railroad Co.*, 127 Mass. 322; p. 376.

CIVIL DAMAGE ACT.—An intoxicated person going home at night had to cross a railroad. Next morning he was found on the track killed by being run over by the cars. *Held*, that the intoxication was the proximate cause of his death, and the seller of the liquor which intoxicated him, and the owner of the premises where it was sold, were liable, under the Civil Damage Act, to his widow, for injury to her means of support. *Schroeder v. Cranford*, 94 Ill. 357; p. 236.

CONTRACT.—The plaintiff having failed in the first deliveries of goods which he contracted to manufacture and deliver, in successive lots, cannot compel the acceptance of goods subsequently manufactured and offered. *King Philip Mills v. Slater*, 12 R. I. 82; p. 603.

An action lies in Rhode Island for breach of contract of sale of goods, the contract being made there and valid there, but the goods to be delivered in New York, where the contract was invalid by the statute of frauds. *Hunt v. Jones*, 12 R. I. 265; p. 635.

CORPORATION.—A corporation is liable to an action for a malicious prosecution conducted by its agents. *Williams v. Planters Ins. Co.*, 57 Miss. 759; p. 494.

An action will lie against a corporation for malicious prosecution, but where the prosecution set in motion by an employee of the corporation was a criminal proceeding for embezzlement, express authority or ratification and adoption by the corporation must be shown. *Carter v. Howe Machine Co.*, 51 Md. 290; p. 811.

CRIMINAL LAW.—On the trial of an indictment for larceny, the prisoner's evidence of good character must be confined to his character for honesty and integrity. *State v. Bloom*, 68 Ind. 54; p. 247.

An objection to the qualifications of a grand juror may be raised by plea in abatement. *State v. Davis*, 12 R. I. 492; p. 704.

The prosecutor delivered to the defendant a roll containing ten twenty dollar gold pieces, supposing it to contain only ten silver dollar pieces. The defendant, although when he discovered the mistake he had reason to know the money belonged to the prosecutor, on demand refused to make restitution. *Held*, larceny. *State v. Ducker*, 8 Oreg. 394; p. 590.

DAMAGES.—In an action for breach of a safe sold and warranted by an agent, *held*, that in the absence of fraud the value of articles stolen from the safe by burglars could not enter into the damages. *Herring v. Skaggs*, 62 Ala. 180; p. 4.

In an action of damages for breach of warranty on sale of seed, *held*, that the proper measure of damages is the difference in value between the crop raised and the crop represented, without interest. *White v. Miller*, 78 N. Y. 393; p. 544.

EVIDENCE.—A testator devised lands in Portland as follows: To Margaret, lot 2 in block 187, and to Esther, lot 1 in block 187. He had no such lots. *Held*, that oral evidence was admissible to show that he did own lots 3 and 4 in that block, and that those lots would pass by the will. *Moreland v. Brady*, 8 Oreg. 303; p. 581.

The declarations of one who has been poisoned, as to his present symptoms, are competent, but otherwise of his declarations as to what he had drunk an hour before. *Field v. State*, 57 Miss. 474; p. 476.

FIXTURES.—A portable hot-air furnace and gas-fixtures in a house, although connected with the house in the usual manner, are not part of the realty. *Towne v. Fiske*, 127 Mass. 125; p. 353.

INFANCY.—If an infant has no guardian, his estate is liable for fees of counsel whose services were beneficial in recovering the estate. *Epperson v. Nugent*, 57 Miss. 45; p. 434.

A minor may recover money voluntarily paid by him on a contract which he has repudiated, and from which he derived no benefit, without deduction for damages for the rescission. *Shurtleff v. Millard*, 12 R. I. 272; p. 640.

INSURANCE.—Husband and wife mortgaged the wife's premises, and got an insurance thereon payable to the mortgagee, as his interest might appear. The policy was conditioned to be void in case of subsequent insurance, whether valid or not, without consent written on the policy. The wife alone procured another insurance in her own name. *Held*, (1) that the first insurance was of the mortgagors' and not of the mortgagees' interest; (2) that the first insurance was avoided by the second. *Continental Insurance Company v. Hulman*, 92 Ill. 145; p. 122.

The defendant's medical examiner, at the request of an agent of the defendant who had acted to some

extent as general agent and occupied defendant's principal office, filled up an application for life insurance. The applicant made correct answers, but the medical examiner incorrectly and untruly stated some of them in the application. *Held*, that in the absence of evidence on the part of the defendant to show the true authority of the agent, a finding that he was authorized to depute the medical examiner to fill up the application was justified, and defendant was estopped from taking advantage of the mistakes. *Flynn v. Equitable Life Insurance Co.*, 78 N. Y. 568; p. 561.

INTEREST.—A note, providing for a conventional rate of interest, but omitting to provide for the rate of interest after maturity, draws the legal rate after maturity. *Burns v. Anderson*, 68 Ind. 202; p. 250.

MARRIAGE.—Betrothal, followed by cohabitation, but without a present agreement to become husband and wife, does not constitute a valid marriage. *Peck v. Peck*, 12 R. I. 485; p. 702.

MASTER AND SERVANT.—A fireman on a locomotive engine carelessly threw a lump of coal from the tender, which struck and killed a track repairer, servant of the same company, standing near. *Held*, that the company was liable in damages. *Chicago and North-western Railroad Co. v. Moranda*, 93 Ill. 302; p. 168.

MUNICIPAL CORPORATION.—A city is not liable for the expense of a public entertainment given to strangers upon the resolution of the common council, and an injunction to restrain payment therefor will issue at the suit of a tax-payer, brought after the entertainment is given, although he knew of the resolution before the entertainment. *Austin v. Coggeshall*, 12 R. I. 329; p. 648.

A municipal corporation is not liable for allowing ordinary surface water to escape from a highway on to adjacent land, nor for the results of such ordinary changes of grade as must be presumed to have been contemplated and paid for laying out the highway. *Wakefield v. Newell*, 12 R. I. 75; p. 598.

NEGLIGENCE.—Where one was found fatally injured in an excavation in a highway, and there was no proof of the circumstances of his death, the jury may consider his habits as to temperance and caution, and his acquaintance with the locality, upon the question whether he had used reasonable care. *Cassidy v. Angell*, 12 R. I. 447; p. 690.

One who sustains injury at a public hospital from unskillful surgical treatment by an unpaid attending surgeon may maintain an action against the hospital therefor, although the hospital is a public charity, supported by trust funds, and the plaintiff paid nothing but a small amount for board and attendance. *Glavin v. Rhode Island Hospital*, 12 R. I. 411; p. 676.

NEGOTIABLE INSTRUMENT.—The sale of the goodwill of a business is a valid consideration for a note, although the business subsequently proves unsuccessful. *Smock v. Pierson*, 68 Ind. 405; p. 269.

A promissory note bearing in the margin the words, "given as collateral security with agreement," is not negotiable. *Costello v. Crowell*, 127 Mass. 298; p. 367.

A note payable to the order of one as "trustee" is not negotiable, and a subsequent indorser before indorsement by the payee is not liable. *Third National Bank of Baltimore v. Lange*, 51 Md. 138; p. 304.

NUISANCE.—Where stones were thrown against plaintiff's shop by a blast, carelessly set off by a contractor employed on a neighboring public work, and his workmen left his shop in fear, and his business was consequently suspended, *held*, that he might recover for the interruption of his business, and the measure of damages was the value of the work thus prevented from being done. *Hunter v. Farren*, 127 Mass. 481; p. 423.

PARENT AND CHILD.—In case of separation of husband and wife, equally fit, by character and circumstances, to have the custody of children, the custody of a delicate female child of four years of age will be awarded to the mother for the time being. *McKim v. McKim*, 12 R. I. 462; p. 694.

PARTY-WALL.—Where houses having a party-wall are accidentally destroyed by fire, leaving the wall standing, the easement in the wall ceases, and either owner may dispose as he pleases of the part on his ground. *Hoffman v. Kuhn*, 57 Miss. 746; p. 491.

SALE.—The mere delivery, for value, of a bill of sale of a chattel to the purchaser does not vest title in him as against a subsequent attaching creditor of the vendor. *Dempsey v. Gardner*, 127 Mass. 381; p. 389.

SEDUCTION.—An action for seduction of a daughter may be maintained upon proof that in consequence she becomes nervous and excitable, and did not appear to be herself, without proof of pregnancy or sexual disease. *Blagge v. Illey*, 127 Mass. 191; p. 361.

SUBSCRIPTION.—One who had executed his note to the trustees of a church, as a donation to enable them to buy a bell, died before the bell was ordered. *Held*, that the note could not be enforced although the bell was afterward ordered. *Pratt v. Trustees of Baptist Society of Elgin*, 93 Ill. 475; p. 187.

SUNDAY.—A., carefully driving on Sunday on a highway in Massachusetts, was injured by the reckless driving of B.; *held*, that A. could maintain an action therefor against B. in Rhode Island, without showing that he was travelling for necessity or charity. *Baldwin v. Barney*, 12 R. I. 392; p. 670.

SURETY.—If a creditor fails to sue his principal debtor, when solvent, at the request of the surety, and he afterward becomes insolvent, still the surety is not discharged. *Findley v. Hill*, 8 Oreg. 247; p. 578.

VENDOR'S LIEN.—A vendor's lien subsists against a married woman. *Kent v. Gerhart*, 12 R. I. 92; p. 612.

VERDICT.—A verdict of damages, ascertained by averaging the aggregate separate markings of all the jurors, in accordance with a precedent agreement to abide the result, is arrived at "by chance," and will be set aside. *Goodman v. Cody*, 1 Wash. 329; p. 808.

WITNESS.—Under a statute providing that "husband and wife may be witnesses for each other in

all criminal cases, but they shall not be required to testify against each other, as witnesses for the prosecution," neither is a competent voluntary witness against the other. *Byrd v. State*, 57 Miss. 46; p. 440.

REMOVAL OF CAUSE—APPEAL TO UNITED STATES SUPREME COURT—TIME OF APPLICATION.

UNITED STATES SUPREME COURT, MARCH 30, 1880.

BABBITT V. CLARK.

Under the Removal of Cause Act of 1875 (18 Stat. 378, ch. 137, § 5), an appeal or writ of error may be taken to the Supreme Court whenever the Circuit Court decides that a controversy removed thereto from a State court is not properly within its jurisdiction, because the necessary preliminary steps were not taken, and remands the same; the right to this appeal does not depend upon the pecuniary value of the amount in dispute. Whether a writ of error or appeal shall be taken, is to be determined by the nature of the suit whether it be at law or in equity.

C. commenced an action against B. in a State court and B. filed his answer, to which C. was entitled to reply within a certain time. That time expired during a term of the court, at which time the case was ready for trial on the pleadings. Thereafter C., without leave of the court, filed a reply, and during the next term of the court an amended reply. *Held*, that an application for removal by B. under the act of 1875, at the last term of the court was too late.

APPEAL from the Circuit Court of the United States for the Northern District of Ohio, in an action by Parker P. Clark and others against Albert T. Babbitt. Sufficient facts appear in the opinion.

WAITE, J. This action was brought by the appellees, citizens of New York, in the Court of Common Pleas of Lucas county, Ohio, against Babbitt, the appellant, a citizen of Wyoming Territory. By the statutes of Ohio regulating practice and pleadings in the courts of that State, a civil action is commenced by filing a petition in the office of the clerk of the proper court, and causing a summons to be issued thereon. Rev. Stat., Ohio (1880), § 5086. The summons is ordinarily returnable the second Monday after its date. *Id.*, § 5089. The only pleadings are a petition, demurrer, answer, and reply. *Id.*, § 5069. The rule day for the answer or demurrer to a petition is the third Saturday, and for a reply to the answer the fifth Saturday after the return day of the summons, but the court, or a judge thereof in vacation, may for good cause shown extend the time. *Id.*, §§ 5097, 5098. Every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, is, for the purposes of the action, to be taken as true, but the allegation of new matter in the reply is deemed controverted by the adverse party. *Id.*, § 5081. When the action is founded on a written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the petition. *Id.*, § 5085. A trial is defined to be "a judicial examination of the issues, whether of law or fact, in an action or proceeding" (*id.*, § 5127), and all actions are triable as soon as the issues therein, by the time fixed for pleadings, are or ought to have been made up. *Id.*, § 5135.

The petition in this action was filed on the 28th of October, 1878, and alleged that on the 16th of June, 1878, the plaintiff recovered judgment in the Court of Common Pleas of the city, county and State of New York, against Babbitt and one Edgar A. Weed, for \$2,626.80, debt and costs, which was in full force and unsatisfied, except "by the following payments, to wit, one of \$311.92, and a further payment of \$387.50 made, to wit, October 1, 1878." Judgment was asked for the balance which remained unpaid, and interest

at seven per cent. From the record of the New York suit found in the transcript sent up on this appeal, it appears that the action in that court was brought August 7, 1877, to recover a debt for goods sold Babbitt and Weed, February 8, 1877, which it was alleged had been created by the fraud of Babbitt. The answer, which was by Babbitt alone, admitted that the debt had been contracted, but denied the fraud. It then alleged by way of defense, that on the 7th of July, 1877, proceedings in bankruptcy were instituted against Babbitt and Weed in the District Court of the United States for the Northern District of Ohio, which resulted in the acceptance by the creditors of the bankrupts and an approval by the court of a proposition for composition under the act of June 22, 1874 (18 Stat. 122, ch. 360, § 17), by which the bankrupts were to give their notes indorsed by T. S. Babbitt to their several creditors for forty cents on the dollar of their debts, divided into three equal parts, and payable in three, six, and nine months, respectively, from July 15, 1877, and that notes for the several amounts due the plaintiffs, according to the terms of the composition, were executed and tendered them in proper time, and ever since had been and were subject to their order and disposal. Upon the issue thus made a trial was had which resulted in the judgment now sued on.

The summons in the present action bears date December 4, 1878; and January 4, 1879, at rules, Babbitt filed his answer, in which he denied that the several payments credited on the judgment in the petition were made by himself or Babbitt and Weed, but averred that the item of \$311.92 was collected by a sale of property on execution, and that of \$387.50 was paid the plaintiffs by John R. Osborn, a register in bankruptcy. He then set forth the proceedings in bankruptcy and the composition, substantially as stated in his answer in the New York suit. He then alleged that the composition notes intended for the plaintiffs were paid to Osborn the register in bankruptcy, as they matured, and that on the 11th of September, 1878, the plaintiffs took from the register the money in his hands for them, with a full knowledge of all the facts.

The rule day for a reply to this answer was January 18, 1879, but no reply was filed at that time and no extension of time was asked or given.

The cause, therefore, under the law regulating the practice of the court, stood for trial on the issues presented by the petition and answer. A term of the court began on the 2d of January, and did not end until the 7th of April, though nothing but formal business was done after March 24.

On the 2d of April the plaintiff filed in the clerk's office a reply without leave of the court and without notice to Babbitt or his counsel. In this reply the facts in relation to the New York suit are set forth substantially as they appear in the record sued on, and it was insisted that the acceptance of the money from the register in bankruptcy did not operate in law as a satisfaction of the judgment. The next term of the court began on the 28th of April, and on the 3d of May the plaintiffs, also without leave of the court, filed an amendment to their reply, in which they set out certain unsuccessful proceedings by Babbitt in the New York court on the 5th of July, 1878, to obtain an injunction against the further execution of that judgment because of his payment of the composition notes to the register in bankruptcy.

On the 17th of May, which was during the term of the court that began on the 28th of April, and before the cause had ever been called for trial, Babbitt filed his petition to remove the suit to the Circuit Court of the United States for the Northern District of Ohio, on the ground that his defense, "which was made by answer filed in due time," was "one arising under the Constitution and laws of the United States." The State court ordered the suit transferred, but the Cir-

circuit Court on motion remanded it because the petition for removal was not filed in time. To reverse that order the case has been brought here by appeal.

It is insisted that we have no jurisdiction: 1, because an order of a Circuit Court remanding a cause to a State court on the ground that the petition for its removal from that court had not been presented in time, is not reviewable here either on writ of error or appeal; 2, because if reviewable at all, this case should have been brought here by writ of error rather than appeal; and 3, because the value of the matter in dispute does not exceed five thousand dollars.

Before the act of 1875 (18 Stat. 270, ch. 137), we did hold that an order by the Circuit Court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was then by mandamus to compel the Circuit Court to hear and decide. *Railroad Company v. Wiscall*, 23 Wall. 507; *Insurance Company v. Comstock*, 16 id. 270. But the fifth section of the act of 1875 provides that if it satisfactorily appears to the Circuit Court that a suit has been removed from a State court which does not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court, it may be remanded and the order to that effect shall be reviewable by this court "on writ of error or appeal as the case may be."

The appellees contend that the right of appeal or writ of error which is here given applies only to cases which are remanded because the subject-matter of the controversy is not one within the jurisdiction of the Circuit Court. The language of the statute might be more explicit in this particular than it is, but we think it may fairly be construed to include a case where the Circuit Court decides that the controversy is not properly within its jurisdiction because the necessary steps were not taken to get it away from a State court, where it was rightfully pending. The right to remove a suit from a State court to the Circuit Court of the United States is statutory, and to effect a transfer of jurisdiction all the requirements of the statute must be followed. If this is done, the controversy is brought properly within the jurisdiction of the Circuit Court and may be lawfully disposed of there, but if not, the rightful jurisdiction continues in the State court. When, therefore, the Circuit Court decides that a controversy has not been lawfully removed from a State court and remands the suit on that account, it in effect determines that the controversy involved is not properly within its own jurisdiction. The review of such an adjudication is clearly contemplated by the act of 1875.

We think, also, this right of review has been given without regard to the pecuniary value of the matter in dispute. There is no pecuniary limit fixed to our jurisdiction in the act of 1875 itself. Final judgments and decrees in the Circuit Courts in civil actions cannot ordinarily be brought here for review unless the value of the matter in dispute exceeds five thousand dollars (Rev. Stat., §§ 601, 602; 18 Stat. 315, ch. 77, § 3), but an order of the Circuit Court remanding a removed suit to the State court is in no just sense a final judgment or decree in the action. It simply fixes the court in which the parties shall go on with their litigation. Under the old law there was no pecuniary limit to our jurisdiction to proceed in this class of cases by mandamus, and we think it was the intention of Congress to substitute appeals and writs of error for that mode of proceeding. If the new remedies are found to be productive of vexatious delays on account of the great accumulation of business in this court, it will be easy for Congress to do away with the evil by a repeal of the law. It follows that if the order in question could properly be brought here by appeal, we have jurisdiction.

Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was in equity an appeal should be taken. That is the fair import of the phrase "writ of error or appeal as the case may be." This was a suit at law and consequently should have been brought up by writ of error. There seems to have been very little attention paid to this distinction heretofore, and we now find that we have often considered cases on writ of error that ought to have been presented by appeal, and on appeal when the proper form of proceeding would have been by writ of error. No objection was made, however, at the time, and we did not ourselves notice the irregularity. Without deciding whether we would reverse the order of a Circuit Court if objection were made when the case was brought up in a wrong way, we are not inclined to delay a decision on the merits in this case because of the irregularity which appears, as we think the suit was properly remanded and the order to that effect should be affirmed.

The act of 1875 requires that the petition for removal shall be filed in the State court at or before the term at which the suit could be first tried and before the trial. The answer of Babbitt in this case was filed in time and the rule day for a reply expired on the 18th of January. Had the case been called at any time after that date and before April 3, neither party could have objected to a trial on the pleadings as they then stood. As no reply had been filed, the new facts set out in the answer would have been taken as true, and the rights of the parties determined accordingly. The case arising under the Constitution and laws of the United States was presented by the answer, and the right of Babbitt to his removal was as apparent then as now. It needed no reply to put his case in a condition for judicial examination. His answer required the court to determine whether in law, with all the facts set out uncontroverted, his composition in bankruptcy presented a valid defense to the judgment sued on. The pleadings presented, to say the least, an issue of law to be tried.

It is true that after the court had substantially closed the business of the term, and had stopped the trial of causes, a reply was put on file without leave, which was supplemented the next term, also without leave, and that in this way the issues as they originally stood may have been to some extent changed, but that does not in our opinion relieve Babbitt from the consequences of his delay. The act of Congress does not provide for the removal of a cause at the first term at which a trial can be had on the issues, as finally settled by leave of court or otherwise, but at the first term at which the cause, as a cause, could be tried. Under the judiciary act of 1879 (1 Stat. 79, ch. 20, § 12), the application for removal must have been made by the defendant when he entered his appearance, but under the act of 1866 (14 Stat. 303, ch. 238), and 1867 (id. 558, ch. 196), it might be effected at any time before trial. This was the condition of existing legislation when the act of 1875 was passed, and the language of that act shows clearly a determination on the part of Congress to change materially the time within which applications for removal were to be made. It was more liberal than under the act of 1789, but not so much so as in the later statutes. Under the acts of 1866 and 1867 it was sufficient to move at any time before actual trial, while under that of 1875 the election must be made at the first term in which the cause is in law triable.

Clearly under the laws of Ohio, this case was in a condition for trial, and actually triable, more than two months before the January term closed. It follows that the presentation of the petition for removal at the next term was too late, and the order of the Circuit Court remanding the cause on that account is consequently affirmed.

UNCHASTITY CONCEALED NOT FRAUD VITIATING MARRIAGE.

WISCONSIN SUPREME COURT, APRIL 19, 1881.

VARNEY V. VARNEY.

Under a statute providing that "when the consent of either party" to a marriage shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof," held, that the concealment by the woman, before the marriage, of her previous unchaste character, or representations falsely made by her, inducing the other party to believe her chaste, are not such a fraud as will support a judgment declaring a marriage void.

ACTION for divorce, brought by a wife. From a judgment in favor of plaintiff defendant appealed. The opinion states the facts.

D. W. C. Priest, for appellant.

Coleman & Spence, for respondent.

TAYLOR, J. This is an action brought by the respondent to obtain a divorce from the appellant on the ground of cruel and inhuman treatment, and failure to provide her with maintenance and support. The appellant denied the matters charged in respondent's complaint, and then, by way of counter-claim, alleged that the respondent had been guilty of adultery since her marriage with him, and demanded a judgment of divorce from the respondent upon such counter-claim. And as a separate defense and counter-claim, he alleged that his marriage with the respondent was procured through the fraudulent and false representations of the respondent as to her previous character for chastity, and asked the court to adjudge the nullity of the marriage on that account. Upon the trial of these several issues the Circuit Court refused a divorce on the complaint of the respondent, for want of sufficient proof of the charges alleged against the appellant. The charge of adultery subsequent to the marriage, made by the appellant against the respondent, was abandoned by him upon the trial, he being wholly unable to establish the same by proofs. And upon the trial of his second counter-claim, upon which the court was asked to declare the marriage void on account of fraud, the court found against the appellant, dismissed such counter-claim, and ordered the appellant to pay T. W. Spence, one of the respondent's attorneys, the sum of \$575 as a sum necessary to enable her to carry on this action during its pendency to defend against the counter-claims set up in the appellant's answer.

The appellant appeals from the judgment of the court dismissing his counter-claim setting up fraud as a ground for declaring the marriage void, and upon this appeal he also claims the court erred in awarding the said sum of \$575 as suit money in favor of the respondent's attorneys. The allegations in the appellant's answer, setting up the alleged fraud on account of which he asks relief, are as follows: "That for the purpose of inducing this defendant to consent to the said marriage the plaintiff falsely and fraudulently represented that she was a chaste and virtuous woman, which representations the defendant believed and relied upon to be true." "That the plaintiff was, in fact, unchaste and of lewd habits, and was the mother of an illegitimate child born out of wedlock, but which had died before such marriage with the defendant; which facts the plaintiff fraudulently concealed from this defendant, and which first became known to this defendant since this action was commenced and since the first answer was interposed herein, and that since the discovery of said facts, and that said representations were false, this defendant has not cohabited with the plaintiff."

The first and most important question in the case is whether the concealment from her husband by the wife of her unchaste character previous to her marriage, or false representations made by her upon that subject previous to the marriage, in order to induce him to marry her, is such a fraud as renders the subsequent marriage void.

If a marriage can be avoided for the reasons above stated, it must be under the provisions of section 2550, Rev. Stat. 1878, which provides that "whenever either of the parties to a marriage, for want of age or understanding, shall be incapable of assenting thereto, or when the consent of either party shall have been obtained by force or fraud, and there shall have been no subsequent voluntary cohabitation of the parties, the marriage shall be void from such time as shall be fixed by the judgment of a court of competent authority declaring the nullity thereof." It is clear that under our statutes upon the subject of divorce, no fraud practiced by either party to the contract of marriage upon the other, previous to the marriage, is a ground for divorce. All divorces are granted for causes occurring after the marriage contract is entered into, except for impotency, and that is a cause which continues after marriage, though it exists before. But a judgment of nullity of the marriage contract proceeds upon matters occurring before or at the time the marriage contract is entered into. The appellant in this action, by his counter-claim, invoked the aid of the court to relieve him from the marriage, not on account of any misconduct of his wife subsequent to her marriage, but for her misconduct before; and he insists that because she concealed her previous misconduct from him, and made false representations concerning it in order to induce him to marry her, she obtained his consent to such marrying by fraud, within the meaning of said section, and he is therefore entitled to the judgment of the court declaring his marriage with her void.

The question whether the concealment of, or false representations as to, the previous character of a female for chastity, made to the person who afterward marries her, and for the purpose of inducing him to do so, and upon which he relies, is such a fraud as will render the subsequent marriage void, has been frequently before the courts, both in this country and England, and we are unable to find that any court has declared a marriage void for that reason. The furthest the courts have gone is to hold that when such previous unchaste conduct has resulted in pregnancy, which exists at the time of marriage and was unknown to the husband, the marriage will be declared void on account of the fraud. The question was very fully and ably discussed by the Supreme Court of Massachusetts, under a statute substantially like ours, in the case of *Reynolds v. Reynolds*, 3 Allen, 605. The argument in that case is so full and complete as to leave little room for adding to the conclusiveness thereof. I have therefore taken the liberty of quoting largely therefrom, as being the best method of stating the argument in the strongest and clearest manner. Chief Justice Bigelow, who delivered the opinion in that case, says: "It is quite obvious, from the terms in which the statute is expressed, that it was founded on the assumption that a marriage, into which one of the parties was induced to enter through the fraud and deception of the other, is null and void, and like other contracts, may be annulled and set aside by the defrauded party. * * * Nor does it define or in any way prescribe the nature of the fraud, or the degree or amount of deception which shall be deemed to be sufficient to warrant the court in adjudging the contract to be void. This is left to be determined on general principles applicable to all contracts, subject only to such restrictions and modifications as necessarily arise and grow out of the peculiar nature of the contract of marriage."

After making some general remarks upon the nature of the fraud which will in general vitiate ordinary contracts relating to business, and remarking that the only general rule which can be safely stated is that the misrepresentation or concealment must be of some material fact, the learned chief justice says: "While, however, marriage by our law is regarded as a purely civil contract, which may well be avoided and set aside on the ground of fraud, it is not to be supposed that every error or mistake into which a person may fall concerning the character or qualities of a wife or husband, *although occasioned by disingenuous or even false statements or practices, will afford sufficient reason for annulling an executed contract of marriage.* In the absence of force or duress, and where there is no mistake as to the identity of the person, any error or misapprehension as to personal traits or attributes, or concerning the position or circumstances in life of a party, is deemed wholly immaterial, and furnishes no good cause for divorce. Therefore no misconception as to the character, fortune, health, or temper, however brought about, will support an allegation of fraud on which a dissolution of the marriage contract, when once executed, can be obtained in a court of justice. These are accidental qualities, which do not constitute the essential and material elements on which the marriage relation rests. The law, in the exercise of a wise and sound policy, seeks to render the contract of marriage, when once executed, as far as possible indissoluble. The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring."

The learned chief justice then lays down the rule, that as to all matters which relate to fortune, health and character, including chastity, of the person with whom a contract of marriage is made, the parties are bound to make their own investigations and inquiries before the contract is consummated; and when the contract is consummated without force and without any mistake as to identity, the courts will not permit any inquiry into those matters for the purpose of avoiding the contract, and then proceeds as follows: "The law, therefore, wisely required that persons who act on representations or belief in regard to such matters should bear the consequences which flow from contracts into which they have voluntarily entered, after they have been executed, and affords no relief for the results of a 'blind credulity,' however it may have been produced. * * * Nor is it unreasonable that each one should take on himself the burden of inquiring into representations concerning the character and qualities of the person whom he intends to marry, which, by the exercise of due caution and discretion, can be ascertained to be true or false, instead of lying by and using them to defeat a contract after it has become executed and a portion of its fruits has been enjoyed."

The learned chief justice then stated that some of the civil-law writers have thought that antenuptial incontinence and want of chastity in woman was a good ground for avoiding the marriage, when it was concealed from the husband and he was led to believe that she was chaste and virtuous; but he adds: "The better opinion seems to be that chastity stands on the same ground as other personal qualities; that there is nothing in the contract of marriage which implies that a woman shall have previously been pure and undefiled, or which renders unchastity prior to the execution of the contract an impediment to a vital marriage. * * Nothing can avoid it which does not amount to a fraud in the *essentialia* of the marriage relation. And as mere incontinence in a woman prior to her entrance into the marriage contract, not resulting in pregnancy (existing at the time of the marriage), does not necessarily prevent her from being a faithful wife, or from

bearing to her husband the pure offspring of his loins, there seems to be no sufficient reason for holding misrepresentation or concealment on the subject of chastity to be such a fraud as to afford a valid ground for declaring a consummated marriage void. In regard to continence, as well as to other personal traits and attributes of character, it is the duty of a party to make due inquiry beforehand, and not to ask the law to relieve him from a position into which his own indiscretion or want of diligence has led him. Certainly it would lead to disastrous consequences if a woman who had once fallen from virtue could not be permitted to represent herself as continent, and thus restore herself to the rights and privileges of her sex, and enter into matrimony without incurring the risk of being put away by her husband on discovery of her previous immorality. Such a doctrine is inconsistent with reason, and a wise and sound policy."

The doctrine of this case is fully sustained by all the authorities cited by the learned counsel for the respective parties, and we do not find that a contrary rule has been held by any court where a similar question has been raised. See *Perrin v. Perrin*, 1 Adams' Ec. 1; *Reeves v. Reeves*, 2 Phill. Ec. 125; *Graves v. Graves*, 3 Curtiss' Ec. 235; *Scroggins v. Scroggins*, 3 Dev. (N. C.) 535; *Leavitt v. Leavitt*, 13 Mich. 452-456; *Benton v. Benton*, 1 Day, 111; *Baker v. Baker*, 13 Cal. 87; *Foss v. Foss*, 12 Allen, 26; *Crehore v. Crehore*, 97 Mass. 330; *Bishop Marr. and Div.*, §§ 167-168, 180-190, and cases cited. Bishop says, section 167: "When the question comes before a tribunal whether a particular contract is void, by reason of fraud shown to have entered into its original constitution, many things may demand consideration. Among these things the nature of the contract must be taken into account, for what would avoid one kind of contract may not necessarily be sufficient to void another. In that contract of marriage which forms the gateway to the *status* of marriage, the parties take each other for better, for worse, for richer, for poorer, to cherish each other in sickness and in health; consequently a mistake, whether resulting from accident, or, indeed, generally from fraudulent practices, in respect to the character, fortune, health, does not render void what is done. To this conclusion all the authorities concur, but different modes of stating the reason for it have been adopted." He then gives Lord Stowell's reason as follows: "A man who means to act upon such representations should verify them by his own inquiries. The law presumes that he uses due caution in a matter in which his happiness for life is so materially involved, and it makes no provision for the relief of a blind credulity, however it may have been produced." *Wakefield v. Mackay*, 1 Phill. 134-137. Bishop's own opinion, as expressed in section 168, is "that the nature of the marriage contract forbids its validity to rest upon any stipulations concerning these accidental qualities. If a man should, in words, agree with the woman to be her husband only on condition of her proving so rich, so virtuous, so wise, so healthy, of such a standing in society, yet if he afterward celebrates the nuptials on her representing herself to possess the stipulated qualities, while in truth she is destitute of them, still, in such celebration, he says to her, in effect and in law, 'I take you to be my wife whether you have the qualities or not, whether you have deceived me or not.' In other words, he waives the condition. To carry such a condition into the marital relation would violate its spirit and purpose, and be contrary to good morals."

These cases, we think, clearly establish the doctrine that the counter-claim of the defendant, alleging fraud as a ground for avoiding the marriage contract, does not state facts sufficient to authorize the court to declare the contract void, had they all been fully proved on the trial. Notwithstanding the learned counsel for the appellant seemed to think these decisions were not

in accord with the spirit of progress which pervades our present high state of civilization, we are unable to agree with him in that statement. We are clearly of the opinion that the highest and best interests of present society demand that these doctrines of the courts, which have come down to us from the time of the earliest Christian civilization, should still be adhered to, especially in this country, where, if a previously unchaste woman enters into marriage without reformation in fact, the mistaken husband has abundant means of getting rid of his unfortunate alliance in an action for a divorce for her misconduct after marriage; and if she enters the married state reformed, and continues faithful to her marriage vows, every consideration of justice and humanity demands that the past should be considered forgiven and forgotten. This view of the case renders it unnecessary to consider the question whether the appellant had notice of the previous unchaste character of his wife before his marriage with her.

But the appellant admits that before the marriage he had notice that the respondent had not always lived a pure and virtuous life, and he cannot plead that he supposed, when he married her, he was marrying a woman whose character for chastity was above reproach. He is hardly in a position, therefore, to allege that he was even deceived in respect to this subject, and must be presumed to have waived any objection to the marriage on account of her former unchaste character. If the appellant knew, before his marriage with the respondent, that she had not been of previous chaste habits, he cannot afterward plead that he was defrauded because he did not know the exact degree of her unchastity. Upon this point Justice Campbell, in *Leavett v. Leavett*, 13 Mich. 458-9, says: "The complainant has alleged in his bill the somewhat singular facts that the chastity of defendant was made a subject of frequent and diligent inquiry by him among her friends and relatives, and also of herself, in the presence of others, to a degree which was complained of as offensive, and that the defendant made specific and open assertions to him on the subject; and he bases his claim for relief entirely on the falsehood of these assertions, and his inability, after due diligence, to ascertain any thing on the subject. The bill was drawn by himself and sworn to, so that he must have fully understood what case he was making. Such a state of things, if true, would of itself go very far to preclude any claim for relief; for it is incredible that any decent man could enter upon such an elaborate course of investigation without having heard or seen something calculated to arouse strong suspicions. The denials of the defendant, as he relates them, refer directly to reports derogatory to her character. If complainant saw fit to marry a person against whom appearances had gone, so far as this bill inevitably would lead us to suppose they had, it would be a very strained consideration which would regard him as seriously wounded in feeling or reputation by a discovery of what had been so strongly suspected before."

After the information which the appellant had of the character of the respondent before he married her, he has no legal ground for alleging that he was deceived and defrauded as to her chastity.

We think the court had power to order the appellant to pay the attorney's fees and respondent's disbursements in and about her defense of the counter-claims of the appellant. As to these counter-claims, he was in the position of plaintiff demanding a judgment of divorce against the respondent. As it appeared the respondent had no means of her own out of which her attorneys and her necessary disbursements could be paid, it is in accordance with the usual practice of courts to make the plaintiff, when sufficiently able, pay such expenses. A question similar to the one presented by the objection to this allowance arose in the case of

Downer v. Howard, 44 Wis. 83-92. In that case the court said: "It is almost a matter of course to award to the wife, when she is plaintiff in a divorce suit, money to carry on the same; and when she is defendant it is always awarded, unless, perhaps, in a case where it appears that she has a separate estate which is adequate to meet all such expenses." In that case, as in this, the order to pay the expenses of the plaintiff for defending against a counter-claim of the defendant was made after the court had announced its decision dismissing the complaint and the defendant's counter-claim, but before a formal judgment of dismissal was entered, and was made a part of the formal judgment. In the case at bar the order appears to have been made after the court had made its findings in the action, but before the final judgment was formally entered by the court; but it was not made a part of the judgment. We do not think it important that the order making the allowance is not inserted in the judgment; it may be enforced as an order of the court made in the action.

It was argued by the counsel for the appellant that the court had no power to make the order after final judgment in the action. That question is not in this case, as it appears to have been made before final judgment; and if it were otherwise, then it could not be considered upon this appeal from the judgment, as an order made in the action, after judgment, cannot be reversed upon such appeal. This court held, in *Williams v. Williams*, 29 Wis. 517, that an allowance for suit money in a divorce case might be made after judgment as well as before. It was also held in that case that such allowance of suit money is a matter very much in the discretion of the trial court. We cannot say from the record that the allowance in this case was unreasonably large, or that the learned judge, in making the same, was guilty of any abuse of the discretion vested in him by the law upon that subject. The litigation appears to have been protracted, and of a nature to require a large amount of work and considerable expenditure of money on the part of the respondent to meet the issues raised by the appellant's counter-claims. It would seem from the whole case that the court was fully justified in making the allowance.

The judgment of the Circuit Court is affirmed.

BURDEN OF PROOF AS TO NEGLIGENCE.

PENNSYLVANIA SUPREME COURT, JAN. 3, 1881.

FEDERAL STREET & PLEASANT VALLEY RAILWAY CO.
v. GIBSON.

Plaintiff below, a passenger on the street-car of defendant below, was struck and injured by a passing wagon. Held, that to make defendant liable for the injury, plaintiff must prove not only that he was without fault, but that defendant was negligent.

WRIT of error to review judgment in favor of plaintiff below. The opinion states the case.

A. M. Brown and C. C. Dickey, for plaintiff in error.
J. W. Over, for defendant in error.

MERCUR, J. This action was by a passenger to recover damages which he sustained while in a car of a street railway company, in being struck by a passing load of hay. The defendant in error sat near an open window with his arm so exposed that it was struck and injured by the hay on a passing wagon. Thus the proximate cause of injury, at least in part, was caused by the act of a third party over which the railroad company had no control. If the injury was caused by contributory negligence of the passenger or by the sole negligence of the driver of the wagon, there should be no recovery against the company. The jury has found

the passenger was without fault on his part. To enable him to recover he must also prove that the company was guilty of negligence and its negligence was a cause of the injury. It is just here that the errors covered by the first, fourth and fifth assignments appear. The learned judge substantially charged if the defendant in error was without fault, the company must prove that it was guilty of no negligence. Thus shifting the burden of proof resting on the passenger and throwing it on the company to disprove negligence. This was error. The duty rested on the defendant in error to prove negligence of the company. Without this he established no cause of action against it. *McCullough v. Clark*, 4 Wright, 399; *Allen v. Willard*, 7 P. F. Smith, 374; *Waters v. Wing*, 9 id. 211. It is true in many cases the mere fact of injury to a passenger raises the presumption of want of care on the part of a railroad company. Such is the case when the injury results from defective track, cars, machinery or motive power. Here there was no privity between the company and the driver of the wagon. It was then not liable for the act of the wagon on the principle of *respondent superior*. *Railroad Co. v. Hinds*, 3 P. F. Smith, 512. The car did not leave its track. It is not alleged that any of the property of the company was improperly constructed or out of repair. If we correctly understand the complaint it is as to the speed of the car. We see nothing in the case which relieved the defendant in error from proving negligence, or that threw on the company the burden of disproving it. It is not sufficient that he be free from fault; he must prove other facts creating a presumption at least of negligence in the company, producing injury. The question then is on this branch of the case, whether under the whole evidence the jury is satisfied that the company did not use all just and proper care and diligence to prevent the injury?

It was urged on the argument, that the first assignment was improperly made, as the point covered thereby was withdrawn. It is however duly certified as part of the record, showing that it was affirmed and bill sealed for defendant below. This creates a presumption it was read and answered in the hearing of the jury. It then had an effect not removed by its subsequent withdrawal, and may be reviewed. That question is of no practical importance now, inasmuch as substantially the same instructions are contained in the portions of the charge covered by the fourth and fifth assignments. The second and third assignments are not sustained.

Judgment reversed, and a *venire facias de novo* awarded.

FOREIGN JUDGMENT NO MERGER OF CAUSE OF ACTION.

EASTERN TOWNSHIPS BANK V. H. S. BEEBE & CO.*

A company, doing business in Canada, composed of members, some of whom lived in Canada, and some in this State, indorsed a note to a bank. The bank brought suit in Canada, and obtained judgment against the company as indorser. In an action in Vermont based upon the same promise as the Canada suit. *Held*,

1. The foreign judgment does not merge the cause of action, and assumpsit will lie upon the same cause in this State.
2. The foreign judgment is of no higher nature as a cause of action than the notes declared on.
3. A domestic judgment constitutes of itself a debt of record; a foreign judgment is only *prima facie* evidence of indebtedness; the one is a contract of record, incontrovertible, and is the basis of an action of debt, while only an action of assumpsit, or debt on simple contract, will lie upon the other.

ACTION against a corporation as an indorser of a promissory note. Suit for the same cause of ac-

tion had already been brought against defendant in Canada where this action was commenced, and judgment thereon was recovered pending this action. Other facts appear in the opinion.

John Young and Crane & Alfred, for plaintiff.

Edwards & Dickerman, for defendant.

BARRETT, J. It is not claimed that the pendency of said suit in Canada, when this suit was brought, could bar a recovery in this suit. It is claimed that the judgment in said suit in Canada, rendered after the bringing of this suit, bars a recovery in this suit. It is not averred or claimed that said Canadian judgments have been satisfied by payment. So the only question is, whether said Canadian judgment merges the cause of action, in such a sense as to render it incapable of being the subject of a judgment in this suit. It is not so merged unless it has become a debt of record, as that the record itself has become a cause of action, of its own vigor, to be declared upon as such, and when produced, is conclusive of the right. All the authorities agree that a suit in Vermont, for getting satisfaction of the Canadian judgment, must be an action of assumpsit, counting upon an implied promise arising from the fact of the existence of such judgment.

It is held in the cases that a foreign judgment, when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was rendered. The books are uniform in making the distinction between merger of the cause of action, and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same original cause of action. Whatever may be the reason for such distinction, it exists, and is established as a rule of law, and we see no occasion for annulling that rule in this State. In the many cases in which the subject of judgments, as between the different States of the Union, has been discussed and determined, the theory and logic have rested upon the provision of the U. S. Constitution, as to the faith and credit to be given to judgments of one State in the other States; and in all the cases it is assumed that but for such provision such judgments would not have that faith and credit, and would be foreign judgments. A specimen case of this kind, is *McGillivray v. Avery*, 30 Vt. 538, in which the very able opinion drawn up by Judge Bennett presents the established doctrine and marks the true distinctions. It is fundamental that a foreign judgment does not constitute a record debt, but is only evidence of obligation to pay. The indebtedness evidenced by a foreign judgment, as a cause of action to be declared on as the ground of recovery, is that of simple contract, and the subject for a suit in assumpsit. In this case, then, the judgment in Canada, as a cause of action, is of no higher grade than the notes themselves. This legal fact is conclusive against the idea of the notes as a cause of action, being merged by that judgment. It leaves that judgment as an instrument or means of evidence, showing conclusively the fact of indebtedness, and operating conclusively to that effect, until satisfied. It is not the judgment, but the satisfaction of it, that renders it a bar to a recovery in the domestic government upon the original cause of action. This is in harmony with the conclusive effect given to a foreign judgment in favor of the defendant. The fact of such judgment is pleaded in bar, and is adduced as evidence to maintain the plea. This is the same, *mutatis mutandis*, as adducing the fact of a foreign judgment for the plaintiff to maintain his

* To appear in 53 Vermont Reports.

right of recovery against the defendant in his action of assumpsit upon that judgment. The confusion on this subject seems to result from not distinguishing between a domestic judgment as constituting of itself a *debt of record*, and a foreign judgment, which is only evidence of an indebtedness, as upon a simple contract.

NEW YORK COURT OF APPEALS ABSTRACT.

ATTACHMENT—UNDER OLD CODE—SUBSEQUENT CREDITOR MAY MOVE TO VACATE.—Where, under the old Code, the affidavit upon which an attachment against property of a defendant was issued, wholly omitted to show that plaintiff had any cause of action against the defendants upon which an attachment could be founded, or to specify the grounds of his claim, *held*, that these were jurisdictional defects and that a creditor who had procured a subsequent attachment against the property of the same defendant had a standing in the court to impeach and set aside such attachment. In such case the right existed under the old Code independently of section 682 of the Code of 1877. Order reversed. *Jacobs v. Hogan*. Opinion by Rapallo, J.

[Decided April 26, 1881.]

FORECLOSURE—ORDER OF SALE WHERE SEVERAL PARCELS MORTGAGED TO DIFFERENT PERSONS.—The general rule that where there are several successive grantees of different portions of mortgaged premises, the land on foreclosure is to be sold in the inverse order of alienation, is applicable to the case of successive mortgages of parts of mortgaged premises on a foreclosure of a prior mortgage on the whole property, where by its application the equitable rights of all parties will be secured. *Stuyvesant v. Hall*, 2 Barb. Ch. 151. But this rule yields to circumstances. *Gulon v. Knapp*, 6 Paige, 85; *Kellogg v. Rand*, 11 id. 59. In this case, H. owning premises 100 feet in front, mortgaged the whole to plaintiff for \$5,000. Subsequently she mortgaged the same premises to G., but thereafter G. released, at her request, 40 feet, which 40 feet she subsequently mortgaged to E. After this H. died, devising the 40 feet and 60 feet to different beneficiaries. Upon the foreclosure of plaintiff's mortgage it appeared that there was due on that \$5,000 and interest; on G.'s mortgage \$6,300 and interest, and on E.'s mortgage \$5,462 and interest. It was shown that the value of the 40 feet was \$8,000; of the 60 feet \$12,000, and that the sum due on the three mortgages exceeded the whole value of the lot. *Held*, that the whole lot should be sold, plaintiff's mortgage and costs paid, after that the mortgage to G., and the balance applied on the mortgage to E. Judgment modified. *Bernhardt v. Lymburner*. Opinion by Andrews, J.

[Decided April 19, 1881.]

INTEREST—COMPOUND INTEREST—ALLOWABLE IN ACTION FOR DIVIDENDS ON PREFERRED STOCK.—Preferred stock was issued by a railroad company, the agreement in the certificate being that the dividends were to be paid semi-annually out of the net earnings of the company, before any portion should be applied to the payment of dividends upon the remaining stock. The company having in its hands on the 1st of August, 1864, from its earnings, a sufficient sum to pay all arrears of dividends upon preferred stock, in violation of its agreement, applied a portion of the same in paying dividends upon common stock, and subsequently made other dividends upon that stock. In an action to compel the payment of the dividends due upon the preferred stock by those holding it, against the company, *held*, that plaintiffs were entitled to recover interest upon the sums to which they were entitled as dividends. The general rule is well established

that compound interest cannot be recovered by law without an agreement to pay the same, entered into after it becomes due. *State of Connecticut v. Jackson*, 1 Johns. Ch. 13; *Ackerman v. Emott*, 4 Barb. 649. But the agreement in question did not bear the character of ordinary obligations, where the allowance of interest would be compounding the same. The preferred stockholders merely obtained an interest in the assets of the company which entitled them to the ordinary dividends the same as the common stockholders. The agreement to pay preferred dividends was an inducement to take the stock, and the dividends provided for were the only return for the moneys advanced. The security differs from an annuity or ordinary dividends, or an agreement to pay interest. The fund was wrongfully applied to pay dividends on the common stock, and the company should pay interest on the sums its wrongful act prevented from being applied to the payment of dividends on the preferred stock. No demand was necessary on the part of the preferred stockholders, as there were no specific dividends to demand until they had been declared. The English cases where interest on annuities has been refused (*Aylmer v. Aylmer*, 1 Malloy, 87; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Booth v. Leicester*, 3 My. & Cr. 45; *Earl of Mansfield v. Ogle*, 4 DeG. & J. 38; *Torre v. Brown*, 5 H. of L. Cas. 555; *Booth v. Coulton*, 7 Jur. [N. S.] 207; *Jenkins v. Bryant*, 16 Sim.) appear to establish such a practice, but are not in point when the claim to interest rests on an unlawful appropriation of moneys. The earlier English cases do not tend in the same direction as those cited, *Litton v. Litton*, 1 P. Wms. 541; *Ferrers v. Ferrers*, Talb. Cas. 2; *Robinson v. Cumming*, 2 Atk. 211; *Morris v. Dillingham*, 2 Ves. Sr. 170; *Morgan v. Morgan*, 2 Dick. 643. Motion denied. *Boardman v. Lake Shore & Michigan Southern Railway Co.* Opinion by Miller, J.

[Decided May 10, 1881.]

JUDGMENT—BY DEFAULT CANNOT BE REVIEWED BY MOTION.—While in cases where a judgment can be taken only on application to the court, it may be said that a default admits only the facts pleaded and not the legal conclusions of liability or its extent (*Argall v. Pitts*, 78 N. Y. 243; *Wright v. Hooker*, 10 id. 59; *Frick v. White*, 67 id. 107), the result is different where no application is necessary. The party in default must be taken to have admitted both the right of recovery and its amount. Therefore he cannot appeal and he cannot contradict his admission by a motion. In this case defendant, after default, disputed plaintiff's right to recover interest. *Held*, that this was a matter of substance and not of form, and could not be contested on a motion. The only proper remedy of defendant, illegally charged with interest, was to excuse his default and come in and defend. He could then offer judgment for the amount he admitted to be due and defend as to the residue. If error existed in the allowance of interest, it was a judicial error and one of substance, which cannot be corrected on motion. *Lillie v. Sherman*, 39 How. Pr. 287; *Libby v. Rosicrans*, 55 Barb. 203; *New York Ice Co. v. North-West Ins. Co.*, 32 id. 534. Order reversed. *Bullard v. Sherwood*. Opinion by Finch, J.; Folger, C. J., dissented.

[Decided May 3, 1881.]

TRIAL—AFFIRMATIVE OF ISSUE—RIGHT OF ONE HOLDING, TO OPEN AND CLOSE—ACTION ON LIFE INSURANCE POLICY—APPEAL.—(1) When the right of a party holding the affirmative upon an issue of fact upon trial to open and close the evidence, and upon the final submission of the case to reply in summing up, is denied by the judge upon the trial, such denial furnishes ground for exception, which is the subject of review on appeal. *Millard v. Thorn*, 56 N. Y. 402. (2) In an action upon two policies of life insurance, each of which contained a provision avoiding it if the

insured should die in or in consequence of the violation of the laws of any nation, State or province. The complaint alleged among other things that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the policies. The answer denied this allegation of the complaint, and set up that the insured died in consequence of a violation of the laws of the State of New York, and in consequence of an unlawful assault committed by him upon a person named, and admitted that the defendant insured the life referred to in the complaint, by two policies, copies of which were annexed to the complaint, and referred to the originals when they should be produced. *Held*, that defendant had the affirmative of the issue. The allegation in the complaint that there had been no breach of the policy was unnecessary and need not be proved. The rule is well established that in an action upon a policy of insurance, where the answer admits the issuing of the policy and the allegations in the complaint, and alleges a breach of its conditions, the burden of proof is upon the defendant, and the plaintiff is entitled to recover unless the defendant satisfies the jury by a preponderance of evidence that the conditions had been broken. *Jones v. Brooklyn Life Ins. Co.*, 61 N. Y. 79; *Van Valkenburgh v. American Pop. Life Ins. Co.*, 70 id. 605; *Elwell v. Chamberlin*, 31 id. 611. Judgment reversed. *Murray v. New York Life Insurance Co.* Opinion by Miller, J.

[Decided April 26, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

APRIL, 1881.

INTERNATIONAL LAW—PROPERTY OF CITIZEN IN ENEMY'S TERRITORY PRODUCING PROFIT.—In 1860 the claimant, a native of Georgia, was domiciled at Dalton in that State, and doing business as a merchant. About the time the State seceded he left his home and his business and went to Indiana, where he remained until the end of the war. Before leaving he appointed an agent to manage for him while he was gone. The agent, in 1864, bought for him, with moneys collected or acquired on his account, two bales of cotton, that were afterward captured by the military forces of the United States at Savannah. *Held*, that claimant was entitled to the cotton as against the United States. If he had remained in Georgia during the war, acquiring his money and buying his cotton himself, he would have a right to claim it. No actual change of his domicile is shown, and his agent has done for him no more than he might himself have lawfully done if he had stayed where his property was. In no just sense was he trading across the lines with the enemy through the operations of this agent. He was simply saving what he had been compelled to leave in order to avoid becoming in law an enemy of his government. His property being in enemy territory was enemy property, and subject to capture as such, but he was both in law and in fact a friend. The agency he left behind was only to manage what he could not take away, and as the money invested in the cotton was collected or acquired through this agency, it will be presumed that it was obtained at the place he left, rather than sent through the lines. Judgment of Court of Claims affirmed. *United States v. Quigley*. Opinion by Waite, C. J.

NEGOTIABLE INSTRUMENT—RAILROAD BONDS—BONA FIDE PURCHASERS—PAST DUE COUPONS ON BOND NOT EVIDENCE OF DISHONOR.—C. owed S., a woman, \$25,000, for which she held his note. He sold her \$75,000 in bonds of the M. railroad company, which she paid for partly by the note and partly by other

securities. The company depositing its interest, she, at his instance, returned the bonds, and received from him in exchange bonds of the I. railroad company for \$75,000. This was June 24, 1871. Those last bonds were dated April 1, 1870, were negotiable, were secured by mortgage of that date, and each had attached interest coupons from the same date, two of which were overdue, being payable October 1, 1870, and April 1, 1871. The bonds and the mortgage contained a provision authorizing foreclosure in case of default in interest for six months; the bonds required a demand to be made, but the mortgage not requiring it. At the time she received the bonds the I. railroad was only a projected railroad. C. was vice president and acting president of the company. The bonds were regularly executed and in possession of C., who had no express authority to dispose of them, but who claimed a lien on them for advances made to the company. *Held*, that S. was a bona fide purchaser for value from C., and could enforce the bonds against the I. company. Possession of negotiable bonds carries with it the title to the holder. *Murray v. Lardner*, 2 Wall. 121. S., therefore, bought the bonds of a person presumptively the owner, and paid for them a full and valuable consideration. The provision of the bonds requiring demand before the debt became due controlled that of the mortgage, which did not. The bonds were, therefore, not due when S. purchased. The mere presence of two unpaid coupons upon the bonds purchased was not of itself sufficient evidence of the dishonor of the bonds to which they were attached. This point has been expressly ruled by this court in *Cromwell v. Sac County*, 96 U. S. 51. In that case it is said: "The non-payment of an installment of interest when due could not affect the negotiability of the bonds or of the subsequent coupons. Until their maturity the purchaser for value, without notice of their invalidity as between antecedent parties, would take them discharged from all infirmities." To the same effect see *Nat. Bk. of N. A. v. Kirby*, 108 Mass. 497, and *Boss v. Hennett*, 15 Wis. 280. In the case of *Parsons v. Jackson*, 99 U. S. 434, the bonds which were the subject of controversy had never been issued, but had been stolen from the office of the company. They were made payable either in New Orleans, New York, or London, as the president of the railroad company might by his indorsement on the bonds determine. The bonds contained no indorsement of the president designating the place of payment, they were offered in the New York market and sold for a very small consideration, and coupons for several years, due and unpaid, were attached to them. The court held that all these circumstances affected the purchaser with notice of the invalidity of the bonds. It is true the court said that the presence of the past-due and unpaid coupons was of itself an evidence of dishonor sufficient to put the purchaser on inquiry. But the case did not turn on this circumstance alone. There were other significant indications of the invalidity of the bonds and the opinion must be restricted to the case before the court. Even if S. was put on inquiry, the facts that she would have discovered would have explained satisfactorily the presence of the unpaid coupons. "The party who takes negotiable coupon bonds, before due, for a valuable consideration, without knowledge of any defect of title and in good faith, holds them by a title valid against all the world. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transaction, will not defeat his title. That result can be produced only by bad faith on his part." *Murray v. Lardner*, 2 Wall. 110. "Bonds for the payment of money, with interest warrants attached, are everywhere encouraged as a safe and convenient medium for the settlement of balances among mercantile men;

any course of judicial decision calculated to restrain or impede their free and unembarrassed circulation, would be contrary to the soundest principles of public policy. Such instruments are protected in the possession of an indorsee, not merely because they are negotiable, but also because of their general convenience in mercantile affairs." *Smith v. Sac County*, 11 Wall. 150. Decree of U. S. Circuit Court, Indiana, affirmed. *Indiana & Illinois Central Railway Co. v. Sprague*. Opinion by Woods, J.

RECORDING ACT—PRIORITY BETWEEN MORTGAGES.—Under the recording statute of New York which gives priority only to the mortgage first recorded, when that is executed for a valuable consideration, which, according to New York decisions, means some new consideration advanced at the time, and that a mortgage for a pre-existing indebtedness is not protected by a prior record, against a non-recorded mortgage for value. *Held*, that as between two mortgages—one for a past indebtedness, and one for an indebtedness to be subsequently incurred—the one for the past indebtedness must have precedence if first recorded. Rehearing denied. *National Bank of Genesee v. Whitney*. Opinion by Field, J.

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

REMOVAL OF CAUSE—APPLICATION BY DEFENDANT FOR, DOES NOT WAIVE OBJECTION TO JURISDICTION.—The application of a defendant for the removal of a cause from a State to a Federal court, does not constitute a waiver of the use and service of proper process of summons or citation in the cause, where the first action of the defendant, in both the State and Federal courts, was to except to the process by which it was attempted to give those Courts jurisdiction of his person. *United States Circ. Ct., N. D. Texas*, Dec. 15, 1880. *Parrott v. Alabama Gold Life Insurance Co.* Opinion by McCormick, D. J.

—ACT OF 1875—RIGHT DETERMINED BY CITIZENSHIP WHEN PETITION FILED.—A cause may be removed under the act of 1875 if the required citizenship exists at the time the petition for removal was filed. In this case the petition for removal, made by the complainant, alleged that at the date of the petition she was a citizen of the State of Illinois, and that the defendant was a citizen of the State of Wisconsin. The defendant moved to remand, on the ground that the petition for removal did not show that the parties were citizens of different States at the time the action was commenced in the State courts. *Held*, that the motion to remand must be overruled. *Jackson v. Mut. Life Ins. Co.*, 3 Woods. 413; *McLean v. St. Paul & Chicago R. Co.*, 16 Blatchf. 309; *Chicago, St. L. & N. O. R. Co. v. McComp*, 9 Rep. 569; *Johnson v. Monell*, 1 Woolw. 390; *McGinnity v. White*, 3 Dill. 450; *Jackson v. Mut. Ins. Co.*, 60 Ga. 423; *Phoenix Life Ins. Co. v. Saettel*, 7 Cent. L. J. 398. *United States Circ. Ct., E. D. Wisconsin*, Jan., 1881. *Curtin v. Decker*. Opinion by Dyer, D. J.

—ACT OF 1795—RIGHT DETERMINED BY CITIZENSHIP AT COMMENCEMENT OF ACTION AND TIME OF FILING PETITION.—In a case of removal the jurisdiction of the Federal court does not depend upon the form or substance of the bond approved by the State court. A cause cannot be removed under the act of 1795, unless the required citizenship existed, not only when the petition for removal was filed, but also at the time when the action was begun in the State court. In this case a petition for removal stated that the defendants are residents of another State. *Held*, that the cause must be remanded, upon the ground that the petition

was in the present tense. *United States Circ. Ct., Minnesota*, Dec., 1880. *Beede v. Cheeney*. Opinion by McCrary, C. J.

SALE OF PERSONAL PROPERTY—CONDITIONAL SALE VALID AT COMMON LAW—STATUTE OF FRAUDS.—Conditional sales were valid at common law, and their validity was not affected by the English statute of frauds. Such sales, oral or in writing, are valid in Arkansas, and creditors of and purchasers from the conditional vendee acquire no right to the property as against the vendor, who has been guilty of no fraud and no laches in asserting his rights. In *Ayer v. Bartlett*, 6 Pick. 71, it is said: "If the transaction is fraudulent, the vendor setting up a condition to the sale, yet suffering the vendee to be in possession, exercising full rights over the property, with the intent and purpose of enabling him to obtain credit on the strength of the property, he will not be able to avail himself of such condition, but the sale will be held to be absolute in regard to creditors. But if *bona fide*, and the object of the condition was merely security to the vendor, he shall not lose his property because some creditor of the vendee supposed it to belong to him." See also, *Armington v. Houston*, 38 Vt. 448; *Bigelow v. Huntley*, 8 id. 151; *Buckmaster v. Smith*, 22 id. 203; *Chaffee v. Sherman*, 26 id. 237; *Bradley v. Arnold*, 16 id. 382; *Paris v. Vail*, 18 id. 277; *Barrett v. Pritchard*, 2 Pick. 512; *Marston v. Baldwin*, 17 Mass. 606; *Merrill v. Rinker*, 1 Bald. C. C. 528; *Blood v. Palmer*, 11 Me. 414; *Miller v. Bascom*, 28 Mo. 352; *Rogers' Locomotive Works v. Lewis*, 4 Dill. 158. And it seems to be equally well settled that the vendor, who has been guilty of no laches in asserting his right to the property, may recover it from a *bona fide* purchaser from the vendee. *Coggill v. Hartford R. Co.*, 3 Gray, 545; *Ballard v. Burgett*, 40 N. Y. 314; *Bigelow v. Huntley*, 8 Vt. 151; *Sargent v. Metcalf*, 5 Gray (Mass.), 306; *Hart v. Carpenter*, 24 Conn. 427; *Parmlee v. Catherwood*, 36 Mo. 479; *Griffin v. Pugh*, 44 id. 326; *Little v. Page*, id. 412; *Benner v. Puffer*, 114 Mass. 578; *Thomas v. Winters*, 12 Ind. 322; *Dunbar v. Rawles*, 28 id. 322; *Bailey v. Harris*, 8 Iowa, 333; *Hamans v. Newton*, 4 Fed. Rep. 880. *United States Circ. Ct., E. D. Arkansas*, July, 1880. *Blackwell v. Walker*. Opinion by Caldwell, D. J.

SERVICE—ON ONE IN JURISDICTION BY FRAUD OR FORCE, INVALID.—Where a person has been brought from another State by force, or has been induced to come into a State by the fraud and deceit of another for the purpose of procuring the service of a summons in a civil action, and personal service has been made under such circumstances, the service of process and return of the officer will be quashed on proper plea, where the facts are undisputed. See *Lagrange's case*, 14 Abb. Pr. 336, 344; *Ranstead v. Otis*, 52 Ill. 30; *Williams v. Reed*, 29 N. J. Law. 385; *Dungan v. Miller*, 37 id. 182; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Steiger v. Bonn*, 4 Fed. Rep. 17. *United States Circ. Ct., Nebraska*, Jan., 1881. *Blair v. Turtle*. Opinion by Dundy, D. J.

RHODE ISLAND SUPREME COURT ABSTRACT.*

AUCTIONEER—TO PAY OVER PROCEEDS OF SALE AN OFFICIAL DUTY—OFFICIAL BOND, FORM OF.—(1) Paying over the proceeds of an auction sale to the person for whom he sells is one of the official duties of an auctioneer. Hence neglect so to pay over constitutes a breach of a bond conditioned simply that the auctioneer shall "well and faithfully perform all the duties of said office during his continuance therein." Commissioners of Raleigh v. Holloway, 3 Hawks, 234; *Allegany County v. Van Campen*, 3 Wend. 48. (2) An

*Appearing in 5 Federal Reporter.

*To appear in 13 Rhode Island Reports.

official bond need not follow the words of the statute if it uses words of the same legal effect. *Cobb v. Commonwealth*, 3 T. B. Mour. 391; *Boring v. Williams*, 17 Ala. 510; *Nunn v. Goodlett*, 10 Ark. 89; *Justices of Inf. Court v. Administrator of Wynn*, Dud. Ga. 22; *State v. Layton*, 4 Harring. Del. 512. *Tripp v. Barton*. Opinion by Durfee, C. J. [Decided Oct. 14, 1880.]

MUNICIPAL CORPORATION—LIABLE FOR INJURY FROM FRIGHT TO HORSE BY OBJECT LEFT IN HIGHWAY BY ANOTHER—SUCH OTHER AND TOWN NOT JOINT TORT-FEASORS.—(1) If an object calculated to frighten horses is left in a highway, and after reasonable notice negligently permitted to remain there by the town charged with the repair of the highway, such town is in Rhode Island liable for the injury sustained by a traveller whose horse is actually terrified by such object and runs away. It is otherwise in Massachusetts, the courts of that State holding that the town is not liable for injury resulting from fright without collision with the object. *Kingsbury v. Dedham*, 13 Allen, 186; *Cook v. City of Charlestown*, 98 Mass. 80; *Bemis v. Arlington*, 114 Id. 507; *Cook v. Montague*, 115 Id. 571. The Rhode Island rule prevails in several States. *Morse v. Richmond*, 41 Vt. 435; *Winship v. Enfield*, 42 N. H. 197; *Chamberlain v. Enfield*, 43 Id. 356; *Bartlett v. Hooksett*, 48 Id. 18; *Dimock v. Suffield*, 30 Conn. 129; *Ayer v. City of Norwich*, 39 Id. 376; *Young v. City of New Haven*, Id. 435; *Foshay v. Glen Haven*, 25 Wis. 288. (2) In the case at bar the object was three flat cars loaded with immense iron castings. A left it in a highway; B's horse was frightened by it; B sued A for the injury caused by the nuisance, recovered judgment, and committed A on execution. A was discharged under the United States Bankrupt Act; B then sued the town. *Held*, that A and the town were not joint tort-feasors, A being liable at common law; the town for the neglect of a statutory duty. *Held*, further, that A and the town were liable for distinct though related torts resulting in the same injury, and that B's action against the town could be sustained. See *Hunt v. Bates*, 7 R. I. 217; *Bennett v. Lovell*, 12 Id. 166. *Bennett v. Fiffield*. Opinion by Durfee, C. J. [Decided Oct. 30, 1880.]

NEGLIGENCE—REQUISITES OF DECLARATION IN ACTION FOR.—In trespass on the case a declaration charged that "said city so carelessly and negligently kept and maintained that highway known as —, and so carelessly and negligently suffered and allowed said highway to be and remain out of repair, as wrongfully and injuriously to turn and cause to flow upon the lands and estate of the plaintiff next adjoining to said highway, the water which otherwise and ordinarily, or naturally and but for the wrongful acts and omissions of the said city would not have flowed or run upon the plaintiff's lands and estate aforesaid, whereby," etc. *Held*, on demurrer, affirming *Wakefield v. Newell*, 12 R. I. 75, that no cause of action was set forth. The requisites of a good declaration in an action for negligence are these: "It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others." *Gautret v. Edgerlon*, L. R., 2 C. P. 371. So too it is not enough to state a relation from which the duty may arise under certain circumstances, but unless the duty necessarily results from the relation, the circumstances which give rise to it must likewise be stated. *Brown v. Mallett*, 5 C. B. 699; *Seymour v. Maddox*, L. R., 16 Q. B. 326; *Wilson v. Newberry*, L. R., 7 Q. B. 31; *Collis v. Selden*, L. R., 3 C. P. 496; *Williams v. Hingham, etc., Turn. Co.*, 4 Pick. 841. In case, for the neglect

of a statutory duty, the plaintiff must show that the duty was imposed for his benefit or existed for his security from the injury suffered. *O'Donnell v. Providence & W. R. Co.*, 6 R. I. 211. *Smith v. Tripp*. Opinion by Durfee, C. J. [Decided Dec. 4, 1880.]

UNDERTAKING—IN RE EXEAT TO "ABIDE AND PERFORM."—In accordance with an agreement made between the parties litigant to a bill in equity, a respondent who had been arrested on a writ of *ne exeat* filed a bond with a surety "to abide and perform the orders and decrees of the court in the cause," whereupon the writ was discharged. Subsequently and before final decree the surety moved for an order discharging him from liability on the respondent principal's putting himself within the jurisdiction of the court and subject to its decrees. *Held*, that the motion could not be granted; that a bond to "abide and perform" differs from a bond to "abide," and that on discharging a writ of *ne exeat* a court may in its discretion require the respondent to give security to perform the decree. *Robertson v. Wilkie*, Amb. 177; *Atkinson v. Leonard*, 3 Br. C. C. 218; *Griffith v. Griffith*, 2 Ves. 401; *La Cien v. Trot*, Prec. Ch. 230, case 192; *Stapylton v. Peill*, 19 Ves. Jr. 615; *Debazin v. Debazin*, 1 Dick. 95; *Johnson v. Clendennin*, 5 Gill & J. 463; *Matter of Wolfe*, 5 N. Y. Leg. Obs. 384. *Petition of Griswold*. Opinion by Matteson, J. [Decided Sept. 20, 1880.]

VIRGINIA SUPREME COURT OF APPEALS ABSTRACT.*

CONSTITUTIONAL LAW—PATENT STATE LICENSE TAX ON VENDER OF PATENTED ARTICLES NOT INVALID.—In a prosecution for the violation of a provision of the Virginia State revenue law requiring persons selling merchandise by sample to take out a license and pay a tax therefor against a person selling sewing machines manufactured by the Singer Manufacturing Company, as agent of such company, *held*, that the fact, that the company made its machines under a patent of which it is the assignee, did not entitle the company to bring such machines into the State and sell them there without complying with the requirements of the State revenue laws. See *Patterson v. State of Kentucky*, 19 Alb. L. J. 156. As was said by Chancellor Kent, in *Livingston v. Van Ingen*, 9 Johns. 582, "That species of property must likewise be subject to taxation and to the payment of debts as other personal property. The national power will be fully satisfied if the property created by patent be for the given term enjoyed and used exclusively, so far as under the policy of the several States the property shall be deemed fit for toleration and use. There is no need of giving this power any broader construction in order to attain the end for which it was granted; which was to reward the beneficent efforts of genius and to encourage the useful arts." *Webber v. Commonwealth of Virginia*. Opinion by Staples, J. [Decided August 19, 1880.]

MUNICIPAL CORPORATION—LIABLE FOR NEGLECT CONSTRUCTION OF STREET INJURING PRIVATE PROPERTY.—If a municipal corporation, in improving its streets, fills up a street and does it in such way that the water which before had been carried off by gutters is thrown back upon an adjoining lot, the corporation will be liable for the damage to the lot, if by proper care and means it might have been prevented. Municipal corporations, acting under authority conferred by the legislature, to make and repair, or to grade level and improve streets, if they exercise reasonable care and skill in the performance of the work resolved

* Appearing in 88 Grattan's Reports.

upon, are not answerable to the adjoining owner, whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation, or in some statute, creating the liability. 2 Dill. on Mun. Corp., § 782, 783; *Callender v. Marsh*, 1 Pick. 418; *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N. Y. 195; *Wilson v. Mayor of New York*, 1 Den. 595; *Smith v. Corp. of Washington*, 20 How. (U. S.) 135; *Mills v. City of Brooklyn*, 32 N. Y. 489; *Carr v. Northern Liberties*, 35 Penn. St. 324; *O'Connor v. Pittsburgh*, 18 Id. 187; *City of Delphi v. Evans*, 36 Ind. 90; *City of Madison v. Ross*, 3 Ind. 236; *Lee v. City of Minneapolis*, 22 Minn. 13; *Cheever v. Shedd*, 13 Blatchf. C. C. 258; *City of St. Louis v. Gurno*, 12 Mo. 414; *Hoffman v. City of St. Louis*, 15 Id. 651; *Keasy v. Louisville*, 4 Dana (Ky.) 154; *Mayor of Rome v. Omburg*, 28 Ga. 46; *White v. Yazoo City*, 27 Miss. 357; *Simmons v. City of Camden*, 26 Ark. 276; *Humes v. Mayor of Knoxville*, 1 Humph. 403; *Dorman v. City of Jacksonville*, 13 Fla. 538. But there may be cases where the deprivation of the use of property not touched might entitle the owner to compensation. See *Ashley v. Port Huron*, 35 Mich. 296; *Iuman v. Tripp*, 11 R. I. 520; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Eaton v. B. C. M. R. Co.*, 51 N. H. 504. Exemption from liability depends upon, or rather implies the due exercise of the power delegated, the observance of reasonable care and skill in the execution of the work undertaken. If the work authorized be not executed in a proper and skillful manner, there will arise a common-law liability for all damages not necessarily incident to the work, and which are chargeable to the unskillful or improper manner of executing it. 2 Dill. on Mun. Corp., § 802; *Perry v. City of Worcester*, 6 Gray, 544; *Sprague v. City of Worcester*, 13 Id. 193; *Mersey Docks v. Gibbs*, 11 H. of L. Cas. 686; *Brine v. Great West. R. Co.*, 2 Best & Sm. 402; *Creal v. City of Keokuk*, 4 G. Greene, 17; *City of McGregor v. Boyle*, 34 Iowa, 266; *Ellis v. City of Iowa*, 20 Id. 229; *Meares v. Com'r of Wilmington*, 9 Ired. 73. *Smith v. City Council of Alexandria*. Opinion by Burks, J. [Decided April 15, 1880.]

FINANCIAL LAW.

BANKS—MAY RECOVER ON LOAN MADE ULTRA VIRES.—A statute prohibiting savings banks from loaning money on the security of names alone, is directory to the trustees, and designed for the protection of the depositors, and will not prevent a bank from enforcing payment of a promissory note, whether the purchase was or was not in conformity with its provisions. The statute was designed for the benefit and security of depositors, and it is not to be so construed as to defeat its own purpose, and enable the makers of negotiable paper to set up defenses, to which they would not be otherwise entitled. *Roberts v. Lane*, 64 Me. 108; *National Pemberton Bk. v. Porter*, 125 Mass. 333. *Maine Supreme Jnd. Ct.*, Feb., 1880. *Farmington Savings Bank v. Fall*. Opinion by Barrows, J., 72 Me. 49.

NEGOTIABLE INSTRUMENT—EQUITIES AVAILABLE AGAINST TRANSFEREE TAKING GUARANTY FROM PAYEE.—Where a promissory note is transferred, and the collection of it is guaranteed by the payee in the following form, to wit: "This note is transferred, and the collection of the same guaranteed to the holder hereof," the makers can make any defense to a suit commenced by an assignee that could have been made to a suit if commenced by the payee, notwithstanding the assignee may take the note before due, and without knowledge of any infirmity in the note. *Trust Co. v. National Bk.*, 101 U. S. 68; *Lamoureux v. Hewitt*, 5 Wend. 307; *Miller v. Gaston*, 2 Hill, 188. U. S. (Ire. Ct. Nebraska, Jan. 3, 1881. *Omaha National Bank v. Walker*. Opinion by Dundy, D. J. [5 Fed. Rep. 386.]

— **INDORSEMENT—INDORSEER OF NOTE ON DEMAND ENTITLED TO NOTICE OF DISHONOR.**—A. made a promissory note, payable on demand with interest, to the order of B. It was indorsed by B. and then by C.; B. and C. affixing their names for the accommodation of A. and to enable A. to borrow money from the plaintiff on the note. Held, that C. was liable as an indorser, not as a joint maker, and was entitled to due notice of dishonor. Held, further, that C.'s liability was not varied by the fact that the note was payable on demand with interest. The case does not fall within the rule laid down in *Mathewson v. Sprague*, 1 R. I. 8, and reaffirmed in several later cases, for which see *Carpenter v. McLaughlin*, 12 Id. 270, that one who indorses a note payable to another before its issue is liable to the payee as a joint maker, and is therefore not entitled to notice. The case presents simply the question whether an accommodation indorser on a note like that in suit is entitled to the usual notice of dishonor. That such an indorser is ordinarily entitled to such notice is beyond question, and if in the case at bar there is any doubt, it is because the note is payable on demand with interest, instead of being an ordinary time note. The precedents, however, show that this is not a circumstance which varies the right of the indorser. *Smith v. Becket*, 13 East. 187; *Rice v. Wesson*, 11 Metc. 400; *Lookwood v. Crawford*, 18 Conn. 381; *Perry v. Green*, 19 N. J. Law, 61; *Lord v. Chadbourne*, 8 Me. 196; *Daniel Neg. Instr.*, § 707; 1 *Parsons Notes and Bills*, 555. See, also, *Howe v. Merrill*, 5 Cush. 80; *Vore v. Hurst*, 13 Ind. 551; *Bigelow v. Colton*, 13 Gray, 309; *Clapp et al. v. Rice et al.*, Id. 403; *Dubois v. Mason*, 127 Mass. 37; *Good v. Martin*, 5 Otto, 90. *Rhode Island Sup. Ct.*, Oct. 30, 1880. *Sawyer v. Brownell*. Opinion by Durfee, C. J. [To appear in 13 R. I. Rep.]

THE VALUE OF THE HUMAN BODY AND BONES.

ONE of the absolute rights of every British subject is that of personal security; and lawyers mean by that, the legal and uninterrupted enjoyment of life, limb, body, health and reputation. Any one interfering, either by accident or design, with the enjoyment by another of these rights, inherent by nature in every individual (unless, indeed, the interference is authorized by the proper power in the State), is liable to make good to the injured party the damages sustained by him. With questions of life and death, of health and reputation, we do not propose to deal; but we desire to glance at some of the very numerous cases which have been decided in England, the United States, and Canada, upon the important subject of the pecuniary value of the various portions of a person's body. The value of the human form has been considered in many ways and by many people; not only in its dead state by medical students, in its captive state by slave dealers, but also in its living, free, independent state—and that piecemeal—by jurors unimpeachable, and judges learned and venerable, who have viewed it as a corpse and as a captive as well.

To begin with what the Sunday-school boy said was the chief end of man—the head. No jury, we believe, has yet been called upon to value the whole head of a living man; and with accidents fatal in their effects, we have nothing to do here. But different parts of the head—inside and out—have been appraised by intelligent jurors. In Maine, a man who could say with Hudibras,

My head's not made of brass,
As Frier Bacon's noddle was;
Nor (like the Indian's skull) so tough,
That authors say, 'twas musket proof;

had the external table of his skull cracked by an iron poker, wherewith he had been assaulted by a brakes-

man, and in consequence of the injury he was threatened with palsy of the optic nerve. He sued the railway company for the wrong inflicted by their servant, and recovered \$4,000 damages; and although the company considered the amount excessive, the court did not. *Hanson v. European, etc., Ry.*, 62 Me. 84. But \$1,700 was held too much to pay for striking a woman's head with a hatchet; she having been very provoking, and not being much hurt. *Hennies v. Vogel*, 87 Ill. 242. When, on a steamboat, a person received an injury, resulting in the temporary loss of the sight of one eye, and the jury calculated the damage at \$5,000, the judges held the amount excessive, and ordered a new trial on that account. *Tenney v. New Jersey Steamboat Co.*, 5 Lans. 507. The jury, although not the judges, evidently considered this one of

Those eyes, whose light seem'd rather given,
To be ador'd than to adore—
Such eyes as may have look'd from Heaven,
But ne'er were rais'd to it before.

A little boy was kicked by a horse, and his eye, skull, and brain were so severely hurt that the witnesses at the trial considered he would never be able to obtain a living in an ordinary way. The jury granted him £150, as a slight compensation; and although the child died nine days after the verdict, yet the court would not grant a new trial asked for on the ground of excessive damages. *Kramer v. Waymark*, L. R., 1 Ex. 241.

Ho Ah Kow sued the sheriff of San Francisco for \$10,000 damages for cutting off his queue. Ho had been fined for keeping a boarding-house in a manner contrary to the city by-laws, and in default he had been imprisoned in the county jail for five days; while in durance vile his head was shorn. The loss of his queue, he alleged in his pleadings, was a mark of disgrace, and attended with misfortune and suffering, and ostracised him from associating with his fellow-heavenlies here on earth. The defendant set up as a justification an ordinance of the city, authorizing the cutting off of a prisoner's hair. Kow demurred; and the judges were with him on the law, considering that such a rule was contrary to the celebrated fourteenth amendment of the Federal Constitution. *Ho Ah Kow v. Nunan*, 20 A. L. J. 250. What the jury said as to the value of the pig-tail, or if they have ever said any thing, we do not know.

A judge and jurors attempted to estimate the worth of a man's brains in a late case. They calculated the value of that part of the brain that was injured (whether the bump of philoprogenitiveness, veneration or self-esteem, the reporter saith not, but we think it was the first named) at \$10,000. Roy was sitting in a Pullman car, and the upper berth fell once and again, the second time striking him on the head, injuring his brain, incapacitating him from the performance of his usual avocations, and necessitating medical treatment. The court held the railway company liable, but granted a new trial solely on the ground that the number and ages of the man's children had been given in evidence apparently to influence the verdict of the jury. *Penn. Railway Co. v. Roy*, 22 A. L. J. 510.

It is a serious matter to touch a person's face unless "Barkis is willing." Mitchell, a very rich man, spat on the cheek of Mr. Alcorn in a public place; and for thus using the human face divine as a spittoon, a jury of his fellow-citizens mulcted Mitchell in the sum of \$1,000. He thought the amount excessive, but the court did not assist him in getting a reduction. *Alcorn v. Mitchell*, 63 Ill. 553.

Kissing, too, is a very expensive way of touching the countenance of an unwilling fair one. A conductor on the Chicago & North Western Railway, saluted on the cheeks, Miss Cracker, a passenger on his train. The consequences were—not matrimony, but—a fine of \$25 for an assault, the dismissal of the gay Lothario by the company, and a verdict of \$1,000 against the company

at the suit of Miss C. The court did not consider the verdict excessive, as it is a carrier's duty to protect his passengers against all the world. *Cracker v. C. & N. W. Ry.*, 38 Wis. 657.

Some twenty years ago, in England, a little boy—aged five years, and named Cox—while playing on the highway, was, like the youngster before mentioned, kicked in the face by a horse that was there depasturing; he was badly hurt. The jury awarded him £20 for damages to his visage, but the court would not let him keep it, as they failed to see that the owner of the horse had been guilty of any negligence in allowing his equine to be at large. *Cox v. Burbridge*, 13 C. B. (N. S.) 430.

In fact a man's head is at least, judging from the view taken of it by some jurors, a very precious part of the body, and indeed every thing connected with it becomes valuable. An individual once had to pay £500 for the slight amusement of knocking off another man's hat. He asked in vain for a new trial—i. e., of his case. 5 Taunt. 443.

Now to leave the head and come to the trunk and its more humble members. Many years ago Mrs. Elizabeth Dudley was riding on the outside of a coach in England. The coachee, before driving under an archway into the stable yard of an inn, asked his passengers to alight; Mrs. D. was dainty and unwilling to soil her boots, and so preferred being driven into the yard. The coach was eight feet nine inches high, and the arch nine feet nine inches. The consequence was that Mrs. Dudley was severely and permanently injured about the shoulders and back (the Divine Sarah might have escaped). An action for damages, and £100 verdict the result. *Dudley v. Smith*, 1 Camp. 167.

One Grieve was standing on a wharf, at Brockville, as the steamer Niagara was leaving, to plough her way along the St. Lawrence. The boat's fender caught in the wharf, broke, and hit G. on the shoulder and so hurt him that he lost the use of his arm. He recovered a verdict for £387 10s.; but the court thought he had been guilty of contributory negligence and so allowed him to continue to grieve, and ordered a new trial, on payment of costs. *Grieve v. Ont. St. Co.*, 4 C. P. 387.

An injury to the vertebrae of the spine of a lady, married, had to be paid for by £500. Mr. and Mrs. Foy were travelling by rail; at the station where they stopped there was not room for all the cars to draw up to the platform, and some of the passengers, the Foyes among the rest, were asked to get out upon the line. Mrs. F., with the aid of Mr. F., jumped from the top step of the car to the ground, a distance of three feet, and came down very heavily, jarring her vertebrae and injuring her spine. An English jury gave her the sum mentioned, and the judges declined to interfere. *Foy v. L. B. & S. C. Ry.*, 18 C. B. (N. S.) 225.

In Wisconsin, \$2,750 was given for the fracture of one of the spinal vertebrae and the dislocation of the hip-joint; and the court did not consider the sum exorbitant. *Houfe v. Fulton*, 34 Wis. 408. Nor did the court in Illinois think \$7,500 too much for a healthy young woman who, through a defect in a sidewalk, fell and fractured her lower vertebrae, so that paralysis ensued. *Chicago v. Herz*, 87 Ill. 541.

Mrs. Toms and her son and heir were driving in a buggy over a bridge on which some new planks had been placed. The sag shied at these, and backed up against the railing which broke; the hind wheels went over the bank, and the occupants of the buggy were thrown into the water below. Mrs. Tom's spine was injured, and even when before the jury she had not recovered her strength. The first verdict was \$750 for herself and \$50 for her husband, for his consequential damages. Unfortunately she had insisted upon swearing at the trial, and the court considered that so improper that they set the verdict aside. *Toms v. Whitty*,

32 U. C. R. 24. Another trial was had, and the jury magnanimously gave \$2,500 to the suffering lady and \$250 for Mr. Toms. Again the court interfered, thinking the damages very large, and ordered a third trial unless the Tomses would consent to take \$1,250 between them; this they wisely agreed to do (35 U. C. R. 195), and the Court of Appeal, to which the defendants went, would not take that sum away from them. 37 U. C. R. 100.

A school teacher was allowed to keep \$8,958 given for a permanent injury to her spine. *Ill. C. R. v. Parks*, 88 Ill. 373.

Arms, both male and female, have been valued. The case just about to be cited must not be taken as a ground for arguing that a lady's arm is worth more than a similar lateral appendage owned by a gentleman. A Miss or Mrs. Sweely (we are not sure which, but judging from her influence on the jurors, we fancy she must have been married) was walking in the town of Ottawa and was severely injured through a defect in the sidewalk. Her arm was hurt so that the muscles gradually wasted away until she completely lost its use, and the wearing away was accompanied by constant pain. She sued the town, and the jury rendered a verdict in her favor of \$3,200, and this the court considered not excessive. *Ottawa v. Sweely*, 65 Ill. 434.

Another woman, through a railway accident, lost one arm and the use of the other, and was withal so bruised, battered, blackened and injured, that she was in constant pain, and suffered from impaired health and memory; she sued the company for damages. The jury at first took a moderate view and gave her \$10,000; the company cried, "Pshaw! that's too much," and the court thinking it exorbitant, directed a new trial. The second jury awarded \$18,000; the company and the court thought as before, and a third trial was ordered. The jury took the bit in their mouths and assessed the injuries of the damaged lady at \$22,500. The company more dissatisfied than ever, again appealed to the court, but the judges (doubtless impressed with the more than sybilline character of the proceedings) declined to interfere, and allowed the suffering — but persistent — woman to keep the money. *Shaw v. Boston & W. Ry.*, 8 Gray, 45.

Mr. Drysdale (perhaps is) a clergyman, enjoying a salary of \$1,400; while travelling on a half-fare ticket (one of the numerous little perquisites of the cloth) he tried to shut a window in the car, and his arm was broken by the standard of a lumber car standing upon a side track. He was detained from his duties for eight weeks (whether either he or his people lost any thing by this does not appear), and suffered great pain from time to time for eight months (perchance his flock suffered similarly on Sundays, only longer). He sued the railway company and recovered a verdict for \$3,000. The company considered, and we think rightly, that this was too large a sum to be compelled to pay for breaking a part of a parson and applied to the court to set aside the verdict. The court, however, deemed the figures not so exorbitant as to justify a reversal. This was in Georgia where ministers may be scarce; nearer home, we fancy, they are not so highly prized. *Western, etc., Ry. v. Drysdale*, 51 Ga. 646.

Query — Do ladies serve on juries in Georgia as they do in Montana (we believe)? If so, and Mr. D. was unmarried, young and good looking, we understand the verdict.

We are not left entirely in the dark as to the value of a Canadian's arm. One Watson, in 1864, was journeying on the Northern Railway, and went into the express car, where he should not have gone, but the conductor who saw him there did not tell him to leave. There was a collision, and W.'s arm, the right one, was broken; no one in the passenger cars was seriously hurt. The injured man was in the house four and a half weeks and attended by two doctors; he suffered

a good deal, kept the arm in a sling for some time, and then found it smaller than the other and scarcely fit to use. The jury gave \$2,000. The court said that the company might have a new trial upon payment of costs as they were not quite satisfied as to the extent of the plaintiff's injuries; and to the chief justice the damages appeared extremely large. *Watson v. N. R. Co.*, 24 U. C. R. 98.

Coming down still lower we find what some people think should be paid for a broken wrist. Mrs. Jones was a nurse, and through a broken board in the sidewalk she stumbled and fell and fractured her right arm at the wrist, and for this the metropolis of the Prairies had to pay \$1,000. *Chicago v. Jones*, 66 Ill. 349. In Kansas, the court decided that \$5,000 was an excessive amount for the railway company to be compelled to pay for an injury causing a deformity of the right hand. *Union, etc., Ry. Co. v. Hand*, 7 Kan. 380.

Fingers even have been valued. Fordham was getting into an English railway carriage. The door being at the side and opening outward, and he having a parcel in his right hand, he placed his left on the door plate, to assist him in entering. The guard, without any previous warning, flung to the door and badly crushed F.'s fingers. Both the Court of Common Pleas and the Exchequer Chamber thought that the guard had been careless and that Fordham had done nothing amiss, and so they let him keep the damages given by the jury against the railway company, £25. *Fordham v. L. B. & S. C. Ry.*, L. R., 3 C. P. 368; 4 C. P. 619, Ex. Ch. A servant and apprentice of one Hodsell, a goldsmith, was bitten by Stallebras' dog, two of the fingers, the right hand, and the right arm being badly lacerated. Hodsell sued for the loss of the services of his apprentice, a lad of seventeen, and recovered £30, one-third for past loss and the balance for future loss. *Hodsell v. Stallebras*, 11 A. & E. 301. Some boys were coming home from school and in passing a machine which stood unguarded beside the road, a child of seven years induced another of four, to place his fingers within the machine, while another boy by turning a handle set it in motion; the fingers were badly crushed and had to be amputated. The jury gave £10 damages for them, but the court considered that the owner of the machine was not liable. *Mangan v. Atterton*, L. R., 1 Ex. 239.

One Jackson was riding in the underground railway from Moorgate street to Westbourne Park, the car was full, yet at the stations others tried to enter, which those already within sought to prevent; the door being open as the car was about to pass into a tunnel, the porter slammed it to, and jammed Jackson's thumb in the hinge. The jury gave him £50 to salve his injuries. The judges of the Court of Common Pleas and of Appeal said: "Let him keep the money;" but when the company went before the House of Lords, that august assemblage said: "He cannot have the money, as the porter was not guilty of negligence." *Jackson v. Metropolitan Ry.* L. R., 10 C. P. 49; 2 C. P. D. 125; 3 App. Ca. 193. Another passenger had a thumb squeezed in a very similar way by the porter shutting the carriage door upon it; and the jury estimated his injury at £20. The court thought that the evidence showed that the passenger and not the porter had been negligent. *Richardson v. Metropolitan Ry.*, 37 L. J., C. P. 300. Still another thumb was appraised in a later case. A man was getting into a car, but before he had taken his seat the servants of the company shut the door without warning; the man's thumb was squeezed by the hinge, and in an action for damages, the jury, following the example set by the last, awarded £20 for the injury, but the court considered that there was no evidence of negligence on the part of the company's servants and so set the verdict aside. *Maddox v. L. C. & D. Ry.*, 88 L. T. 458. Fortunately on our Canadian cars thumbs are not in such danger. — *R. Vashon Rogers, Jr., in Canadian Law Times.*

NEW BOOKS AND NEW EDITIONS.

DILLON ON MUNICIPAL CORPORATIONS.

Commentaries on the Law of Municipal Corporations. By John F. Dillon, LL. D., Professor of Real Estate and Equity Jurisprudence in Columbia College Law School; late Circuit Judge of the United States for the eighth judicial circuit, and formerly Chief Justice of the Supreme Court of Iowa. Third edition, revised and enlarged. -Boston: Little, Brown & Co., 1881. Two vols. Pp. cxiix, 553; vi, 554-1157.

THE first edition of this great work appeared in 1872, the second in 1873. The present is larger by more than two hundred new sections, and the citation of more than three thousand additional cases. The work is practically unrivalled, for the simple reason that its excellence renders rivalry hopeless. It is already of absolute authority, both original and derivative, in all the courts of the country. The only similar instance of a recent work, monopolizing a field and rendering an author famous, now occurring to us, is Benjamin on Sales. Judge Cooley's great work on Constitutional Limitations, and Mr. Daniel's excellent treatise on Negotiable Instruments cannot be said to be without rivals, although we rank them at the head of these branches of the law. But if there is such a thing possible as a perfect law book, Judge Dillon has accomplished it in this treatise, which has already become a classic, and taken its place among the dozen indisputable legal classics of this country. The author has not only paid the debt which every lawyer owes his profession, but has brought his profession in debt to him. The present edition is peculiarly useful as presenting a consideration of the latest authorities, a more elaborate treatment of the topic of torts, and a general amplification of the notes. The old sections have been abolished, but their numbers are preserved in parenthesis. The publisher's duty is admirably done.

STEPHEN'S JOINT STOCK COMPANIES.

The Law and Practice of Joint Stock Companies under the Canadian Acts. A Practical Treatise on the Law of Commercial Joint Stock Associations, in the form of a commentary on the Canada Joint Stock Company's Act, 1877, with which is included most of the other companies' acts, both general and local; as also a number of Forms relating to the management of such companies. By Charles Henry Stephens, of the Montreal bar, author of the Quebec Law Digest. Toronto: Carswell & Co., 1881. Pp. xlii, 627.

This is an elegantly printed, and apparently a methodical and intelligent treatise on the local law in question. Of its actual merits of course we cannot speak without an extended examination which our duty to our readers would hardly warrant. It is evident, however, that the work is a treatise, and not a mere digest, and that the author has opinions which he is able and willing to express. A general history of joint stock companies, in the introduction, we have done more than glance at, and found it admirable. The opening sentence of Mr. Stephen's preface is earnestly to be commended to opponents of codification. He says: "The restless and ever-changing nature of that which we call 'law' is, I take it, a sufficient justification, now-a-days, for the appearance of a treatise on any legal subject, and that without pretending to advance any new theories respecting it."

NOTES.

THE *Law Magazine and Review* for May contains the following leading articles: England's Treaties of Guarantee, by J. E. C. Munro; New Trials in Felonies, by W. Harris Falconer; Ecclesiastical Courts, their Past and Future, by S. T. Taylor-Taswell; Extradition and the Right of Asylum. — The *Virginia Law Journal* for May contains an article on Jury Trial — Charging

the Jury, by Wm. Archer Cooke. — The *Criminal Law Magazine* for May contains an article on Personal Identity, and one on Self-criminating Evidence, by Decius S. Wade, chief justice of Montana. Also, a note on *State v. Swayze*, New Jersey Sessions, which case holds that an objection to a grand juror, valid on challenge to the favor, cannot be raised by plea in abatement; and the important case of *State v. Moore*, in the New Jersey Court of Errors, holding that a statute extending the period of limitation for the prosecution of a crime is *ex post facto* as to a crime already barred by the old statute. — The *American Law Record* for May contains a pleasant lecture by Thomas Hoynes, on The Lawyer as a Pioneer, delivered in Chicago. — The *American Law Register* for May contains Mr. Chauncey's article on Contempt of Court, and has an article on Trade Marks, by Hugh Weightman. Also, the case of *Debenham v. Mellon*, on power of wife to pledge her husband's credit for necessities, with note by Edmund H. Bennett; the case of *Andrews v. Congur*, on liability of indorser before utterance, with note by Henry Wade Rogers; the case of *Ellison v. Lindsley*, on service of notice by mail, with note, by J. H. Stewart; and the case of *State v. Burdette*, on criminal obstruction of public highway, with note by W. N. S.

The *Ohio Law Journal* gives the following table, showing the number of the judges constituting the highest court in each State in the Union, the length of term, and their salaries:

State.	Number of Judges.	Term of office.	Salary.
Alabama.....	Three.....	6 years..	\$3,000
Arkansas.....	Three.....	8 ..	3,500
California.....	Seven.....	12 ..	6,000
Colorado.....	Three.....	9 ..	3,250
Connecticut.....	Five.....	8 ..	4,000
Delaware.....	1 Chief Justice.....	For life..	2,500
	1 Chancellor.....	"	2,500
	3 Associate Justices.....	"	2,000
Florida.....	Three.....	"	3,000
Georgia.....	Three.....	4 years..	2,500
Illinois.....	Seven.....	9 ..	5,000
Indiana.....	Five.....	6 ..	4,000
Iowa.....	Five.....	6 ..	4,000
Kansas.....	1 Chief Justice.....	6 ..	3,000
	2 Associate Justices.....	4 ..	3,000
Kentucky.....	Three.....	8 ..	5,000
Louisiana.....	1 Chief Justice.....	8 ..	7,500
	4 Associate Justices.....	5 ..	2,000
Maine.....	Eight.....	7 ..	3,000
Maryland.....	Eight.....	15 ..	3,500
Massachusetts.....	1 Chief Justice.....	During	6,500
	7 Associate Justices.....	good be-	6,000
		havior.	
Michigan.....	Four.....	8 years..	4,000
Minnesota.....	1 Chief Justice.....	7 ..	4,500
	3 Associate Justices.....	7 ..	4,000
Mississippi.....	Three.....	9 ..	3,500
Missouri.....	Five.....	10 ..	4,500
Nebraska.....	Three.....	6 ..	2,500
Nevada.....	Three.....	6 ..	7,000
New Hampshire.....	1 Chief Justice.....	Until 70	2,400
	6 Associate Justices.....	ys. old.	2,200
	1 Chancellor.....	7 years.	10,000
New Jersey.....	1 Chief Justice.....	7 ..	5,500
	8 Associate Justices.....	7 ..	5,000
*New York.....	1 Chief Justice.....	14 ..	7,000
	6 Associate Justices.....	14 ..	7,000
North Carolina.....	Three.....	8 ..	2,000
Ohio.....	Five.....	6 ..	3,000
Oregon.....	Three.....	6 ..	2,000
Pennsylvania.....	Seven.....	21 ..	7,000
Rhode Island.....	Five.....	For life..	4,000
	1 Chief Justice.....	6 years..	4,000
South Carolina.....	8 Associate Justices.....	6 ..	3,500
	8 Circuit Judges.....	4 ..	3,200
Tennessee.....	Five.....	8 ..	4,000
Texas.....	Three.....	4 ..	3,500
Vermont.....	Seven.....	12 ..	3,200
Virginia.....	1 Presiding Judge.....	12 ..	3,200
	4 Associated Judges.....	12 ..	3,200
West Virginia.....	Four.....	12 ..	3,200
Wisconsin.....	Five.....	10 ..	3,500

* Each judge is allowed \$3,000 additional for expenses.

The Albany Law Journal.

ALBANY, JUNE 4, 1881.

CURRENT TOPICS.

AT the recent commencement exercises of the Albany Law School, held in this city, an address was made to the graduating class by ex-Judge Countryman, on the Ethics of Compensation as between Attorney and Client. This was an elaborate and ingenious attempt, not simply to justify, but in effect to recommend to lawyers, the practice of taking cases, as Messrs. Dodson & Fogg took Mrs. Bardell's case, on speculation. This is, we dare say, the first public and authoritative apology for this practice ever uttered in this country. Coming from a man of Judge Countryman's recognized position and influence, it must necessarily have weight, and addressed, under the auspices of the law school faculty, to a class of young men just entering on professional life, it may have seemed to bear the approbation of the faculty, and may have sown some mischievous seeds. We cannot believe that the faculty knew beforehand of the tone of the discourse, or that they approved its doctrines and inculcations, which we cannot but regard as pernicious. There can be no doubt that the general and deliberate sense of our profession is against the practice which Judge Countryman justifies. In the few cases which a high-minded lawyer may now and then have undertaken on such terms, he must have done it reluctantly, from force of special circumstances, and with the conviction that it is a custom more honored in the breach than in the observance. Much of Judge Countryman's address was devoted to combating the false delicacy of the idea of the *honorarium*. In this we quite agree with him. The lawyer is worthy of his reward, and he should have the means of compelling payment. The English doctrine on this subject prevails nowhere in this country, we believe, except in New Jersey. Nor do we see any impropriety in a simple preliminary agreement on the amount of compensation, not giving the lawyer an absolute ownership or interest in a cause of action for unliquidated damages. But, says Judge Countryman, there is a large class of cases where poor people—widows and orphans—have claims for damages against powerful corporations, in which large outlay and long delay are necessary to attain justice, and if a lawyer is not permitted to take a pecuniary interest in such cases, how is justice to be done? This is the most plausible and only possibly tenable ground of the argument. If such a case now and then comes to a lawyer, without his seeking it, he may be justified in this course; but the danger is that he will fall into this way, become known and sought by others, and finally be led to seeking such business for himself. Even in this class of cases the theory of the law is that the claimant shall sue *in forma pauperis*, and the court will assign attorneys and

counsel who must work without compensation. But when Judge Countryman goes beyond this, and boldly avows the propriety of taking commercial cases, from clients perfectly able to pay, on shares, we utterly and earnestly dissent from him. Here, too, he becomes immersed in his own argument, for while he insists that the *honorarium* is absurd—that the lawyer ought to be paid at all hazards—he recommends the lawyer himself to run the hazard, to take cases on an agreement by which he may be called on to waste his time and skill, and render services for which he is not to be paid, although he knows his client is quite able to pay him. To be sure, he says the lawyer must not accept a case unless he is convinced it is right. But as we have before this remarked, the advocate is a poor judge on this point. Advocacy blunts the perceptions and blinds the judgment. When you add to the zeal of advocacy a pecuniary interest dependent on success, you introduce a dangerous element. Here is a temptation to manufacture, supply, or warp evidence, to tamper with juries, to lobby with judges, in order to suit their need. Here is a temptation to seek this class of business, or an inducement for it to seek you. This is at all events making merchandise of the law. The lawyer who makes this his practice becomes a huckster, and after a while gets a huckster's conscience. Judge Countryman asks if there is one standard of morals for commercial men, and another for professional men. We say unhesitatingly there is. What may be quite right for a mere collecting agent, may be quite wrong for an officer of a court of justice. When Judge Countryman compares the case in hand to the case of an agreement to work a farm on shares, he makes no allowance for the sanctities, the temptations, the dignity of the advocate's office and position. We think there can be no question about these things among the better class of lawyers. We are especially sorry to see a class of young law graduates dismissed from their studies with such an ignoble view of a noble and conscientious calling. There was a disheartening moral discrepancy between the theoretical views of the enthusiastic young valedictorian who spoke on the Lawyer's Code of Honor, and the practical views of the experienced practitioner who spoke on Professional Ethics.

It seems that a German lawyer and magistrate of the city of New York, desiring to join the Bar Association, was favorably reported by the committee on admissions, but was rejected on the ballot. This gentleman, whose name we have seen much in print in the newspapers, with his business address attached, now complains in the newspapers that he was rejected because of the mistaken impression in the Bar Association that he was a Jew. He improves the occasion to give a graphic account of his own life and heroic struggles, asserting that he was not "born with a silver spoon in his mouth," but owes every thing he has got to his "own energy, industry, and perseverance." He "challenges" the association, and the young men of "blue blood"

who voted against him; his "blood boils at such injustice;" he wants to know who among the association "will have the manliness to reply to this letter." All this leads us to suspect that the association may not have done unwisely, although they may have assigned a wrong and unworthy reason. A correspondent and member of the association writes us on this subject: "In its corporate and aggregate capacity the association offers the privileges and advantages of its membership to all lawyers of good character and repute, who are willing to pay forty dollars a year, and who are reported upon favorably by its committee on admissions. As a society, however, composed of so many individual members, it has (or rather its members have) their piques and prejudices. One would think that an association of lawyers would be the last body of men in the world to be intolerant, or to be warped or influenced by religious prejudice, but the fact *notoriously exists* in the New York Bar Association! A clique of its very young associates is desirous of preventing Jewish lawyers from becoming members; and as there is a little anti-German and anti-Catholic feeling there also, it might be well to change its name to that of the '*New York Protestant-American Bar Association!*'" The difficulty is all these cases consists in distinguishing between objections founded on race and religion and those founded on purely personal peculiarities. The rejected never reflect on the possibility of the existence of the latter class of objections, but always attribute the rejection to the former. The mean and narrow prejudice alluded to by our correspondent may have influenced the association, and it may not. We know many perfectly unobjectionable Jews, and many very objectionable christians; also many obnoxious Jews, and many unobnoxious christians. If we were a member of the association we should feel quite at liberty to black-ball the objectionable candidates without distinction of race or religion, and we should certainly never vote to exclude anybody on these accounts. And our correspondent, who, we take it, is a Jew, would probably feel himself at liberty to black-ball an obnoxious christian candidate, and the defeated man would be silly to complain about it in the newspapers. The world pays little attention to such complaints. If any such prejudice exists in the association as is alleged, the association will lose influence and respect, and degenerate into a mere club, into which admission will become as difficult as undesirable.

Although Lord Beaconsfield may have been a friend to our government during the great rebellion, as is alleged, yet as appears from extracts from his speeches cited in the current number of *Scribner's Magazine*, he had a very mild and indifferent way of avowing his friendship, in public. The burden of his speech was like that of the Pharisee's prayer—thanking God that his country was not like ours—not like that republican. — The *Lat* Journal recalls a curious incident, showing his sense of the power of the legal profession. In 1838, he was called on to re-

ceive judgment in the Queen's Bench for a libel on Mr. Austin, the celebrated parliamentary lawyer. Mr. Austin, in his remarks on the Maidstone election petition, had said: "Mr. Disraeli, at the general election, had entered into engagements with the electors of Maidstone, and made pecuniary promises to them which he had left unfulfilled." In answer to this charge, Mr. Disraeli wrote a letter to the *Morning Post* charging Mr. Austin with falsehood, denying the accusation in explicit terms, and concluding: "I am informed that it is quite useless and even unreasonable in me to expect from Mr. Austin any satisfaction for those impertinent calumnies, because Mr. Austin is a member of an honorable profession, the first principle of whose practice appears to be that they may say any thing provided they be paid for it. The privilege of circulating falsehoods with impunity is delicately described as doing your duty toward your client, which appears to be a very different process to doing your duty toward your neighbor. This may be the usage of Mr. Austin's profession, and it may be the custom of society to submit to it; but for my part, it appears to be nothing better than a disgusting and intolerable tyranny, and I, for one, shall not submit to it in silence." This was the libel complained of. In mitigation of punishment, when called up for judgment, Mr. Disraeli, after apologizing for the violence of his expressions, said: "I have no hesitation in saying that my opinion of the bar of England in my cooler moments cannot be very different from that of any man of sense and study—I must, of course, recognize it as a very important portion of the social commonwealth—one, indeed, of the lustiest ribs of the body politic. I know, my lords, to arrive at eminence in that profession requires, if not the highest, many of the higher qualities of our nature; that to gain any station there needs great industry, great learning, and great acuteness. I cannot forget that from the bar of England have sprung many of our most illustrious statemen, past and present; and all must feel, my lords, that to that bar we owe those administrators of justice to whose unimpassioned wisdom we appeal with the confidence which I do now." "But as to my offense against the bar, I do, with the utmost confidence, appeal to your lordships—however much you may disapprove my opinions, however objectionable, however offensive, even however odious, they may be to you—that you will not permit me to be arraigned for one offense and punished for another. In a word, my lords, it is to the bench I look with confidence to shield me from the vengeance of an irritated and powerful profession." "The attorney-general having expressed himself as satisfied on the part of Mr. Austin with the apology that had been tendered, withdrew the prayer for judgment; and Lord Denman assenting to that course, the matter ended." The *Law Journal* leaves it ambiguous whether Disraeli denied having made any pecuniary promises to his constituents, or only his non-fulfillment of such promises. But now who would not rather be Austin than Disraeli?

Assemblyman Skinner proposes a court of claims, to consist of three lawyers, to be appointed by the governor, to hold office for six years, at a salary of \$5,000. Also a State solicitor, at \$4,000. The State board of audit and canal appraisers to cease. No costs to be allowed to any party. Mr. Scott proposes a similar bill, with a difference of details.

NOTES OF CASES.

IN *Houghton v. People*, New York Supreme Court, in an indictment for bigamy, the defendant's wife was permitted to testify against him. For this Judge Dykman reverses the conviction. In speaking of the statute the court remarked: "It is a statute in derogation of the common law, and can be permitted to accomplish nothing beyond what is fairly intended. It is first affirmatively enacted that a husband or wife may be examined as a witness for the other in a criminal prosecution, and further, the statute does not provide affirmatively. What follows is a provision that on no criminal trial or examination shall husband or wife be compelled to testify against the other. These are negative words only, and make no innovation or relaxation of the old rule of law. Probably their true intention and operation will be found in preventing the elicitation of testimony from husband or wife against each other after being called in their behalf. Substantially the same view of this statute was taken in the *Briggs* case, 60 How. 17. If it had been the intention of the statute makers to break down the barrier protecting the husband and wife from the testimony of the others in criminal prosecutions, it would not have been left to inference or implication, and we are not at liberty to resort to either to find it. In this case the court proceeded on the theory that the wife was competent but not compellable, and might testify of her free will, but as we have seen already the statute affirms her competency only in favor of her husband and not against him." To same effect, *Byrd v. State*, 57 Miss. 243; S. C., 34 Am. Rep. 440; also, 22 Alb. L. J. 81.

In *Avery v. Meikle*, Louisville (Ky.) Chancery Court, a permanent injunction has been refused to restrain the defendant's use of the same numbers and letters used by the plaintiff, to denote the pattern, size, and character of plows. The court said: "Now it seems to be the clearly-settled law that the letters of the alphabet and the numerals of arithmetic are the common property of mankind, and cannot in their ordinary forms and functions be appropriated by any one to his exclusive use as trade-marks. No one can acquire an exclusive right to use letters or numerals for any purpose, and thus prohibit the use of them to others. The newspaper or book publisher has the right to use the same kind of type as his rival uses. School-books may be printed in letters of small and large type, beginning with single letters and developing the progress of the pupil by syllables, words, sentences, and

compositions, and unless the book be copyrighted, any one may copy or reprint the whole or any part of it. There is a limit to this common freedom, and it is well defined. Every person is entitled to the exclusive use of such letters in such combination as compose his name, and no one will be allowed to use those letters when singly or in combination they have acquired this signification. It is upon this principle that letters standing as the initials of and representing a name, or composing a full name, are capable of being valid trade-marks and are protected as such. In that meaning they denote the origin of the article upon which they are marked; they point to the maker or vender; they represent his signature, his certificate of the fact that the article comes from him. But when the letters do not signify the name of the maker, but by general use, signify size or quality, the fact so expressed may be as true of one article as of another, and may be stated by one maker as well as by another, by the same method of expression. And when numbers or numerals are used to express size or qualities, then, again, the same facts may be expressed by the same means with equal truth by all persons. These principles are founded in the rights of mankind to share in the knowledge which is open and common to all, and these principles have been stated with great clearness in cases of the highest authority. *Amoskeag Manufacturing Co. v. Spear*, 2 Sandf. 599, and *Manufacturing Co. v. Trainor*, 11 Otto, 51. The cases which are mainly relied on for plaintiff as establishing the right to appropriate numerals as valid trade-marks are not in my opinion in conflict with the general doctrine announced in the leading case *supra*. It is true that in *Gillett v. Esterbrook*, 48 N. Y., the numeral 303 was held to be a valid trade-mark, and in *Boardman v. Britannia Co.*, 35 Conn. 402, No. 2,340 was held to be a valid trade-mark; but in both cases the ground upon which these numerals were sustained was, they were arbitrary signs; that they did not express size, quality or quantity; that being unmeaning in their connection with the articles upon which they appeared, they were symbols of a name. And both cases expressly approve the great case of Judge Duer in 2 Sandf., *supra*." The same doctrine was held of the use of "IXL," in *Lichtenstein v. Mellis*, 8 Or. 464; S. C., 34 Am. Rep. 592.

In *Redlich v. Bauerlee*, 98 Ill. 134, it was held that where charges are made first upon a slate, and within a reasonable time correctly transferred to a book by the proprietor and his clerk, and these carefully compared with the entries on the slate, the book, on proof of these facts, will be admissible in evidence in behalf of the proprietors—the minutes upon the slate being regarded as mere memoranda to aid the memory until the items should be transferred to the books. The court said: "The fact that the charges, in the first instance, were made on a slate and were subsequently transferred to the books admitted in evidence, does not destroy the character of the books as those of original entries.

The minutes of the slate were mere memoranda, to assist the memory until the items were transferred to the books, and were not intended to be permanent. *Faxon v. Hollis*, 13 Mass. 427; *Pillsbury v. Locke*, 33 N. H. 90; *Hall v. Glidden*, 39 Me. 445; *Stroud v. Tilton*, 3 Keyes, 139; *Sickles v. Mathers*, 20 Wend. 72; *Davison v. Powell*, 16 How. Pr. 467; *Landis v. Turner*, 14 Cal. 575; *Hartley v. Brooks*, 6 Whart. 189; *Whitney v. Sawyer*, 11 Gray, 243. Although the entries were drawn off by appellee, the subsequent comparison of the entries upon the slate with those in the books, made it certain that they were correctly copied into the books. The authorities do not establish any precise length of time within which such entries shall be transcribed; 'it suffices if it be within a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which a knowledge of it was derived unimpaired.' *Jones v. Long*, 3 Watts, 325; *Hall v. Glidden*, *supra*. Here, as in *Hall v. Glidden*, 'the source of knowledge was unimpaired, and there is no reason to believe the memory of the facts to have been forgotten when transcription was made.' The entry on the slate was at the time the goods were delivered, 'and from the nature of the case it could not be permanent. It had not been obliterated.'

LARCENY OF ANIMALS.

IN *Ree v. Mann*, Supreme Court of the Hawaiian Islands, April, 1881, the defendant had been convicted of stealing turkeys. Two questions arose: whether the turkeys in question were "wild animals," and thus not subject of larceny; and whether ownership had been proved. The court, Judd, J., said: "The essential facts are as follows: On the mountain range of this island, back of Waialua, called the Waiānæ mountains, are numbers of turkeys. These birds were brought to this country so long ago that there is no remembrance existing as to the exact time when or by whom they were imported. These birds are now in a wild state, afraid of man, breeding in the unfrequented parts of the mountain and bush country, and have been hunted down and caught by devices, precisely as if they were *feræ naturæ*. They are not penned or fed, marked by the land-owner, nor does he exercise any actual control over them, except as he may be able to catch them and reduce them to his possession. It is well known that the domestic turkey is descended from the wild turkey, first found in America, modified by breeding and the care of man, and this perhaps accounts for the tendency to revert to the wild state which is so strongly manifested in them. These turkeys, although 'wild,' are not properly speaking 'wild animals.' Where the phrase 'wild animals' is used, the word 'wild' is used as a generic term to indicate that they are of a species not usually domesticated, and does not refer to their comparative docility or familiarity with men. We consider that these turkeys are not properly speaking animals *feræ naturæ*, though partak-

ing of their habits. The land on which the defendant is alleged to have taken the turkeys in question is the land of 'Mokulua,' in Waialua, the property of the prosecuting witness, Gaspar Silva, who claims the ownership of the turkeys by virtue of their being on his land and of value to him. Now to say that these turkeys are A.'s solely because they are on A.'s land, would lead to the absurdity that they would become B.'s, when they went on to B.'s land. Suppose on a certain night A. goes into the woods on his own land and ensnares part of a flock of the so-called 'wild turkeys,' and the rest of the flock, being disturbed, cross over the boundary to the land of B., and the next night A. ensnares them on B.'s land. On the theory advanced, that the place of capture determines the ownership, the latter taking would be larceny. In the case before us, if the owner of the land where the alleged taking of the turkeys took place was able to trace them, as the undisputed descendants of birds owned by him or his grantors, he would thus show title to them. So far from this being the evidence in this case, it is more than probable that these turkeys are not the descendants of a parent stock introduced on this land by one person, but that these birds have received accessions at different times from the tame turkeys of many different individuals. In the absence, therefore, of proof of ownership of these turkeys by the prosecuting witness, aside from the fact that they were caught on his land, and it being proved that they cannot be distinguished from any other turkeys on contiguous lands, they are not the subjects of larceny." Conviction reversed, and prisoner discharged.

This is in harmony with *State v. Mary Turner*, 66 N. C. 618. Mary was indicted for stealing "one turkey of the value of five cents." Thus it seems that turkeys are cheap in North Carolina. The report does not disclose the date of the offense, but we infer that it was shortly before Thanksgiving. Mary having been convicted, a motion in arrest of judgment was made upon the ground "that the indictment was insufficient, for that it failed to state that the turkey stolen was a *tame* turkey. That the turkey was a native fowl of America, large numbers are found in every part of the State, wild and unreclaimed, and that the indictment should have negatived the presumption that the turkey in question was wild and unreclaimed." The motion was sustained, but this was reversed by the Supreme Court. The court said: "His honor was mistaken in this case, in supposing that our domestic turkey is a creature *feræ naturæ*. All the authorities cited by his honor are cases of creatures *feræ naturæ*, and we take the case to be clear, that where a creature, for the stealing of which a defendant is indicted, is *feræ naturæ*, it will not be sufficient to allege that the property was of the goods and chattels of one A. B., the owner; in such case, the indictment must further allege that the creature was dead, tamed, confined or reclaimed. 2 Russ. on Crimes, 152. But surely this cannot be the case, when the defendant is indicted for stealing one of our do-

mesticated turkeys. In 2 Bish. Crim. Law, §§ 787, 788, speaking of animals, *feræ naturæ*, and of which larceny may be committed when reclaimed, the author says, 'domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls, turkeys, and the like; which being tame in their nature, are the subject of larceny on precisely the same grounds as other personal property.'

The following animals have been held "wild": Deer, rabbits, hares, conies, fish, rooks, doves, pigeons, martens, bees. Whart. Crim. L., § 869. In *Warren v. State*, 1 Greene (Iowa), 106, it is said: "As this principle applies, by common law, to monkeys, bears, foxes, etc., it will evidently apply to 'coons.'"

But such animals as are reclaimed and confined, and may serve for food or use, are subject of larceny. Thus, young pheasants hatched and reared by a hen. *R. v. Shickle*, L. R., 1 C. C. 158. Marked swans, even on a public river. Dalt. Just. 156. Pea-hens. *Com. v. Beaman*, 8 Gray, 497. Pigeons in a cote. *R. v. Cheafor*, 5 Cox's C. C. 367. In this case, Lord Campbell said: "The pigeons were the subject of larceny, although they had the opportunity of getting out and enjoying themselves." This is probably because of the *animus revertendi* in the birds.

In *Swan v. Saunders*, Q. B. Div., 44 L. T. (N. S.) 424, it was held that freshly imported parrots were not "domestic animals," within the statute of cruelty to animals. The court said: "I do not say that a parrot might not become a domesticated animal, when thoroughly tamed and accustomed to the society of human beings, but these were young unacclimatised birds freshly imported into England. They are clearly different from fowls and other poultry, and the evidence goes to prove that they were not tamed and domesticated."

In regard to fish, it is not so clear. All the books agree that if fish are confined in a tank or otherwise so that they may be taken at the pleasure of him who has thus appropriated them, then they are the subject of larceny. "Fish confined in a net or tank are sufficiently secured; but how, in a pond, is a question of doubt, which seems to admit of different answers, as the circumstances of particular cases differ." 2 Bish. Cr. L., § 685; 1 Hale's P. C. 511; Fost. Cr. L. 366. An English statute made it indictable to steal fish from a river, in any inclosed park. In a case "where the defendant had taken fish in a river that ran through an inclosed park, but it appeared that no means had been taken to keep the fish within that part of the river that ran through the park, but that they could pass down or up the river, beyond the limits of the park at their pleasure; the judges held that this was not within the statute." *Rex v. Corrodice*, 2 Russ. 1199.

Oysters planted and staked out where they do not naturally grow, come within this rule. *State v. Taylor*, 3 Dutch. 117. They seem however barely to come within the description of animals. In the last case the court said: "The principle, as applied to animals *feræ naturæ*, is not questioned. But oysters, though usually included in that description of animals, do not come within the reason or opera-

tion of the rule. The owner has the same absolute property in them that he has in inanimate things or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his home or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed or made tame by art, industry, or education; nor to be confined, in order to be within the immediate power of the owner. If at liberty, they have neither the inclination nor the power to escape. For the purposes of the present inquiry, they are obviously more nearly assimilated to tame animals than to wild ones, and perhaps more nearly to inanimate objects than to animals of either description. The indictment could not aver that the oysters were dead, for then they would be of no value; nor that they were reclaimed or tamed, for in this sense they were never wild, and were not capable of domestication; nor that they were confined, for that would be absurd." In *Fleet v. Hegeman*, 14 Wend. 42, the court said: "Oysters have not the power of locomotion any more than inanimate things, and when property has once been acquired in them, no good reason is perceived why they should not be governed by the rules of law applicable to inanimate things." "They have been reclaimed, and are as entirely within his possession and control as his swans, or other water fowl, that may float habitually in the bay." But in *Cassell v. Johnson*, 58 Me. 164, oysters were held to be fish.

At common law the rule of property in reclaimed wild animals excluded many which were called "base," principally because they are not fit for food. But in this country the rule seems to be more flexible. Thus in *State v. House*, 65 N. C. 744; S. C., 6 Am. Rep. 744, a conviction of larceny of an otter from a trap was sustained. The court said: "All the distinctions as to animals *feræ naturæ*, and as to their generous or base natures, which we find in the English books, will not hold good in this country. The English system of game laws seems to have been established more for princely diversion than for use or profit, and is not at all suited to the wants of our enterprising trappers. We take the true criterion to be the *value* of the animal, whether for the food of man, for its fur, or otherwise. We know that the otter is an animal very valuable for its fur, and we know also that the fur trade is a very important one in America, and even in some parts of North Carolina. If we are bound absolutely by the English authorities, without regard to their adaptation to this country, we should be obliged to hold that most of the animals, so valuable for their fur, are not the subject of larceny, on account of the baseness of their nature, while at the same time we should be obliged to hold that hawks and falcons, when reclaimed, are the subject of larceny in respect of their generous nature and courage."

Dogs are generally held not the subject of larceny, being "base." *State v. Holder*, 81 N. C. 527; S. C., 31 Am. Rep. 517; *State v. Lymus*, 26 Ohio St. 400; S. C., 20 Am. Rep. 722; *Ward v. State*, 48 Ala. 161; S. C., 17 Am. Rep. 31. But otherwise

when they are taxed. *People v. Maloney*, 1 Park. 593; *Mayor v. Meigs*, 1 McA. 53; S. C., 29 Am. Rep. 578; *Ex parte Couper*, 3 Tex. Ct. App. 489; S. C., 30 Am. Rep. 152; *Harrington v. Miles*, 11 Kans. 480; S. C., 15 Am. Rep. 355.

It has always been held that any dead animal, whose carcass is fit for food, or use, is subject of larceny; but the query arises whether a dead and stuffed dog is subject of larceny in those States where a live dog is not. Probably the expense of the stuffing would bring it within the rule. So a dead dog may be better than a live lion.

REMOVAL OF CAUSE—PARTIES TO CONTROVERSY.

SUPREME COURT OF THE UNITED STATES, APRIL 19, 1881.

BARNEY V. LATHAM.

The second clause of the second section of the removal act of March 3, 1875, which declares that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district"—constructed, and held to mean that the entire suit is removed when one or more of the parties actually interested in such separable controversy files the proper petition and bond for removal. Such right is not affected by the fact that a defendant, who is a citizen of the same State, with one of the plaintiffs, may be a proper, but not an indispensable party, to the separable controversy between the citizens of different States. The right of removal, if claimed in the mode prescribed by the statute, depends upon the case disclosed by the pleadings, when the petition for removal is filed.

APPEAL from the Circuit Court of the United States for the district of Minnesota. The opinion states the case.

HARLAN, J. This case involves the construction of the second clause of the second section of the act of March 3, 1875, chapter 137, determining the jurisdiction of the Circuit Courts of the United States, and regulating the removal of causes from the State courts.

It was commenced by a complaint filed in one of the courts of the State of Minnesota. The plaintiffs are William H. Latham and Edward P. Latham, citizens, respectively, of Minnesota and Indiana. The defendants are Ashbel H. Barney, Jessie Hoyt, Alfred M. Hoyt, Samuel N. Hoyt, Wm. G. Fargo, N. C. Barney, Charles T. Barney, citizens of New York; Angus Smith, a citizen of Wisconsin; Benjamin P. Cheney, a citizen of Massachusetts; and the Winona and St. Peter Land Company, a corporation organized under the laws of Minnesota.

The complaint is very lengthy in its statement of the grounds upon which the suit proceeds, but the facts, so far as it is necessary to state them, are these:

The Territory and State of Minnesota received, under various acts of Congress, lands to aid in the construction of railroads within its limits. Acts of March 3, 1857, 11 Stat. 195; Act of March 3, 1865, 13 Stat. 520; Act of July 13, 1866, 14 Stat. 97. The benefit of the grants from the government was transferred by the State to the Winona and St. Peter Railroad Company, a corporation created under its own laws, with authority to construct a road from Winona westerly by way of St. Peter in that State.

Prior to October 31, 1867, the individual defendants already named (except N. C. Barney and Charles T. Barney), together with Charles F. Latham and Dan-

forth N. Barney (both of whom died before the commencement of this suit), had, under a contract between them and that company, constructed one hundred and five miles of the proposed road, whereby the latter became entitled to several hundred thousand acres of the lands granted by Congress to the State. On the day last named those persons entered into a written contract with the company, whereby the latter, among other things, agreed, in consideration of its indebtedness to the former, to sell and convey to them such lands as it should receive from the State by reason of the construction of the one hundred and five miles of road, excepting so much thereof as was necessary for tracks, right of way, depot grounds, and other purposes incidental to the operation of the railroad. Of the moneys advanced and used in construction, Charles F. Latham contributed one thirty-seventh, and to that extent, it is claimed, he was entitled, in equity, to an undivided one-thirty-seventh of the lands earned. The company, prior to October, 1870, received from the State conveyances of lands to the extent of 364,154 acres, which quantity was increased to 617,510 acres by a deed from the State, of date February 26, 1872; and on May 30, 1874, it received a further conveyance for more than 500,000 acres. Up to the end of the year 1869, the railroad company made numerous sales, on long time, and in small quantities for actual settlement. Charles F. Latham died in October, 1870, seized and possessed, it is contended, of the equitable title to the undivided one-thirty-seventh of the lands earned. He left nine heirs-at-law, among whom are the plaintiffs. The defendant Ashbel H. Barney, acting for his associates, had a settlement with those heirs in reference to the sales of lands, and procured releases from them, which are averred to have been fraudulent and void as to present plaintiffs. The facts averred in support of that charge need not be here detailed. They are fully set forth in the complaint. The surviving associates of Charles F. Latham, together with N. C. Barney and Charles F. Barney, heirs-at-law of D. N. Barney, deceased, without the knowledge and consent of plaintiffs, incorporated themselves under the general laws of the State of Minnesota, as the Winona and St. Peter Land Company, to which, by their direction, the railroad company conveyed, and by which were thereafter managed, all the lands remaining unsold. The plaintiffs claimed that the individual defendants owed them, as heirs of Charles F. Latham, the further sum of \$3,500, on account of sales of land made both prior to his death and subsequently thereto, up to the time when the title to the lands was conveyed to the land company. The individual defendants repudiated the claim of plaintiffs to any further sum on that account, and the land company refused to recognize the claim of plaintiffs to an interest in the unsold lands.

The specific relief asked for is:

1. That the individual defendants be required to account to plaintiffs for the amount of all moneys which came to their hands from the sales of land prior to the death of Charles F. Latham, and pay over to plaintiffs the sum of \$3,500, or such other sum as shall be found, on an accounting, to be due them as their share thereof; also such amounts as might be due them out of the sums received by Ashbel H. Barney, from purchasers subsequently to the death of Charles F. Latham.

2. That the plaintiffs be adjudged to be the owners of two-ninths of one-thirty-seventh part of all unpaid contracts and securities in the hands of the land commissioner of the company; that the land company be required to account with plaintiffs for all lands sold by it subsequently to the conveyance from the railroad company, and convey to them an undivided two-ninths of one-thirty-seventh of all the unsold lands.

The individual defendants answered and put in issue all the material allegations of the complaint.

The land company, in its answer, admits the conveyance by the railroad company to have been without any consideration by it paid; that the stock therein is all held by its co-defendants and the heirs or personal representatives of D. N. Barney; and that if the relief prayed for against the other defendants be granted, the company is liable to and should account to plaintiffs as asked in their complaint. It consented that the matters and facts established and proven as against its co-defendants may be considered and established as proven against it, and such judgment accordingly entered as might be equitable and proper.

Upon the petition, accompanied by a proper bond, filed by the individual defendants, the State court entered an order that it would proceed no further in the suit. But upon motion of plaintiffs, the Circuit Court remanded the suit to the State court, upon the ground that it was not removable under the act of Congress.

Is this suit removable upon the petition of the individual defendants, citizens of New York, Wisconsin, and Massachusetts? Does the fact that the land company, one of the defendants, is a corporation of Minnesota, of which State one of the plaintiffs is a citizen, prevent a removal of the suit to the Circuit Court of the United States?

The answer to these questions depends upon the construction which may be given to the second clause of the second section of the act of March 3, 1875.

We will be aided in our construction of that act by recalling as well the language as the settled interpretation of previous enactments upon the subject of removal of causes from State courts.

The act of September 24, 1789, chapter 20, gives the right of removal to the defendant in any suit, instituted by a citizen of the State in which the suit is brought against a citizen of another State. According to the uniform decisions of this court it applied only to cases in which all the plaintiffs were citizens of the State in which the suit was brought, and all the defendants citizens of other States. It made no distinction between a suit and the different controversies which might arise therein between the several parties; that is, Congress, when authorizing the removal of the suit, did not permit any controversy therein between particular parties to be carried into the Federal court, leaving the remaining controversies in the State court for its determination. If the whole suit could not be removed, no part of it could be taken from the State court.

Thus stood the law until the act of July 27, 1866, chapter 288, which provided (omitting such portions as have no bearing upon the present question) that "if any suit * * * in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * a citizen of the State in which the suit is brought is or shall be a defendant, and if the suit, so far as relates * * * to the defendant who is a citizen of a State other than that in which the suit is brought, is or has been instituted or prosecuted for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy, so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case * * the defendant who is a citizen of a State other than that in which the suit is brought, may, at any time before the trial or final hearing of the cause, file a petition for the removal of the cause as against him into the next Circuit Court of the United States, to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court * * * copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his there appearing; * * * and it shall be

thereupon the duty of the State court to accept the surety and proceed no further in the cause as against the defendant so applying for its removal, * * * and the said copies being entered as aforesaid in such court of the United States the cause shall there proceed in the same manner as if it had been brought there by original process against the defendant who shall have so filed a petition for its removal as above prescribed. * * And such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the State court, as against the other defendants, if he shall desire to do so." 14 Stat. 306.

This provision is explicit, and leaves no room to doubt what Congress intended to accomplish. It proceeds, plainly, upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such a case, although the citizen of another State, under the particular mode of pleading adopted by the plaintiff, is made a co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separate controversy, be required to remain in the State court, and surrender his constitutional right to invoke the jurisdiction of the Federal court; but that, at his election, at any time before the trial or final hearing, the cause, so far as it concerns him, might be removed into the Federal court, leaving the plaintiff, if he so desires, to proceed, in the State court, against the other defendant or defendants. When there were several defendants to that separate controversy, all of whom are citizens of States other than that in which the suit was brought, they could unite in claiming the removal of such controversy.

Next came the act of March 2, 1867, chapter 196, which allows the citizen of the State other than that in which the suit was brought, whether plaintiff or defendant, upon the proper affidavit of prejudice or local influence, filed before the final hearing or trial of the suit, to remove the suit into the Federal court. 14 Stat. 538. It was construed in *Case of Sewing Machine Companies*, 18 Wall. 553, as allowing a removal, upon such an affidavit, only where there is a common citizenship upon each side of the controversy raised by the suit; that is, all on one side being citizens of the State in which the suit is brought, while all on the other side are citizens of other States. In that case the plaintiff and one of the defendants were citizens of the State where the suit was brought, while two of the defendants were citizens of other States. It was ruled that whatever was the purpose of the act of 1866 as to the particular cases therein provided for, Congress did not intend, by the act of 1867, to give to parties who are citizens of States other than that in which the suit is brought, the right of removal, upon the ground of prejudice or local influence, when their co-defendants or co-plaintiffs, as the case might be, are citizens of the same State with some of the adverse parties. The court, there, evidently had in mind the case where the presence in the suit of all the parties, on the side seeking the removal, was essential that complete justice might be done, and not a suit in which there was a separable controversy, removable under the act of 1866.

We come now to the act of March 3, 1875, chapter 137, the second section of which is in these words: "That any suit of a civil nature at law or in equity now pending or hereafter brought in any State court, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500, * * * in which there is a controversy between citizens of different States, * * *

either party may remove said suit into the Circuit Court of the United States for the proper district; and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove said suit to the Circuit Court of the United States for the proper district." 18 Stat., pt. 3, 470.

We had occasion to consider the meaning of the first clause of this section in *Removal Cases*, 100 U. S. 468. Disregarding as immaterial the mere form of the pleadings, and placing the parties on opposite sides of the real matter in dispute, according to the facts, we found that the only controversy there was between citizens of Ohio and Pennsylvania on one side, and certain corporations created under the laws of Iowa on the other. And we held that if, in arranging the parties upon the respective sides of the real matter in dispute, all those on one side are citizens of different States from those on the other, the suit is removable, under the first clause of the second section of the act of 1875—those upon the side seeking a removal uniting in the petition therefor. Whether that suit was not also removable under the second clause of that section we reserved for consideration until it became necessary to construe that part of the statute. The present case imposes that duty upon us.

We may remark that with the policy of the act of 1875 we have nothing to do. Our duty is to give effect to the will of the law-making power when expressed within the limits of the Constitution.

We are of opinion that the intention of Congress, by the clause under consideration, was not only to preserve some of the substantial features or principles of the act of 1866, but to make radical changes in the law regulating the removal of causes from State courts. One difference between that act and the second clause of the second section of the act of 1875 is, that whereas the former accorded the right of removal to the defendants who were citizens of a State other than that one in which the suit was brought,—if between them and the plaintiff or plaintiffs there was, in the suit, a controversy finally determinable as between them, without the presence of their co-defendants, or any of them, citizens of the same State with plaintiffs,—the latter gave such right to any one or more of the plaintiffs or the defendants actually interested in such separate controversy. Both acts alike recognize the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies. But while the act of 1866, in express terms, authorized the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal,—leaving the remainder of the suit, at the election of the plaintiff, in the State court,—the act of 1875 provided, in that class of cases, for the removal of the entire suit.

That such was the intention of Congress is a proposition which seems too obvious to require enforcement by argument. While the act of 1866 expressly confines the removal to that part of the suit which specially relates to or concerns the defendant seeking the removal, there is nothing whatever in the act of 1875 justifying the conclusion that Congress intended to leave any part of a suit in the State court where the right of removal was given to, and was exercised by, any of the parties to a separate controversy therein. Much confusion and embarrassment, as well as increase in the cost of litigation, had been found to result from the provision in the former act permitting the separation of controversies arising in a suit, removing some to the Federal court, and leaving others in the State court for determination. It was often convenient to embrace in one suit all the controversies which

were so far connected by their circumstances as to make all who sue, or are sued, proper, though not indispensable parties. Rather than split up such a suit between courts of different jurisdictions, Congress determined that the removal of the separable controversy to which the judicial power of the United States was, by the Constitution, expressly extended, should operate to transfer the whole suit to the Federal court.

If the clause of the act of 1875, under consideration, is not to be thus construed, it is difficult to perceive what purpose there was in dropping those portions of the act of 1866 which, *ex industria*, limited the removal, in the class of cases therein provided for, to that controversy in the suit, which is distinctively between citizens of different States, and of which there could be a final determination without the presence of the other defendants as parties in the cause.

It remains only to inquire how far this construction of the act of 1875 controls the decision of the case now before us. The complaint, beyond question, discloses more than one controversy in the suit. There is a controversy between the plaintiffs and the Winona & St. Peter Land Company, to the full determination of which the other defendants are not, in any legal sense, indispensable parties, although, as stockholders in the company, they may have an interest in its ultimate disposition. Against the latter, as a corporation, a decree is asked requiring it to convey to the plaintiffs an undivided two-ninths of one-thirty-seventh of certain lands, and to account for the proceeds of the lands by it sold subsequently to the conveyance from the railroad company.

But the suit as distinctly presents another and entirely separate controversy, as to the right of the plaintiffs to a decree against the individual defendants for such sum as shall be found, upon an accounting, to be due from them upon sales prior to the conveyance from the railroad company. With that controversy the land company, as a corporation, has no necessary connection. It can be fully determined as between the parties actually interested in it without the presence of that company as a party in the cause. Had the present suit sought no other relief than such a decree, it could not be pretended that the corporation would have been a necessary or indispensable party to that issue. Such a controversy does not cease to be one wholly between the plaintiffs and those defendants because the former, for their own convenience, choose to embody in their complaint a distinct controversy between themselves and the land company. When the petition for removal was presented, there was in the suit, as framed by plaintiffs, a controversy wholly between citizens of different States, that is, between the plaintiffs, citizens respectively of Minnesota and Indiana, and the individual defendants, citizens of New York, Wisconsin and Massachusetts. And since the presence of the land company is not essential to its full determination, the defendants, citizens of New York, Wisconsin and Massachusetts, were entitled, by the express words of the statute, to have the suit removed to the Federal court.

It may be suggested that if the complaint has united causes of action, which under the settled rules of pleading need not or should not have been united in one suit, the removal ought not to carry into the Federal court any controversy except that which is wholly between citizens of different States, leaving for the determination of the State court the controversy between the plaintiffs and the land company. We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin and Massachusetts. Whether those defendants and the land company were not proper parties to the suit we do not now decide. We are not advised that any

such question was passed upon in the court below. It was not discussed here, and we are not disposed to conclude its determination by the court of original jurisdiction, when it is therein presented in proper form. A defendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff whom he will join as defendants. Consistently with established rules of pleading he may be governed often by considerations of mere convenience; and it may be that there was, or is, such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it—at least in such a sense as to protect the complaint against a demurrer upon the ground of multifariousness or misjoinder.

In *Oliver v. Pratt*, 3 How. 411, we said, "it was well observed by Lord Cottenham, in *Campbell v. Mackay*, 1 My. & Cr. 603, and the same doctrine was affirmed in this court in *Gaines, etc., v. Relf*, 2 How. 619, that it is impracticable to lay down any rule as to what constitutes multifariousness as an abstract proposition; that each case must depend upon its own circumstances; and must necessarily be left, where the authorities leave it, to the sound discretion of the court." We further said that the objection of multifariousness cannot, "as a matter of right, be taken by the parties, except by demurrer, or plea, or answer, and if not so taken, it is deemed to be waived;" that although the court may take the objection, it will not do so unless it deems such a course necessary or proper to assist in the due administration of justice. Story's Eq. Pl., § 530 to 540; *Shields v. Thomas*, 18 How. 259; *Fitch v. Creighton*, 24 id. 163. No objection was taken by the defendants in the court below to the complaint upon the ground of multifariousness, or misjoinder, and the plaintiffs should not be heard to make it for the purpose or with the effect of defeating the right of removal. They are not in any position to say that that right does not exist, because they have made those defendants who were not proper parties to the entire relief asked. The fault, if any, in pleading, was theirs. Under their mode of pleading, whether adopted with or without a purpose to affect the right of removal, accorded by the statute, the suit presents two separate controversies, one of which is wholly between individual citizens of different States, and can be fully determined without the presence of the other party defendant. The right of removal, if claimed, in the mode prescribed by the statute, depends upon the case disclosed by the pleadings as they stand when the petition for removal is filed. The State court ought not to disregard the petition upon the ground that in its opinion the plaintiffs, against whom a removal is sought, had united causes of action which should or might have been asserted in separate suits. Those are matters more purely for the determination of the trial court, that is, the Federal court, after the cause is there docketed. If that court should be of opinion that the suit is obnoxious to the objection of multifariousness, or misjoinder, and for that reason should require the pleadings to be reformed, both as to subject-matter and parties, according to the rules and practice which obtain in the courts of the United States, and if, when that is done, the cause does not really and substantially involve a dispute or controversy within the jurisdiction of that court, it can, under the fifth section of the act of 1875, dismiss the suit, or remand it to the State court as justice requires.

We are of opinion that upon the filing of the petition and bond by the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all the defendants may have been proper parties thereto, was removed to the Circuit Court of

the United States, and that the order remanding it to the State court was erroneous.

The judgment is reversed with directions to the court below to overrule the motion to remand, to restate the cause upon its docket, and proceed therein in conformity with the principles of this opinion.

Mr. Justice Swayne, while on the bench, participated in the decision of this case in conference, and concurs in this opinion. The judgment now ordered is directed to be entered as of 10th of January, 1881, when the cause was submitted in this court.

Miller and Field, JJ., and Waite, C. J., dissented.

STATUTE OF LIMITATIONS—PAYMENT PROCURED BY SURETY OUT OF FUNDS OF PRINCIPAL.

VERMONT SUPREME COURT.*

MCCONNELL v. MERRILL.

1. Where one of two joint contractors procures a payment to be made, it arrests the running of the statute.
2. Where the surety procures a payment to be made, though out of the funds of the principal, and promises to pay the balance, such, in effect, is payment by the surety himself.

J. H. Watson and J. K. Darling, for plaintiff.

Farnham & Chamberlain, for defendant.

ACTION upon a promissory note against Merrill and Worthley. Sufficient facts appear in the opinion.

ROYCE, J. The only question presented by the exceptions is whether the evidence offered of payment made and indorsed upon the note November 19, 1877, would prevent the running of the statute of limitations as against the defendant Worthley. The payment offered to be shown was made from the proceeds of the property of the defendant Merrill, and the legal effect of the payment, as affecting the defendant Worthley, would depend upon the circumstances under which it was made. The plaintiff offered to show that after this writ was brought and Worthley's property had been attached, he applied to the plaintiff to bring a second suit and have the property of Merrill attached and sold, and the proceeds applied upon the note, and verbally promised that he would pay all the expenses of the second suit, and of the sale of the property that might be attached in the same, have the proceeds indorsed upon the note, and would pay the balance that might remain due upon the note, saying that he wanted the suit brought for his own benefit; that plaintiff finally consented that the suit might be brought; that property of Merrill was attached and sold upon the writ, and the whole of the proceeds of the sale indorsed upon the note November 17, 1877, by Worthley's direction. The court ruled as matter of law that these facts, if proved, would not prevent the running of the statute as against the defendant Worthley; that they would not amount to such a payment by Worthley as would prevent the running of the statute.

This we hold was error. The payment was made by the procurement of Worthley and for his benefit, and was made under such circumstances that the creditor had a right to rely upon it as a payment made by him for the purpose of arresting the running of the statute. It is not necessary that the payment should be made from the funds of the party making it. Here the payment made was not a voluntary payment by Merrill, but was compulsory, and was procured to be made by Worthley, and the payment thus made, when accompanied by the promise of Worthley that he would pay the balance of the debt that might remain due, we

*To appear in 53 Vermont Reports.

think the creditor had a right to consider it as a payment made by Worthley. This view, in our judgment, harmonizes with the spirit and intent of the statute, while the adoption of the construction claimed by the defendant would operate as a fraud upon the plaintiff, and be in conflict with the theory of the law pertaining to the defenses of actions from lapse of time.

This case is clearly distinguishable from *Bailey v. Corliss*, 51 Vt. 366. There the payment relied upon was a voluntary one. The defendant acted as the agent of the party making it, and informed the creditor at the time he handed him the money, whose it was, and what disposition he was requested to make of it; so that there was nothing in the conduct of the defendant that had a tendency to mislead the creditor, or to induce the belief that he intended to assume any new responsibility, or to waive any legal right.

The judgment is reversed and cause remanded

CONSTITUTIONAL LAW—OFFENSE COMMITTED OUT OF STATE—DYING DECLARATIONS.

ALABAMA SUPREME COURT, 1890.

GREEN V. STATE OF ALABAMA.

A statute of Alabama provides thus "where the commission of an offense commenced here is consummated without the boundaries of this State, the offender is liable to punishment therefor, and the jurisdiction in such case is in the county in which the offense was committed." Held, that the statute is constitutional, and one committing an assault with intent to kill in Alabama, from which the assaulted person dies in Georgia, may be convicted of murder in Alabama.

The admission of dying declarations is not hearsay, and is not in contravention of the constitutional right of the accused to be confronted by the witnesses against him.

INDICTMENT for murder. Sufficient facts appear in the opinion.

SOMERVILLE, J. The principal question involved in this case is that of sovereign jurisdiction in the matter of homicide, where the fatal shot or blow occurs in one State, and death in another.

The appellant, Green, being under indictment, was convicted of the murder of Ephraim Thompson, and sentenced to the penitentiary for life. The evidence showed that the act of shooting, which caused the death, took place in Colbert county, Alabama, where the indictment was found and the trial occurred. Thompson died within a year and a day, in the State of Georgia.

It was formerly doubted, at common law, where a blow was inflicted in one county, and death by reason of the injury ensued in another, whether the offense could be prosecuted in either county. 1 East's P. C., 361; 1 Hale's P. C., 426. The better opinion seems to have been, however, that the jurisdiction attached in the venue where the blow was inflicted. Id. This difficulty, as noted by Mr. Starkie, was sought to be avoided by the legal device of carrying the dead body back into the county where the blow was struck; and the jury might there, he adds, inquire both of the stroke and death. 1 Stark., Cr. Pl. (2d ed.), 3, 4, and note.

It was to quiet doubts and obviate this difficulty, that the statutes of 2 and 3 Edw., VI, ch. 21, and the later one of 2 Geo., 2-21, were enacted by the British Parliament.

The example has been followed by some fourteen or fifteen States of the American Union, and by our own State, among others. These statutes, though different in phraseology, are similar in substance and purpose. Their manifest design seems to be to prevent a defeat

of justice in administering the law of felonious homicide and other crimes, by rendering the jurisdiction certain.

The Alabama statute, as comprised in section 4634 of the Code (1876), reads as follows:

When the commission of an offense, commenced here, is consummated without the boundaries of this State, the offender is liable to punishment therefor, and the jurisdiction in such case, unless otherwise provided by law, is in the county in which the offense was committed."

The validity of the statute is assailed, as being beyond the scope of legitimate legislative power.

It may be conceded that the laws of no nation can operate beyond its own territorial domain or jurisdiction, being local in their nature, and coextensive only with the limits of the State by which they are enacted. As said by Story, J., in the case of *The Apollon*, 9 Wheat. 362, "they must always be restricted, in construction, to places and persons upon whom the legislature have authority and jurisdiction." It is a safe principle, perhaps, to be asserted, that a crime committed in a foreign country, and in violation of the laws thereof, cannot by mere legislative fiction or construction, be constituted an offense in another country.

This reasoning does not apply, however, to a case where a crime is perpetrated partly in one State or country and partly in another, "provided," as suggested by Mr. Bishop, "that what is done in the country which takes jurisdiction, is a substantial act of wrong, and not merely some incidental thing, innocent in itself alone." This principle must be subject, perhaps, to reasonable limitation. 1 Bish. Cr. Law, sec. 116.

We can find no case where statutes of this character, when subjected to judicial interpretation, have been declared unconstitutional, especially where the question arose in a case of homicide, on an indictment in the jurisdiction where the fatal blow was given.

In *Commonwealth v. Parker*, 2 Pick. 549, the question was raised as to the repugnancy of a similar statute of Massachusetts to the constitution. Chief Justice Parker, discussing the power of the legislature to enact such a law, says: "Surely, an act of the legislature which removes all doubt as to place of trial, by designating the county in which the death happened, is, in no respect, a violation of the spirit, or even the letter of the constitution."

The sovereign rights of States to enact jurisdictional laws of this kind, though often questioned, has been uniformly sustained, and notably in the recent case of *Hunter v. State*, 40 N. J. Law, 495. Here the mortal blow was given within the jurisdiction of New Jersey, and the death of the victim occurred in Pennsylvania. It was held that the courts of the former State had cognizance of the crime by force of a statute not unlike our own. So in the States of Michigan and Missouri. *Tyler v. State*, 8 Mich. 321; *Stevenson v. State*, 10 Mo. 503.

If, then, we consider the fatal shooting of the deceased by the appellant as the commencement, merely, of the crime of murder charged in the indictment, and that the death of the injured party was the consummation of the offense in Georgia, the statute conferring jurisdiction on the Circuit Court of Colbert county, the alleged venue was valid and not obnoxious to legal objection.

We need not rest the decision of the question, however, on this particular construction of the statute.

Our view is, that the crime of murder consists in the infliction of a fatal wound, coupled with the requisite contemporaneous intent or design, which legally renders it felonious.

The subsequent death of the injured party is a result or sequence, rather than a constituent elemental part of the crime. This principle is correct, we think, at

least, so far as affects the question as to jurisdiction. As asserted by Patterson, J., *Res v. Hargrove*, 5 C. & P., 170, "the giving of the blow which caused the death constitutes the felony."

In *Riley v. State*, 9 Hump. 646, this question was learnedly discussed by the Supreme Court of Tennessee. It was here held, that the offense was committed at the place of the blow, though the death occurred elsewhere. The Tennessee statute required all criminal cases to be tried "in the county in which the offense may have been committed." Green, J., said: "That (the blow) alone is the act of the party. He committed this act, and the death is only a consequence. Therefore, when the legislature enacts that the party shall be tried in the county where the offense may have been committed, they intended where the active agency of the perpetrator was employed."

In the case of *State v. Carter*, 3 Dutch. 499, it was held by the Supreme Court of New Jersey, that an indictment charging a felonious assault and battery in New York, and that the injured party came into the State of New Jersey and there died from its effects, charged no crime against the latter State, but against the former.

The Supreme Court of California, in the case of *People v. Gill*, 6 Cal. 637, decided that the crime of murder is committed at the time when the fatal blow is struck. There, the statute had been changed between the time of the offense and the death of the victim, and provided that upon trials for crimes committed previous to the new enactment, the offender should be tried and punished under the laws in force at the time of the commission of the crime.

These views are in harmony with the conclusions reached by the most approved text-writers on criminal jurisprudence. 1 Bish. Cr. Law, §§ 112-116.

We conclude, then, that the crime charged against the prisoner was, irrespective of the statute, one against the peace and dignity of the State of Alabama, and properly within the jurisdiction of the courts of this Commonwealth.

The appellant, by his counsel, further objects, that *dying declarations* of Ephraim Thompson, as testified by Lucius Thompson, are inadmissible. It is urged that they are *hearsay* evidence, and their admission to the jury is repugnant to that clause of section 7, of the Declaration of Rights, which gives the accused the right, when on trial, to be "confronted by the witnesses against him." Const. (1875), art. I, § 7. It is not insisted that these declarations are otherwise objectionable as not coming within the usual rule. They were uttered under a clear conviction of impending death, and had reference only to circumstances immediately attending the crime, and relating to the identity of the perpetrator. 1 Greenl. Ev., 156; 1 Whart. Cr. Law, §§ 670-71; *Walker v. State*, 52 Ala. 182.

This is the first time the question raised has been presented for the decision of this court. For more than half a century dying declarations have been regarded as legal and admissible evidence, and the constitutionality of such testimony has gone unchallenged by the bar, and unquestioned by the judiciary of this State.

The fallacy of the objection consists in the supposition that the *deceased person* whose dying declarations are proved, is the *witness* in the case. The witness by whom the accused has a right to be confronted, is the one who testified to the truth of such declarations. Lucius Thompson, not the deceased, is the witness in the case.

No proposition is plainer than that this clause in the Declaration of Rights was not designed to proclaim any novel principle. It is but the repetition of an ancient and well-established principle of the common law. It was never construed in England, whence,

with our great system of common-law jurisprudence, it was derived, to exclude such evidence as was crystallized into that system, and recognized as a vital part of it, upon wise principles of policy, expediency or necessity.

The 6th article of the amendments to the Constitution of the United States is in the same language as the clause under discussion in our Declaration of Rights, and so it is, perhaps, embodied in the various Constitutions of all the American States.

We know of no case where this species of evidence has ever been held to contravene these several clauses of the various State Constitutions, or that of the Federal Government. The decisions, however, are numerous to the contrary. *Campbell v. State*, 11 Ga. 355; *Woodside v. State*, 2 How. (Miss.) 655; *Anthony v. State*, 1 Meigs (Tenn.) 265; *Robbins v. State*, 8 Ohio St. 131; *State v. Nash*, 7 Iowa, 347; 1 Whart. Cr. Law, § 669.

In view of the importance of this case, we have seen fit to consider the question raised somewhat at length, although the record fails to show that the charge asked by defendant was in writing, and it is not error for the court below to refuse charges requested unless they are in writing. Code (1876), § 3109; *Jackson v. State*, 55 Ala. 151.

We see no error in the rulings of the Circuit Court, and the case is hereby affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

MASTER AND SERVANT—FELLOW-SERVANT—FIRE-MAN ON LOCOMOTIVE AND TELEGRAPH OPERATOR—TIME OF RUNNING TRAINS CHANGED BY TELEGRAPH—DUTY OF MASTER TO SERVANT—JUDICIAL NOTICE.—The plaintiff's intestate, a locomotive fireman, in the employ of defendant upon his railroad, was killed by a collision upon such road caused by the negligence of the conductor on the colliding train, co-operating with that of a telegraph operator in defendant's employ at S., a station on such road. Defendant's trains were run by a general time-table, but the time of a train might, by the rules, be varied by a special order sent by telegraph from defendant's train-dispatcher to the conductor in charge of the train. The sending of such an order was a usual thing. The negligence in question had reference to a special order. *Held*, (1) that the courts may take judicial notice (*Agawam Bank v. Strever*, 18 N. Y. 502), that railroads are managed in the practical running of them by overlooking officers at distant places who use the telegraph to keep informed as to, and to direct the movement of trains. (2) That both the conductor and the operator were fellow-servants of intestate. The conductor was engaged in the particular work intestate was, viz., the running of trains; and the operator in a work connected therewith—that of giving information of the trains, and communicating orders to those controlling them for stopping or going on. The duty of the operator was not that of the master for the negligent performance of which the master was bound. The fact that the operator sometimes did business not connected with the running of trains would not alter his character as a fellow-servant, nor would the fact that he was appointed and discharged by one superior agent of defendant, and intestate by another. It cannot be claimed that the making of a variation from a time-table is an act of the master, in doing which, he must answer for the negligence of his subordinates. All that can be required from him by the public and by passengers is, that when he makes the variation he act under it with reasonable care and diligence. *Sears v. Eastern R. Co.*, 14 Allen, 433; *Gordon v. M. & L. R. Co.*, 52 N. H. 596. That is to say, due care and diligence in giving notices of the change, and in running the train upon the changed time. See *Rose v. Bost.*

ALB. R. CO., 58 N. Y. 217. In the case at bar minute regulations and directions in reference to charges were made by rules known to the employees, the obedience of which by employees would insure safety. In such case it is not the duty of the master, as a part of his contract with the employee, to see to it as with a personal sight, and trust that notice of a temporary and special interference with a general time-table will come to the intelligence of all those whom it is to govern in the running of approaching trains. In such case the reasonable rule is, that the master must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication according to prescribed general rules and regulations, derived from the best experience in such business, and if among these means are the services of a fellow servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering the service. It is a misconception of this case to hold that the order of the train dispatcher was a change in the rules of the road, it was in accordance with those rules. In such a case as this it is not the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table. His duty is done when he has beforehand provided rules minute, explicit and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to every one entitled to it. Judgment reversed and new trial ordered. *Slater v. Jewell*. Opinion by Fulger, C. J. Danforth and Finch, JJ., dissented. [Decided April 19, 1881.]

NEGLIGENCE — RESPONDEAT SUPERIOR — BOARD OF EDUCATION OF NEW YORK CITY NOT LIABLE TO SCHOOL PUPIL FOR INJURY BY NEGLIGENCE OF WORKMAN ON SCHOOL HOUSE. — Under the statute of New York the board of education of the city of New York is a corporation vested with the general control of the school buildings and property in that city "for the purposes of public education." The special care and safe-keeping of school premises in the respective wards is committed to the ward trustees, who formerly were elected by popular vote, and are now appointed by the board. These trustees are authorized to make repairs to the school buildings, subject to such general rules, regulations and limitations as the board may prescribe. The board has concurrent power to employ, under the superintendent of school buildings, workmen, and provide materials for the repair, etc., of school buildings, with the proviso that "this provision shall not be construed to compel the trustees of any ward to use or employ such workmen or materials for any purpose whatever." Workmen employed by the trustees of a ward to repair, or a janitor having care of the school building, also employed by them, negligently left the opening of a cellar uncovered, whereby plaintiff, a pupil attending the school, was injured. *Held*, that an action for the injury was not maintainable against the board of education. The workmen and the janitor were selected by the trustees and not by the board, and the trustees were not agents of the board, but were independent public officers. Though appointed by the board their general authority was derived not from it, but from the law. See *Maximilian's case*, 62 N. Y. 160. Judgment affirmed. *Donovan v. Board of Education of the City of New York*. (Opinion by Andrews, J.) [Decided April 19, 1881.]

RESPONDEAT SUPERIOR — SCHOOL OFFICERS NOT LIABLE FOR NEGLIGENCE OF WORKMEN EMPLOYED BY THEM UPON SCHOOL BUILDING. — By the regulations of the board of education of New York city the superintendent of school buildings is charged with the duty of examining as to the safety of all buildings, and con-

dition as to repairs, and to superintend all work done in connection therewith. In an action for the same injury as that in the last proceeding case, against the superintendent and trustees, it was not claimed that either of the defendants were personally negligent. *Held*, that the action would not lie. The trustees, acting within the scope of their authority, if they employed competent men and exercised reasonable supervision over the work, their whole duty was discharged. They were acting as gratuitous agents of the public, and it could not be expected that they should be personally present at all times during the progress of the work. See *Hall v. Smith*, 2 Bing. 168, where it is held that one acting gratuitously for the public, within his authority, is not answerable for the negligent execution of an order properly given. Also *Bailey v. Mayor of New York*, 8 Hill, 538. The defendants were acting as public officers, and in respect to the acts of persons necessarily employed by them the doctrine of *respondent superior* does not apply. Judgment affirmed. *Donovan v. McAlpin*. Opinion by Andrews, J. [Decided April 19, 1881.]

PRACTICE — ORDER BY COURT STAYING PROCEEDINGS ON ITS OWN JUDGMENT NOT APPEALABLE. — When an appellant will rely alone upon his appeal for a stay of all proceedings on the judgment appealed from, he must give the undertaking that the order requires. The Code, however, does not abridge the power that the Supreme Court has always had over its own judgments to correct mistakes in them; to vacate them for irregularity; to stay proceedings on them for such time as to the court seems proper. It is a discretion still resting in that court, and not to be reviewed in this court unless capriciously exercised and abused. Appeal dismissed. *Granger v. Craig*. Opinion per curiam. [Decided May 3, 1881.]

ON APPEAL TO GENERAL TERM — NEW TRIAL ON QUESTIONS OF FACT — NEGOTIABLE INSTRUMENT — HOLDER FOR VALUE — ACCOMMODATION NOTE. — (1) Plaintiff brought action upon a note which was a renewable one. Defendant set up that he had a defense upon the former notes, and as counter-claim, payments by mistake on the former notes. The jury found a verdict for the amount of defendant's counter-claim. Upon appeal from an order denying a new trial, and a judgment for defendant, the General Term modified the judgment by striking out the counter-claim, and allowed it to stand as a simple judgment for defendant. *Held*, that the rule applicable to cases tried before referees, or by the court without a jury (Code, § 1338), would not apply here, so as to reverse the order of the General Term and affirm the original judgment on the ground that no errors of law were committed, and the order does not state that it was based upon any question of fact. In cases tried by a jury there is no necessity that the order of reversal should state whether it was made on questions of law or fact. In this case, if the General Term had granted a new trial, its decision would not have been reviewable here. But the case was one for a new trial, as although the evidence of a counter-claim might be shadowy, the court cannot say that under the pleadings evidence sufficient to establish a counter-claim might not be produced. But it does not follow that because the General Term erred in awarding final judgment, its order should be wholly vacated and the original judgment restored. It was a proper case for a new trial, and the order should be modified accordingly. The judgment of the jury as to the note sued upon, having been approved by the General Term, cannot be reviewed here. (2) Defendant made his accommodation notes for the benefit of B., to enable B. to engage in an undertaking. B. indorsed and diverted the notes from their intended purpose, and paid with them an antecedent debt due

G. G. had no knowledge that the notes were accommodation, and when due, he, without knowledge of that fact, accepted from defendant in renewal defendant's own note, without the indorsement of S. Held, that G. was a holder for value of the new note, and could maintain an action on the same against defendant. Order modified. *Goodwin v. Conklin*. Opinion by Rapallo, J.

[Decided April 19, 1881.]

UNITED STATES CIRCUIT DISTRICT COURT ABSTRACT.*

CONSTITUTIONAL LAW — REGULATION OF COMMERCE BETWEEN STATES — CARRIER — MAY NOT EXCLUDE UNCHASTE FEMALE PASSENGER BEHAVING PROPERLY FROM LADIES' CAR.—(1) A State statute which abrogates all common-law remedies for the wrongful exclusion of a passenger from the cars of a railroad company is unconstitutional, so far as it relates to railroads running between two or more States, it being a regulation of inter-State commerce that the State has no power to make. *Hall v. De Cuir*, 95 U. S. 485. A carrier of passengers may rightfully exclude a passenger whose conduct at the time is annoying, or whose reputation for misbehavior is so notoriously bad that it furnishes a reasonable ground to believe that the person will be offensive to other passengers; but the social penalties of exclusion of unchaste women from hotels, theaters and other public places cannot be imported into the law of common carriers; nor can the carrier classify his passengers according to their respective reputations for chastity, whether they be men or women. A female passenger travelling alone is entitled to ride in the ladies' car, notwithstanding an alleged want of chastity, if her behavior is lady-like and proper, and she cannot be compelled to accept a seat in another car offensive to her because of smoking and bad ventilation; and this whether she be white or colored. See *Brown v. Memphis, etc., R. Co.*, 4 Fed. Rep. 37. U. S. Cir. Ct., W. D. Tennessee, October 30, 1880. *Brown v. Memphis & Charleston Railroad Co.* Opinion by Hammond, D. J.

PATENT — EQUIVALENT CONTRIVANCE OF DIFFERENT FORM, INFRINGEMENT.—Where a person procures a patent for the building of a machine, which produces certain results which are novel and useful, by means of certain mechanical contrivances and appliances, any person who attempts to accomplish the same results by mere substitutions, which are equivalents of the means employed by the first patentee, is an infringer. Any application of known mechanical powers which will produce that result, although different in form from the means employed by the original patentee, is a mechanical substitute and equivalent of the same. *Foster v. Moore*, 1 Curt. 279; *Curtis v. Baker*, 4 Fish. Pat. Cas. 404; *Morgan v. Seaward*, Web. Pat. Cas. 170; *Curtis Pat.* (4th ed.), § 311. U. S. Cir. Ct., Delaware, January 29, 1881. *Wilt v. Grter.* Opinion by Bradford, D. J.

CORPORATION — OF ONE STATE ADOPTED BY ANOTHER STATE IS CORPORATION OF LATTER — CITIZENSHIP OF INCORPORATORS — JURISDICTION.—It is always a question of legislative intent whether the Legislature of a State has adopted as its own a corporation of another State, or merely licensed it to do business in the State. If, however, the effect of the legislation be to adopt the corporation, it becomes, for the purposes of jurisdiction, a corporation created by the State adopting it. *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 444; *Ex parte Schollenberger*, 96 id. 360; *Railroad v.*

Vance, id. 450; *Williams v. Railroad Co.*, 3 Dill. 287; *Wilson Co. v. Hunter*, 11 Chi. L. N. 267. The incorporators of a Kentucky corporation are conclusively presumed to be citizens of that State. Held, therefore, that a suit commenced in the State court by a citizen of Kentucky against a corporation chartered as a single consolidated company by the several States, including Kentucky, through which it operates a railroad, cannot be removed to the Federal court, as a controversy between citizens of different States. *Railroad Co. v. Letson*, 2 How. 497; *Marshall v. Railroad Co.*, 16 How. 314; *Bank of Augusta v. Earle*, 13 Pet. 519; *Dodge v. Woolsey*, 18 How. 331; *Whitney v. Baltimore*, 1 Hughes, 90 U. S. Cir. Ct., Kentucky, July, 1880. *Uphoff v. Chicago, St. Louis and New Orleans Railroad Co.* Opinion by Hammond, D. J.

CONNECTICUT SUPREME COURT OF ERRORS ABSTRACT.*

CORPORATION — LIABILITY OF CORPORATOR — CHANGE IN CORPORATE ORGANIZATION.—The directors of a Massachusetts manufacturing corporation, who were also its principal stockholders, decided to organize the company as a joint-stock corporation under the laws of Connecticut, and locate its office in this State, but to carry on its manufacturing business in the State of Massachusetts as before. The new corporation was organized, and the property of the old corporation transferred to it. Afterward the new corporation failed, and one of its creditors, claiming that the new company had not been legally organized, and that its members were liable as partners, brought suit against M., with the other members, as such partners. M. had been a stockholder in the old company, and knew that a reorganization under the laws of this State was being considered by the directors, but he had nothing to do with the measures taken for the purpose and did not sign the articles of association, his share of the stock being subscribed for by one of the directors simply as "attorney." Soon after the reorganization he was informed by the secretary of the fact, and that if he would send in his certificate of stock in the old company he would send him a certificate for the same amount in the new, which exchange was soon after made. M. did not keep himself informed with regard to the operations of the company, and had no knowledge of the particular debt on which the suit was brought. The organization of the new company had been made in entire good faith and with intent to make it a legal corporation, and M. supposed it to be so. The plaintiff had dealt with the company as a corporation and had not trusted the credit of M. in the matter. Held, that even if the new company had not become a legal corporation, M. had not made himself liable as a partner. *Fay v. Noble*, 7 Cush. 188; *Trowbridge v. Scudder*, 11 id. 83; *Blanchard v. Knall*, 44 Cal. 440; *Central City Savings Bk. v. Walker*, 66 N. Y. 424; *Haynes v. Brown*, 36 N. H. 545. *Stafford Bank v. Palmer*. Opinion by Granger, J.

BANKRUPTCY — DEBT DUE FOR MONEYS BORROWED FROM PUBLIC SCHOOL FUND NOT DISCHARGED.—The State, in holding and administering the school fund, is acting in its sovereign capacity. A discharge in bankruptcy of a person indebted to the school fund as a borrower does not affect the State as a creditor. It is a general rule in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication. 1 Kent's Com. 460. See *United States v. Herron*, 20 Wall. 251. *State of Connecticut v. Shelton*. Opinion by Granger, J.

LANDLORD AND TENANT—FORFEITURE, WAIVER OF, BY DEMANDING RENT—HEIR NOT LIABLE FOR COVENANT OF ANCESTOR.—(1) A demand for rent accruing after a default, known to the lessor, which might work a forfeiture, is a waiver of the right to enter for the default. Under a lease for a term of years the rent was payable quarterly on the first days of April, July, October and January, and if not paid within thirty days after due the lessor was to have the right to enter and terminate the lease. The quarter's rent due April 1st was not paid, the lessee claiming the right to set off against it a larger sum paid for repairs. On the 26th of July the lessor demanded the rent due July 1st, offering to allow the lessee the April rent in full of the repairs; but the lessee refused to make this settlement, and the lessor thereupon refused to allow any thing for the repairs and declared that the lease was forfeited, and that he should take measures to eject the lessee. *Held*, that as the demand was for the July rent, as to which the thirty days had not expired, the lessor had waived his right to enter for the non-payment of the April rent. And to take advantage of the non-payment of the April rent the lessor was bound to demand it on the premises on the last of the thirty days allowed for its payment, and upon the lessee's neglect to pay, to enter for the default, or in some other positive manner assert the forfeiture. *Pennant's Case*, 3 Coke, 64; *Doe v. Rees*, 4 Bing. N. C. 381; *Roe v. Harrison*, 2 T. R. 425; *Goodright v. Cordwenter*, 6 id. 219; *Garnhart v. Finney*, 40 Mo. 449; *Gomber v. Hackett*, 6 Wis. 323; *Collins v. Cauty*, 6 Cush. 415; *Bleeker v. Smith*, 13 Wend. 530; *Taylor's Landl. & T.* (7th ed.), §§ 497, 498; *Jackson v. Sheldon*, 5 Cow. 448; *Wilder v. Ewbank*, 21 Wend. 587; *Conway v. Starkweather*, 1 Denio, 113; *Smith v. Saratoga County Fire Ins. Co.*, 3 Hill, 508; *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; *Croft v. Lumley*, 6 H. of L. Cas. 705; *Clough v. Smith*, 13 Wend. 530; *Taylor's Landl. & T.* (7th ed.), § 497; *Ward v. Day*, 4 Best & Sm. 337; *Green's Case*, Cro. Eliz. 3; *Doe v. Birch*, 1 M. & W. 402; *Bowman v. Foot*, 29 Conn. 333. A provision in a lease for a forfeiture will be so construed as to prevent rather than aid the forfeiture, where the language admits of such a construction. (2) The lessee had covenanted for himself and his heirs to pay the rent during the term. He died, and his son and heir entered into possession and for several months continued to pay the rent. *Held*, that this was not enough to make the heir liable upon the covenant of the ancestor. A lessor cannot maintain a suit against a sub-tenant upon the lessee's covenant to pay rent. *Taylor's Landl. & T.* (7th ed.), § 448; *Holford v. Hatch*, 1 Doug. 183; *Quackenboss v. Clarke*, 12 Wend. 555; *Harvey v. McGrow*, 44 Tex. 412. *Camp v. Scott*. Opinion by Loomis, J.

WILL—WITNESS TO, NEED NOT KNOW CONTENTS, OR IF PUBLICATION NOT REQUIRED BY STATUTE, THAT IT IS A WILL.—Under the Connecticut statute, which requires a will to be "in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other," it is not necessary that a witness to a will should know that it is a will. The object of his attestation is that he may be able to testify that the testator put his name upon the identical piece of paper upon which he puts his own. The English statute, at one time, required wills to be attested and subscribed in the presence of the deviser by three or four witnesses. In *Wyndham v. Chetwynd*, 1 Burr. 421, Lord Mansfield said: "Suppose the witnesses honest, how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; if he acknowledges his hand it is sufficient; they need not know that it is a will." In *Bond v. Seawell*, 3 Burr. 1775, he said: "It is not necessary that the testator should declare the instru-

ment he executed to be his will." In *Wright v. Wright*, 7 Bing. 457, it is held that "a will of lands subscribed by three witnesses in the presence and at the request of the testator is sufficiently attested although none of the witnesses saw the testator's signature, and only one of them knew what the paper was." To the same effect is *White v. Trustees of British Museum*, 6 Bing. 310. Perhaps the principle attained to its highest development in *Trimmer v. Jackson*, 4 Burn's Eccl. Law (3d ed.), 102, in which the attestation was held sufficient, although the deviser, not content with withholding the truth from the witnesses concerning the contents or nature of the instrument executed, intentionally misled them by stating it to be a deed. A similar statute has received the same interpretation in Massachusetts. *Dewey v. Dewey*, 1 Metc. 349; *Hogan v. Grosvenor*, 10 id. 54; *Osborn v. Cook*, 11 Cush. 532; *Nickerson v. Buck*, 12 id. 332; *Tilden v. Tilden*, 13 Gray, 110. And the same principle has been recognized in other States where the statutory requirement is attestation only, with no suggestion as to publication. *Canada's Appeal*. Opinion by Pardee, J.

MAINE SUPREME JUDICIAL COURT ABSTRACT.*

CONSTITUTIONAL LAW—STATUTE GIVING PRISON OFFICER POWER TO EXTEND TIME OF PUNISHMENT VOID—LIABILITY OF OFFICER FOR ACTS UNDER VOID LAW.—(1) Section 40 of chapter 140 of Revised Statutes of Maine, which provides that no convict shall be discharged from the State prison until he has remained the full term for which he was sentenced, excluding the time he may have been in solitary confinement for any violation of the rules and regulations of the prison, is in derogation of the constitutional provision that a man shall not be deprived of his liberty without due process of law, and is for that reason unconstitutional and void. The common law requires that the punishment of persons convicted of crime shall be definite and certain. *Præmunire* was an exception, as for that offense a convict could be imprisoned during the pleasure of the King. The sentence must inform the convict as to the kind and duration of his imprisonment. *Washburn v. Belknap*, 3 Conn. 502; *Republic v. De Longchamps*, 1 Dall. 120; *Yates v. The People*, 6 Johns. 337; *Rex v. Hull*, 3 Burr. 1637. If this statute is constitutional, then there can be no definite sentences awarded. The will of the warden would in effect control the maximum duration. It is plainly to be seen, that in this way, the warden could extend a punishment indefinitely. In *Commonwealth v. Holloway*, 42 Penn. St. 446, it was held that a law like this one was unconstitutional "as interfering with the judgments of the judiciary." See, also, *State v. Gurney*, 37 Me. 156; *Lord v. State*, id. 177; *Jones v. Robbins*, 8 Gray, 320; *Portland v. Bangor*, 65 Me. 120. (2) In an action by a convict against the warden of the prison for such over-detention, actual (but not punitive) damages are recoverable, notwithstanding the statute has never before been judicially declared to be unconstitutional. *Gross v. Rice*. Opinion by Peters, J. [Decided June 15, 1880.]

DEFINITION—SCHOOL-HOUSE PUBLIC PLACE.—Where the officer, in his return, states that a "school-house," on which he posted a notice of sale, is a public place, it is sufficient evidence of that fact. A shoemaker's shop was held to be a public place in *Tidd v. Smith*, 3 N. H. 179. So a school-house, mill and mechanic's shop may be properly regarded as public places, as was held in *Russell v. Dyer*, 40 id. 173. *Wilson v. Bucknam*. Opinion by Appleton, C. J. [Decided Dec. 27, 1880.]

* To appear in 71 Maine Reports.

MICHIGAN SUPREME COURT ABSTRACT.

APRIL 13, 1901.

DURESS—OF GOODS—REFUSAL TO PAY DEBT DUE ONE PECUNIARILY EMBARRASSED, NOT.—Defendants were indebted to plaintiff, but refused to pay unless plaintiff would accept less than the amount due, in full payment, defendants knowing that plaintiff was financially embarrassed and must have the money to save him from ruin. Plaintiff accepted the sum tendered as payment in full. *Held*, not a duress of goods invalidating the consent of plaintiff. *Distinguishing* *Vyne v. Glenn*, 41 Mich. 112. The leading case involving duress of goods is *Astley v. Reynolds*, 2 Strange, 515. The plaintiff had pledged goods for £20, and when he offered to redeem them, the pawnbroker refused to surrender them unless he was paid £10 for interest. The plaintiff submitted to the exaction, but was held entitled to recover back all that had been unlawfully demanded and taken. "This," say the court, "is a payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business; where the rule *volenti non fit injuria* is applied, it must be when the party had his freedom of exercising his will, which this man had not; we must take it he paid the money relying on his legal remedy to get it back again." The principle of this case was approved in *Smith v. Bromley*, Doug. 685, and also in *Ashmore v. Wainwright*, 2 Q. B. 337. The latter was a suit to recover back excessive charges paid to common carriers who refused, until payment was made, to deliver the goods for the carriage of which the charges were made. There has never been any doubt but recovery could be had under such circumstances. *Harmony v. Bingham*, 12 N. Y. 99. The case is like it of one having securities in his hands which he refuses to surrender until illegal commissions are paid. *Scholey v. Mumford*, 60 N. Y. 498. So if illegal tolls are demanded, for passing a raft of lumber, and the owner pays them to liberate his raft, he may recover back what he pays. *Chase v. Dwinah*, 7 Me. 134. Other cases in support of the same principle are *Shaw v. Woodcock*, 7 B. & C. 73; *Nelson v. Sudarth*, 1 H. & Muir. 350; *White v. Heylman*, 34 Penn. St. 142; *Snapparas v. Jennings*, 1 Bay, 470; *Collins v. Westbury*, 2 id. 211; *Crawford v. Cato*, 22 Ga. 594. So one may recover back money which he pays to release his goods from an attachment which is sued out with knowledge on the part of the plaintiff that he has no cause of action. *Chandler v. Sanger*, 114 Mass. 361. See *Spalds v. Barrett*, 57 Ill. 289. Nor is the principle confined to payments made to recover goods; it applies equally well when money is extorted as a condition to the exercise by the party of any other legal right; for example when a corporation refuses to suffer a lawful transfer of stock till the exaction is submitted to (*Bates v. Insurance Co.*, 3 Johns. Cas. 232); or a creditor withholds his certificate from a bankrupt. *Smith v. Bromley*, Doug. 685. And the mere threat to employ colorable legal authority to compel payment of an unfounded claim is such duress as will support an action to recover back what it paid under it. *Beckwith v. Frisbie*, 32 Vt. 559; *Adams v. Reeves*, 68 N. C. 134; *Briggs v. Lewiston*, 20 Me. 472; *Grim v. School District*, 57 Penn. St. 433; *First Nat. Bank v. Watkins*, 21 Mich. 463. But where the party threatens nothing which he has not a legal right to perform there is no duress. *Skeate v. Beale*, 11 Ad. & El. 983; *Preston v. Boston*, 12 Pick. 14. When therefore a judgment creditor threatens to levy his execution on the debtor's goods, and under fear of the levy the debtor executes and delivers a note for the amount, with sureties, the note cannot be avoided for duress. *Wilcox v. Howland*, 23 Pick. 167. See, also, *Atlee v. Bachhouse*, 3 M. & W. 633; *Hall v. Schultz*, 4 Johns. 240; *Sullivan v.*

United States, 101 U. S. 405. *Hackley v. Headley*. Opinion by Cooley, J.

MORTGAGE—EVIDENCE REQUIRED TO SHOW APPARENT DEED MORTGAGE.—The natural and *prima facie* effect of a conveyance expressing no condition, and regularly executed in the presence of attesting witnesses and duly acknowledged as an absolute deed, ought not to be controlled and qualified by oral evidence, and brought down to the effect due to a mere security, on a slight showing. The great current of authority is distinct in holding that the party thus seeking to modify the operation of the instrument and prove himself entitled against the terms of his own deed to an equity of redemption, is not only bound to make out that the transaction was in truth and justice nothing more than the giving of security, but is required to do so by a force of evidence sufficient to command the unhesitating assent of every reasonable mind. Unless the testimony, say the Supreme Court of the United States, is entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. *Howland v. Blake*, 97 U. S. 624; *Haines v. Thompson*, 70 Penn. St. 434. And many cases use much stronger language. *Bingham v. Thompson*, 4 Nev. 224; *Zuver v. Lyons*, 40 Iowa, 510; *Schade v. Bassinger*, 3 Neb. 140; *Stall v. City of Cincinnati*, 16 Ohio St. 109; *Haynes v. Swann*, 6 Meisk. 500; *Campbell v. Dearborn*, 109 Mass. 130. *Tilden v. Streeter*. Opinion by Graves, J.

MARYLAND COURT OF APPEALS ABSTRACT.*

DEED—CERTIFICATE OF ACKNOWLEDGMENT NOT CONCLUSIVE BY ONE NON COMPOS—NOT VOID BUT VOIDABLE, AND EJECTMENT WILL NOT LIE TO SET ASIDE.—The certificate of acknowledgment is not conclusive of the fact that a deed was actually signed and sealed by the grantor; the execution of a deed consists of acts of the party making the deed and who is affected by it. *Carrie v. Farmers & Merch. Nat. Bk.*, 33 Md. 245. A deed of bargain and sale of real estate for a valuable consideration, duly acknowledged and recorded, is voidable only, and not absolutely void, by reason of the fact that the grantor was non compos mentis at the time it was executed. *Key v. Davis*, 1 Md. 32; *Chew v. Bank of Baltimore*, 14 id. 209; *Walt v. Maxwell*, 5 Pick. 217; *Jackson v. Gunner*, 2 Cow. 552; *Breckinridge v. Ormsby*, 1 J. J. Marsh. 236; *Thompson v. Leach*, Carth. 435. Such a deed may be avoided by the heirs-at-law of the grantor; but they cannot do this at law in an action of ejectment, where possession under it has been held for a long period, and permanent improvements have been made upon the land by a bona fide possessor; they must assail it by a direct proceeding in equity, where the equities of the parties can be properly adjusted. See *Jones v. Jones*, 4 Gill. 87; *McLaughlin v. Barnum*, 31 Md. 453. *Evans v. Horan*. Opinion by Miller, J.

DIVORCE—EVIDENCE OF ADULTERY—DELAY AND DEED OF SEPARATION NOT BAR—AGREEMENT BY HUSBAND TO SUPPORT ENFORCEABLE AFTER DIVORCE.—(1) Direct proof of adultery, that is, evidence of eye-witnesses, is not required, for such is the nature of the offense, and the secret and clandestine manner in which it is committed, that such proof is in most cases unattainable; yet where it is sought to be inferred from circumstances, they must lead to the conclusion of guilt by fair and necessary inference. *Loveden v. Loveden*, 2 Hagg. Con. 24. (2) A husband discovered that his wife was guilty of adultery and refused to live with her as his wife any longer. A deed of separation

* Appearing in 55 Maryland Reports.

was made, in which he covenanted with her father to pay a specific sum for her support, the father agreeing to save him harmless from her debts. Three years and a half thereafter he filed a bill for divorce. *Held*, that neither the lapse of time, nor the deed of separation, nor both, constituted a bar to a divorce. *Ferres v. Ferres*, 1 Hag. Con. 130; *D' Aquilar v. D' Aquilar*, 1 Hag. Eccl. 773; *Cood v. Cood*, 1 Curteis Ec. 755; *J. G. v. H. G.*, 33 Md. 401; *Matthews v. Matthews*, 1 Sw. & Tr. 161. (3) *Held*, further, that a decree of divorce a vincula matrimonii, in favor of the husband would not avoid the agreement in the deed of separation, to pay for the wife's support, but such agreement could be enforced against him. *Elworthy v. Bird*, 2 Sim. & St. 372; *Seeling v. Crawley*, 2 Vern. 286; *Stevens v. Olive*, 2 B. C. C. 90; *Seagrave v. Seagrave*, 13 Ves. 439; *Charlesworth v. Holt*, 29 L. T. Rep. (N. S.) 647. *Kremelberg v. Kremelberg*. Opinion by Robinson, J.

FALSE REPRESENTATION—WHAT NECESSARY TO SUSTAIN ACTION FOR.—Whenever one person makes a false representation, knowing it to be false, with intent to induce another to enter into a contract, which, but for such representation, he would not have entered into, and he is thereby damaged, a case of fraud is made out, and an action will lie. The representation to be material must be in respect of an ascertainable fact, as distinguishable from a mere matter of opinion. A representation which merely amounts to a statement of opinion, judgment, or expectation, or is vague and indefinite in its nature and terms, or is merely a loose conjecture or exaggerated statement, is not sufficient to support an action. And for the reason that such indefinite representations ought to put the person to whom they are made upon the inquiry, and if he chooses to put faith in such statements, and abstained from inquiry, he has no reason to complain. *Jennings v. Broughton*, 5 De M. & G. 134; *Higgins v. Samels*, 2 John. & Hem. 464; *Leyland v. Illingworth*, 2 De F. & J. 248; *Haycraft v. Crease*, 2 East, 92; *Drysdale v. Mace*, 5 De M. & G. 107; *Denton v. Macneal*, L. R., 2 Eq. 352; *Kisch v. Central R. Co. of Venezuela*, 3 De J. & S. 122. *Buschman v. Codd*. Opinion by Robinson, J.

PENNSYLVANIA SUPREME COURT ABSTRACT.

MARRIED WOMAN—WILL BY, BEFORE MARRIAGE—WHEN EQUITY WILL ENFORCE PROVISIONS OF.—A single woman intending to marry, on the day before her marriage made her will. Her intended husband had knowledge of her act and consented to and approved of it. About that time he made a verbal contract with her by which she was, after marriage, to have the power to "dispose of her fortune by will or otherwise," in any way she pleased. By the statute of Pennsylvania "a will executed by a single woman shall be deemed revoked by her subsequent marriage." This law was not known to her, and not adverted to by her counsel, called in by her to give his advice and prepare the instrument, and it was not intended by her that her marriage should have the effect of invalidating the will, and the intended husband knew that the purpose of the will was to carry out the agreement made between him and her. *Held*, that the husband would not be allowed, on her decease, to take advantage of the provisions of the statute, but that equity would interfere to carry out the intention of the parties to the antenuptial contract as contained in the provisions of the will. In such a case, to prevent injustice, two principles of equity are applied. One of these principles is, that whatever a chancellor on the facts of a case would have decreed to be done, the courts will consider as having been actually done. Another is, that whenever a person has the legal right to dispose of property, and means to do so, the form of the in-

strument adopted for the purpose, if at law ineffectual, will be disregarded, and it will be reformed so as to be made effectual. *Lant's Appeal*. Opinion by Sharwood, C. J.
[Decided Oct. 4, 1880.]

PAYMENT—WHEN STRANGER PAYS DEBT HE BECOMES PURCHASER.—When one who is a stranger to the obligation, pays a debt in whole or in part, in the absence of evidence to the contrary, he becomes by implication a purchaser of the debt to the extent of his payment. In *Lithcap v. Wilt*, 4 Phila. Rep. 64, it was held that "the essential difference between the purchase of a debt and the payment of it, depends upon the intention of the parties at the time; but the payment by a stranger to the obligation of the debt, or by one whose liability was secondary, is *prima facie* a purchase." In *Wilson v. Murphy*, 1 Phila. 106, the court say "there is no doubt that a mortgage may be kept alive even after payment in full, if such was the intention of the parties, and even though there be no actual assignment to a trustee, equity will consider that as one which was agreed to be done, and not suffer the trust to fail for want of a trustee." In *McCall v. Senex*, 9 S. & R. 304, *Tilghman, C. J.*, says: "An assignment of the debt carries with it the benefit of the mortgage, although the mortgage be not specifically assigned. From the moment the debt is assigned the mortgage becomes the trustee of the assignee." See, also, *Wistar's Lessee v. Monlin*, 2 Barr. 969. In *Johnson v. Hart*, 3 Johns. Cas. 329, *Kent, J.*, said: "When the note, to secure which the mortgage was given, was negotiated, the interest in the mortgage, which was given for no other purpose than to secure that note, passed, of course. It required no writing, no assignment on the back of the mortgage." * * * "Whoever was owner of the debt was likewise owner of the security." In *Rickert v. Madeira*, 1 Rawle, 328, *Rodgers, J.*, says: "Whatever will give the money secured by the mortgage will carry the mortgaged premises along with it. The forgiving the debt, although by parol, will draw the land after it as a consequence." It has been many times decided that a mortgage may be transferred by parol, and that when given to secure notes payable to bearer, the holder is the equitable owner of the mortgage. Whoever pays the debt for the mortgagor is the equitable owner of the mortgage. See 1 *Hillard on Mort.* 243, 253. *Brice's Appeal*. Opinion by Green, J.
[Decided Oct. 4, 1880.]

STATUTE OF FRAUDS—CONTRACT FOR SALE OF STANDING TIMBER—WHEN EQUITY WILL ENFORCE VERBAL AGREEMENTS AS TO LAND.—A contract for standing timber on a tract of land, to be taken off at the discretion of the purchaser as to time, is an interest in land, within the meaning of the statute of frauds, the transmission of which must be in writing. *Patterson's Appeal*, 11 P. F. Smith, 294. In that case *Thompson, C. J.*, says, the announcement that the timber growing on a man's land might be held by a contract in parol while the soil itself can only be legally transmitted by a written instrument, would strike even the unprofessional mind with surprise. The rigid requirements of the statute have, however, been so far relaxed by courts of equity that effect is sometimes given to verbal agreements for an estate or interest in land; but it is only in cases where the contract, in all its essential parts, is established by clear and unequivocal proof, and where it has been so far executed that it would be unjust and inequitable to rescind it; and this is done in order that the statute itself may not become an instrument of fraud. *Hazlett v. Hazlett*, 6 Watts, 464; *Woods v. Farmers*, 10 id. 195; *Moore v. Small*, 7 Harris, 461; *Hart v. Carroll*, 4 Norris, 508. To take a case of parol sale out of the statute, the terms of the contract, the land which forms its subject-matter, the

nature and extent of the interest to be acquired therein, the consideration to be paid, etc., must all be fully and satisfactorily shown. Exclusive possession, taken and kept up in pursuance of the contract, is an indispensable ingredient in every case. Hence it is that there cannot be a valid parol sale of land by one tenant in common to his co-tenant in possession. *Spencer and Newbold's Appeal*, 30 P. F. Smith, 317. *Bowers v. Bowers*. Opinion by Sterrett, J. [Decided Nov. 1, 1880.]

RECENT ENGLISH DECISIONS.

DEFINITION—MEANING OF BEER-HOUSE.—Where a word contained in a written instrument has an ordinary popular signification, evidence will not be admitted to show that it has a special technical signification, until the court is satisfied that the word was not used in the instrument in its ordinary, popular signification. The word "beer-house," according to the ordinary signification, is a house where beer is sold and consumed on the premises. *Held*, therefore, that a covenant not to use certain premises as "a public house, tavern, or beer-house," was not broken by selling on the premises, under a grocer's off license, beer to be consumed off the premises. See *Bishop of St. Albans v. Battersby*, 38 L. T. Rep. (N. S.) 685; *London, etc., Land Co. v. Farnett*, W. N. 1881, p. 11; *London & N. W. R. Co. v. Garnett*, 21 L. T. Rep. (N. S.) 352; *Chano. Div.*, Feb. 23, 1881. *Holt & Co. v. Collyer*. Opinion by Fry, J., 44 L. T. Rep. (N. S.) 214.

INTERNATIONAL LAW—JURISDICTION OVER FOREIGN SOVEREIGN.—A foreign sovereign or State is exempted by international law, founded upon the comity of nations, from the jurisdiction of the tribunals of this country, and therefore an action is not maintainable in our courts against a foreign sovereign or estate. The only exceptions to this rule are: 1. Where a foreign sovereign or State has waived the privilege he possesses, and has come into the municipal courts of this country to obtain relief, in which case the defendant may assert any claim he has by way of cross-action or counterclaim to the original action in order that justice may be done. 2. Where there are moneys in the hands of third parties within the jurisdiction of the English courts, to which a claim is set up by a foreign sovereign, notice of an action against the third parties in relation to those moneys may be given to the foreign sovereign, that he may have an opportunity of putting forward his claim. *Ct. of App.*, Nov. 17, 1880. *Strousberg v. Republic of Costa Rica*. Opinion by Jessel, M. R., *James & Lush L. JJ.*, 44 L. T. Rep. (N. S.) 199.

SLANDER—PRIVILEGE.—To an action for slander the defendant stated in defense that the words were spoken upon his examination on oath before a select committee of the House of Commons, which had been appointed by the House to inquire and report upon certain circumstances connected with the plaintiff, power being given to the committee to send for persons, papers and records. *Held*, on demurrer, that this was a good answer to the action. *Seaman v. Netherliff*, L. R., 2 C. P. Div. 53; *Dawkins v. Lord Rokeby*, L. R., 7 H. L. 744. *Q. B. Div.*, Feb. 25, 1881. *Goffen v. Donnelly*. Opinions by Field and Manisty, JJ., 44 L. T. Rep. (N. S.) 141.

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT TAKING DEBT OUT OF.—T. S. devised land to his wife for life, remainder to his two sons, T. and J., as tenants in common in fee. The widow died in 1833. T. then entered into possession of the whole, and received all the rents and profits till 1864. From that time till 1877 he regularly paid one-half the rents to J. or his mortgagee. In 1877 T. died, his son, who succeeded him,

continued this payment till 1878, then refused to do so any longer. The devisee of J. and the mortgagee brought an action for partition. The defendant pleaded the statute of limitations as having acquired an indefeasible estate before 1864. *Held*, that the acknowledgment was sufficient to take the case out of the statute though made after twenty years' possession. *Stansfield v. Hobson*, 20 L. T. Rep. 106. *Ch. Div.*, Feb. 12, 1881. *Sanders v. Sanders*. Opinion by Bacon, V. C., 44 L. T. Rep. (N. S.) 171.

THE VALUE OF THE HUMAN BODY AND BONES.

[CONTINUED FROM PAGE 437.]

LEGS have often been considered by juries and judges. We will submit to our readers the values at which these nether limbs have been held in England, New York, Massachusetts, and Canada—cases of men's legs, women's legs (we trust the printer will put these words in nonpareil type), and a baby's leg. Sharp boys and girls of the Lord Macaulay style can then readily find the probable value of their own legs by simple proportion. A New York court agreed with a jury in considering \$12,000 not too much for Mr. Rockwell, who, through an injury, was confined to bed for six weeks (suffering great pain), and unable to attend to business for several months, and was left permanently lame, after having paid from \$1,200 to \$1,500 for doctor's fees and such extravagances. *Rockwell v. Third Avenue Ry.*, 64 Barb. (N. Y.) 438. Apparently the value of lower limbs has gone up in the New York market, for some time since it was held that even \$8,000 was not an excessive sum to give for a broken leg which got well (to be sure) in about eight months; but the defendants got a new trial, to enable them to persuade the jury that such was a fancy price. *Clapp v. Hudson Ry.*, 19 Barb. 461. In Wyoming \$10,000 was considered by the court to be an excessive compensation for a compound fracture of a leg. *U. P. Ry. v. House*, 1 Wy. Ter. 27. And even in Iowa, where \$4,000 had been given for a broken leg, the court reduced the sum to \$2,500. *Lombard v. Ch., etc., Ry.*, 47 Iowa, 494.

In Ontario, some twenty-five years ago, a jury gave one Batchelor £6,178 11s. 7d. for the loss of a leg (and a few other hurts); "that precious leg of Miss Kilmanseg that was the talk of 'Change—the Alley—the Bank—and with men of scientific rank, made as much stir as a fossil shank of a lizard coeval with Adam," could not have been much more valuable than the twelve jurors thought this. But the court said that it did not appear to them that the jury had exercised that sound and reasonable discretion, in awarding such heavy damages as the law requires of them. And so a new trial was granted; but only upon payment by the guilty party of £500 into court, which sum Batchelor was to be at liberty to take out, without prejudice to his claim for damages *ultra* at another trial. Their lordships were careful to say that they did not consider £500 sufficient to cover the damages sustained; in other words they deemed a leg worth more than \$2,000. *Batchelor v. B. & B. Ry.*, 5 C. P. 127. In 1873 a butcher, earning \$50 a month, fell into a culvert made by the Great Western Railway in the highway, and broke his leg in two places. In consequence he was obliged to keep his bed for four months and was hobbling about on crutches at the trial—six months after the accident. The leg was permanently shortened, and the doctor's bill proportionately long. The verdict was \$2,000; and Richards, C. J., on an application for a new trial, said, "on the whole, we cannot say the damages, \$2,000, are so excessive as to justify our setting aside the verdict on that ground;" and the judges did not set it aside on any ground. *Fairbanks v. G. W. R.*, 35 U. C. R. 523.

A teamster's leg is not thought much of by his fellow-countrymen; one of that calling in Ontario had his limb broken owing to his falling off his load and his load falling on him, through a defect in the highway. He was confined to the house for some six weeks — could do nothing for some months — and then found himself so injured that he had to give up the employment of teaming. The jury, to mend matters, only gave him \$300, which the court let him keep. *Bradley v. Brown*, 32 U. C. R. 436. Strange to say, some years before the teamster's leg was broken, in the same part of the world, a deck hand was assisting in unloading a schooner at a wharf; the pier was out of repair, and Johnson (the mariner) broke his leg. He was awarded £250 for his pains and damages, and the court refused to order a new trial. *Johnson v. Port Dover, etc.*, 17 U. C. R. 151. In England poor Armytage fared even worse than Bradley; he had his thigh broken by Haley's servant when driving an omnibus. The surgeon was called in and gave evidence that it was doubtful whether A. would not always be lame, and he had been paid £10 for his attendance. The jurors, however, gave a verdict of one farthing damages! Armytage was rather naturally dissatisfied with the amount, and asked the court for a new trial to try to get more; he got the second chance. Denman, C. J., remarked: "A new trial on a mere difference of opinion as to the amount of damages may not be grantable, but here are no damages at all." *Armytage v. Haley*, 4 Q. B. 917. The jurymen in this case must have been of the same stripe as those miserable wretches who in an action, under Lord Campbell's act, for damages for the death of a husband and father, gave one pound to the sorrowing widow and ten shillings each to two fatherless little ones, as compensation. *Springett v. Balls*, 7 B. & S. 477.

One Greenland was on board "The Sons of the Thames," sailing between Westminster and London Bridge, and he was standing on the deck near the bow. The "Bachelor" collided with "The Sons" and the concussion caused the anchor of the latter steamer to fall from its place, and in falling it came against Greenland's leg which broke beneath the blow. He sued the owner of the "Bachelor," and recovered £200 damages. *Greenland v. Chuplin*, 5 Ex. 243. Tebbutt was standing at a railway station waiting for his baggage, and a porter in passing with a truck laden with trunks let a portmanteau fall off and injured T.'s leg. The jury fixed the damages at £300, and the court would not interfere. *Tebbutt v. B. & E. Ry.*, L. R., 6 Q. B. 73.

Mrs. Feital was a Massachusetts lady and a spiritualist. One Sunday she went to a camp-meeting of her sect, at which, among other wonderful things, a Miss Ellis was put in a box with her hands tied, and when the box was opened, a ring that had been on her finger was found on the end of her nose. On her way home by train Mrs. F. had her leg broken, and on suing the company, got \$5,000 damages. The company objected strongly, on the ground that the accident happened on Sunday, and the lady had not been at divine service; but the court would not interfere. *Feital v. Middlesex Ry.*, 109 Mass. 398.

A Canadian lady in the little town of Dundas stepped into a hole in the board walk, fell and broke her leg a little above the ankle. The hole was variously estimated at from sixteen to eighteen inches long, and from five to seven in width, but at the time of the accident was partly hidden by the snow. The defect had existed for some time. The jury gave a verdict of \$800 (the doctor's bill was over \$100). A new trial was granted, as it was by no means clear that the plaintiff had been guilty of negligence, or that the defect was such as to make the corporation liable. *Boyle v. Corporation of Dundas*, 25 C. P. 420. The next jury estimated Mrs. Boyle's damages at \$150, and her husband's (for medical attendance and such like) at \$150 more.

The chief justice remarked that these damages were moderate; we entirely agree with his lordship. 27 C. P. 129.

Mrs. Siner was more fortunate in obtaining damages from the jurors than her Canadian sister, although not so badly damaged. Her train — we mean the train in which she travelled — that is, the one that carried her, not the one which she carried — was too long to permit the cars in which she was, to reach the platform: she stood on the front step, took hold of her husband's hands and jumped to the ground, and in doing so strained her knee. The jury gave her £300, but the judges were ungallant enough to say that the injury was all her own fault (she did not use the footboard), and would allow her nothing. *Siner v. G. W. R., L. R.*, 3 Ex. 150; 4 Ex. 117.

A woman in Illinois had her knee injured. After three years she was not quite recovered, although she could walk naturally and gracefully, though one leg was smaller than the other, yet it probably was not permanently injured; she had not suffered much and had lost no money. *Held*, \$2,500 excessive. 87 Ill. 125.

In Connecticut a baby two years old was run over by a train, and had a leg and an arm amputated in consequence. The jury tried to make things right by a verdict of \$1,800; how much for each member we cannot say. Here the question of imputable negligence arose; but with that doctrine we are not now concerned. *Redfield on Railways*, Vol. II, p. 243.

A bite on a woman's leg was valued by an English jury at £50. A middle-sized black dog of the terrier kind, about eleven o'clock one night, bit a Mrs. Smith, a laundress, at a railway station. The canine had been haunting the depot for some hours; at 9 P. M., it had torn a lady's dress, at 10:30 it had attacked a cat, and been kicked out by a porter, and shortly after it worried Mrs. Smith's calf. The verdict, however, was set aside, the court deeming that the company had not been guilty of any negligence in allowing the presence of the dog. *Smith v. G. E. R., L. R.*, 2 C. P. 4.

The court held that \$1,950 was not too much for Crawford to pay for putting a buckshot into Cameron's leg and a rifle-ball through his left lung. 88 Ill. 312.

For a sprained ankle \$2,500 is excessive. Spicer was a mail agent on a Chicago line, and fearing a collision jumped from a passenger train while it was in motion; in doing so he sprained his ankle and consequently was confined to the house long enough to lose two weeks' salary (at the rate of \$1,080 per annum). The court considered the jury far too liberal. *Spicer v. Chicago, etc., Ry.*, 29 Wis. 680. A truck went over the ankle of a boy of fourteen, and through the improper conduct of the surgeon called in to attend it (as the plaintiff's witnesses swore) the foot mortified and had to be amputated. The jury gave the boy a verdict for nominal damages and the court would not grant a new trial on account of the smallness of the damages, because the judge who tried the case was not dissatisfied with the verdict. *Gibbs v. Tinsley*, 1 C. B. 640.

We do not know exactly in what part of the body lie hid one's "feelings." Wherever they are, they are not much thought of; and even a "shock to the feelings" of a wife by her husband's death cannot be considered in awarding damages. *Nashville, etc., Ry. v. Sterens*, 9 Heisk. 12.

In the good old days of the Saxons the bot, or penalty for the smallest disfigurement of the face was three shillings; the same for breaking a rib; the breaking of a thigh was twelve shillings; the robbing a man of his beard, twenty shillings; and a front tooth was valued at six shillings. *Taswell-Langmead*, p. 41.

And now a word or two as to what should be taken into account by a jury in estimating the amount of damages to be awarded for personal injuries. The American courts have held that the loss of time caused by the injury is proper to be considered. *Jones v.*

Northmore, 46 Vt. 587. The age and the situation in life of the injured one; the expenses incurred; the permanent effect upon the plaintiff's capacity to pursue his professional calling, or to support himself as before times (*Whalen v. St. Louis, etc., Ry.*, 60 Mo. 323; *Indianapolis, etc., v. Gaston*, 58 Ind. 224), are also essential factors. Bodily pain, too, is to be considered and compensated for; and so much of mental suffering as may be indivisibly connected with it, but mental anguish and agony cannot be measured by money—the courts consider—and there is no established rule authoritatively commanding such a futile effort. *Johnson v. Wills*, 6 Nev. 224. It is difficult to measure even excessive pain against money. *Campbell v. Portland Sugar Company*, 62 Me. 552; *Redfield on Railways*, Vol. II, p. 286. In fact, they say that one should get compensated for all injuries that are the legal, direct and necessary results of the accident. *Curtis v. Rochester & S. Ry.*, 20 Barb. 282. Loss of anticipated profits from real estate on land was held a proper subject for compensation to a land speculator. *Penn. Ry. v. Dale*, 70 Penn. St. 47. Disfigurement was also held a proper point to be considered. *The Oriflamme*, 3 Sawyer, 397.

The late case of *Phillips v. The South Western Railway Company*, fully enunciates what, in the estimation of the English judges, are to be considered in fixing the amount of damages. Cockburn, C. J., on a motion for a new trial for insufficiency of damages, said that the heads of damages were the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure; the pecuniary loss sustained through inability to attend to a profession or business; as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life. L. R., 4 Q. B. D., 407.

In the Common Pleas Division on a motion, after a second trial, to set aside the verdict for excessive damages, Grove, J., said, "The plaintiff is entitled to receive at the hands of the jury, compensation for the pain and bodily suffering which he has undergone for the expense he has been put to for medical and other necessary attendance, and for such pecuniary loss as the jury (having regard to his ability and means of earning money by his profession at the time) may think him reasonably entitled to." "Damages are awarded as a compensation for the injury and loss sustained; they are not to be given from motives of charity and compassion." Lopes, J., was of the same opinion. And in the Court of Appeal, Bradwell, L. J., said that he was, in common with other judges, accustomed to direct juries as follows: "You must give the plaintiff a compensation for his pecuniary loss, you must give him compensation for his pain and bodily suffering; of course, it is almost impossible to give an injured man what can be strictly called a compensation; but you must take a reasonable view of the case, and must consider under all the circumstances what is a fair amount to be awarded to him." Cotton, L. J., remarked that a plaintiff is not to receive an annuity for the rest of his life calculated on the amount of his income; but that after taking into account the chances affecting the income, the jury are to say what, in their opinion, is a fair compensation for the disability, whether permanent or temporary, under which a plaintiff comes of practicing his profession and earning the income which he previously enjoyed." L. R., 5 C. P. D. 280. In this case Phillips, who was a physician of middle age and robust health, making £5,000 a year, was so injured that for sixteen months, the time between the accident and the trial, he was totally incapable of attending to business; his health was irreparably injured to such a degree as to render life a burden and a source of utmost misery; he had undergone a great amount of

pain and suffering, and the probability was that he would never recover. Yet the first jury only gave him £7,000. This verdict was set aside as inadequate. The second jury awarded £16,000, and the court refused to consider it excessive. In fact, Bramwell, L. J., said that the only misgiving he had was whether the jury ought not to have given more. L. R., 5 C. P. D., p. 287.—*R. Vashon Rogers, in Canadian Law Times.*

NEW BOOKS AND NEW EDITIONS.

ELWELL ON MALPRACTICE.

A Medico-Legal Treatise on Malpractice, Medical Evidence and Insanity, comprising the Elements of Medical Jurisprudence, by John J. Elwell, M. D., member of the Cleveland Bar, one of the Editors of New Edition of Bouvier's Law Dictionary, Professor in Ohio State and Union Law College and Western Reserve Medical College, etc., etc. Fourth edition, revised and enlarged. New York: Baker, Voorhis & Co., 1881. Pp. 600.

THIS work was originally published in 1859. It has received the highest encomiums of such competent critics as Dr. Carpenter, the great English physiologist, Dr. Ordonaux, and William Curtis Noyes. A pretty careful examination has led us to believe that these commendations are deserved. It has the advantage of being written by a lawyer as well as a physician. It is distinguished by the boldness and independence of its criticisms upon leading cases, both in their legal and in their medical aspects. We have found it very entertaining as well as instructive, disclosing much that is new, and treating the old in a new manner. The book is handsomely printed.

JONES ON CHATTEL MORTGAGES.

A Treatise on the Law of Mortgages of Personal Property. By Leonard A. Jones, Author of Treatises on "Mortgages of Real Property," and "Railroad Securities," Boston: Houghton, Mifflin & Co., 1881. Pp. xxxv, 657.

Mr. Jones is very favorably known by his cognate treatises mentioned in the title. He also announces, as in preparation, treatises on Pledges and Liens. This will constitute a unique and valuable series. The present work has been in some measure foretold by the author's writings in the *Southern Law Review*, and there as well as here, we have had occasion to examine his treatment with some care, and we now feel no hesitation in commending this work as in a very high degree comprehensive, succinct, clear and trustworthy. We have never found any work more free from diffuseness and padding. For judicious compression, combined with reasonable lucidity, it may be ranked with Mr. Pierce's Law of Railroads. The topic is a very vexatious and difficult one, but Mr. Jones has exhibited and treated the conflicting rulings with great method, fullness and discrimination. While there is no lack of works on this subject, the present has distinguishing excellencies and no noteworthy blemishes, and it will prove an invaluable assistant. The printing is excellent.

BUMP'S FEDERAL PROCEDURE.

Federal Procedure. The Title Judiciary in the Revised Statutes of the United States, and the Rules Promulgated by the Supreme Court, and Forms, together with Notes referring to all Decisions Reported to January 1, 1881, by Orlando F. Bump, author of "Law and Practice in Bankruptcy," "Law of Patents," "Fraudulent Conveyancing," etc. Baltimore: Cushings & Bailey, 1881; pp. 975.

Mr. Bump, for his volume on the Bankrupt Law, has received the most substantial encomiums of the profession. Edition after edition was required to satisfy

the demand. Following the same general plan of notes to the sections which he then adopted, Mr. Bump has in this volume taken the sections of the United States Revised Statutes applicable to the practice of the law, and has made a Federal annotated Code. Any lawyer can readily comprehend United States practice by consulting this work, and the increasing volume of litigation in the United States courts, under the provision of the Constitution extending the judicial power to all cases in law and equity between citizens of different States, will make this work a necessity in all offices of general practice. Its value is enhanced by embracing the Rules of the Supreme Court, and by an appendix containing forms for general procedure in those courts. The mechanical execution of the work is commendable.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, May 31, 1901:

Judgment affirmed with costs—*Penfold v. The Universal Life Ins. Co.*; *Dusenbury v. Kelly*; *Collins v. Ralli*; *Dauchy v. Drake*; *Ward v. Kipatrick*; *The Syracuse Chilled Pile Co. v. Wing*; *Phillips v. Dye*; *Jordan v. Van Epps*; *Vall v. Hamilton*; *Perry v. Dickerson*.—Judgment affirmed and case remitted to General Term—*Moett v. The People*.—Judgment reversed and new trial granted, costs to abide event—*Purcell v. The Mayor, etc., of New York*; *Andrews v. The Aetna Life Ins. Co.*; *Weyh v. Boylan*; *Wight v. Wood*; *Chapman v. Phoenix National Bank of New York*.—Judgment reversed and new trial granted—*Stupe v. The People*.—Judgment of General Term reversed, and that of Special Term affirmed, with costs—*The People ex rel. Robison v. The Board of Supervisors of Ontario County*; *Levy v. Loeb*.—Judgment modified by adding a direction that the bond be cancelled and discharged and delivered up to the obligor, and as modified affirmed with costs—*Ryan v. Hayes*.—Order affirmed with costs—*Weesman v. Wingrove*; *Fisher v. Hersey*.—Order of General Term reversed and order of County Court affirmed with costs—*Boardman v. Board of Supervisors of Tompkins County*.

NOTES.

THE annual commencement exercises of the Albany Law School took place at Tweddle Hall, Friday evening, May 27th. Among those present were President Eliphalet Nott Potter, D. D., LL. D., of Union University; Judge Andrews, of the Court of Appeals; Judge Learned, of the Supreme Court; Rev. Dr. Rufus W. Clark; Rev. Horace C. Stanton; ex-Judge Parker; Orlando Meads; Dr. Homes, of the State Library; S. W. Jackson; Prof. Joel P. Bishop; Dr. David Murray; D. J. Pratt; Horace E. Smith; Matthew Hale; Frank H. Woods; Irving Browne; Geo. L. Stedman; Wm. Lansing; Charles T. F. Spoor; Judge Gallup; A. J. Parker, Jr. The exercises were opened with music, after which Rev. Dr. Clark offered prayer. Prof. Smith, Dean of the School, then introduced Prof. Amaro Cavalcanti, of Ceara, Brazil, a gentleman commissioned by his government to examine the systems of education in other countries, who, as a means of carrying out his commission, had taken a course in the law school. This gentleman made a brief but interesting address on "American education," drawing some comparisons between what he had seen here and his observations in Europe. The regular orations were as follows: Our Jurisprudence—Horatio A. Alling,

Canon City, Col.; The Legal Profession—J. Zed Dunlap, Cedar Shoals, S. C.; The Political Dreamer—Fox Holden, Ithaca, N. Y.; Valedictory—The Lawyer's Code of Honor—Samuel H. Woodson, Jr., Independence, Mo. The annual address to the graduating class was delivered by ex-Judge Edwin Countryman on "Professional Ethics," dealing especially with the ethics of agreements between attorney and client for compensation for legal services. The report of the committee to award the Parker prize, of \$100 in gold, offered by ex-Judge Parker, to the author of the best essay written upon a subject prescribed by the faculty of the school, was then read by Hon. Samuel W. Jackson, chairman. The subject prescribed was: "The jurisprudence and powers of the general government and the States, and the proper dividing line between them," upon which nine essays had been submitted. The committee unanimously agreed to award the prize to Thomas F. Wilkinson, of Albany. The essays signed "Clio" and "Iugomar," by Robert C. Alexander, of West Charlton, N. Y., and William A. Sternberg, of Ellsworth, Kan., respectively, received honorable mention. The Learned prize of \$50 in gold, for the best essay on "The reformation of written instruments," offered by Judge Learned, was awarded on the report of George L. Stedman, chairman of committee, to Winslow B. Hyatt, of Fishkill. The degree of bachelor of Laws was then conferred by President Potter on the 46 following named: Horatio T. Alling, Canon City, Col.; Ernest O. Aldridge, Wilcox, Pa.; Robert C. Alexander, West Charlton, Saratoga county; James B. Bagga, Stockton, Cal.; Philip E. Brown, Belmont, Wis.; Chas. C. Bulkley, Fort Henry, N. Y.; Amaro Cavalcanti, Ceara, Brazil; Chas. B. Coates, Albany; John B. Conway, Argyle, Washington county; George K. Coryell, Odessa, N. Y.; John Zed Dunlap, Cedar Shoals, S. C.; Hugh J. Dobbs, Beatrice, Neb.; Alonzo C. Dingman, Minden; Percival S. Fuller, Racine, Wis.; John E. Gallup, Albany; Walter N. Gill, Rondout; J. Wendell Griffing, Albany; Ira Harper, Albany; DeWitt Heermance, Rhinebeck; Fox Holden, Ithaca; Winslow B. Hyatt, Fishkill; John F. Kenney, Spencerport; Mahlon T. Lightner, Schenectady; A. Wylie McConnell, Pittsburgh, Pa.; Edward A. Merrill, Concord, N. H.; John G. Merrill, Saratoga Springs; Frank L. Miner, Elmira; Andrew D. Morgan, Ilion; Howard F. Mowry, Bedford, Pa.; Irving Moyer, Fort Plain; David A. Myers, Logansport, Ind.; Volkert J. Outhout, West Troy; Myron W. Pardee, Jamestown; Cornelius B. Reardon, Hartford, Conn.; James C. Sands, Bainbridge; James W. Sansberry, Anderson, Ind.; John W. Scott, Newstadt, Ont.; Cornelius Shufelt, Chatham Village; Frederick P. Squier, Holyoke, Mass.; John D. Stantial, Albany; William A. Sternberg, Ellsworth, Kan.; Alinton Telle, Boggy Dt., Ind. Ter.; John M. Terwilliger, Sing Sing; George M. True, Ashland, N. H.; Thomas F. Wilkinson, Albany; Samuel H. Woodson, Jr., Independence, Mo.

Chief Justice Cofer of the Kentucky Court of Appeals is dead, at the age of 49.—A Portland, Maine, lawyer, has sued a man for twenty-seven cents which he had lent him.—*Ex.* This is a very doubtful statement. How could any lawyer have so much to lend!—Some of our western contemporaries are making a great deal of fun of some judge for pronouncing *route*, *root* rather than *rust*. There are two good reasons for the pronunciation which they ridicule. First, it is preferred by Webster and Worcester; second, it distinguishes the word from *rust*. Analogy is very trustworthy. It is easy to cite many instances where *ow* is pronounced *ou*; but would any of our contemporaries talk about cutting off their *coupons*? Or about *rousting*?

The Albany Law Journal.

ALBANY, JUNE 11, 1881.

CURRENT TOPICS.

MR. BROCKWAY is the superintendent of the Elmira Reformatory Prison, where "indeterminate sentences" are in practice. He explains the theory to the Social Science Association as follows: "The recommendation is that upon conviction for crime the prerogative of the courts be simply to determine whether liberty shall be restricted, leaving the question, within due bounds, as to the extent and duration of imprisonment, to another tribunal of experts, which shall adjudicate only after careful observation of the criminal during imprisonment, and when he shall be adjudged a safe citizen—that all criminals (with the possible exception of some of the most aggravated crimes on the ground of expediency) when committed to prison shall be sentenced indeterminate, the period of their incapacitation to continue, under proper direction and treatment, until such reformation is wrought as, with reasonable certainty, renders them safe citizens." He explains the practice as follows: "Upon the arrival of an inmate, always under charge of the transfer officer of the reformatory, and after a night's rest, he is photographed, and at the convenience of the superintendent, is subjected to a long, searching, and instructive examination. The inquiry covers a large field—the family, the ancestors, the occupation of the parents, their habits, the habits of the prisoner, his literacy or the reverse, his own habits as to occupation, industry, regularity of performance and residence, his physical health and its grade of quality as among men, the natural capabilities of his mind, and present education or undevelopment, and so far as may be, his moral state. Upon this examination an estimate is made, and a plan of discipline or treatment prescribed. The new comer is instructed as to the plan of the institution, and the best way of availing himself of its benefits. After a bath and a surgical inspection he is clothed and assigned to work, according to the indications of the special case. He is now classed in the second or neutral grade of inmates. By any misdemeanor he may fall into the third or convict grade; or by cheerful, good behavior through six continuous months, he is entitled to promotion to the first grade. This second or neutral grade exhibits nothing of the convict character; no hair-cropping, no lock-step marching. It is a probationary grade; in it the new comer makes a reputation. He may fall, he may rise. In the third, or convict grade, the discipline is substantially that of an ordinary State prison. Strict separation from the upper grades at marching, meals, assemblies, and at night, shaving, enforced lock-step marches, and silence." The three grades seem to correspond the three states of purgatory, heaven, and hell. There is good fare in the first grade—

nice, clean, pretty work, good schooling, good rooms, good food, good furniture, comfortable hospital, and clergymen adapted to every phase of belief. Nothing like it since Mr. Squeers' prospectus. "An account is kept in the office books, and every inmate has his own pass-book, which (as in banks) is written up for his information once a month." Complaints in any grade are determined first by the superintendent; from him an appeal lies to the managers; and "in extreme cases, the question and the evidence are heard by a jury of first-grade prisoners." All this sounds Utopian enough. It is enough to make the godly Mr. Bergh burst with rage. But it is better in theory than his damnable, wild-beast, whipping-post theory. And the question after all is, how does it work? We have only space to say that upon Mr. Brockway's showing, it works well. It gives the offender "something to gain." We have never heard that the commutation system in our State prisons does not work well. And this may be well adapted to young criminals, especially when we recollect, as Mr. Brockway tells us, that "forty-four per cent of prisoners inherit from their ancestry whatever of nervous disease and vicious impulse is transmitted by intemperance, gross ignorance, licentiousness, epilepsy, pauperism, *all* these; twenty per cent inherit from intemperance, ignorance and epilepsy; fourteen per cent from intemperance and extreme irritability, amounting almost to insanity; twelve per cent from intemperance and pauperism, while only four per cent spring from healthy stock and favorable early influences."

The General Term of the First Department have denied an examination to some seventy graduates of Columbia College Law School, on the ground that they have not attended on the school eighteen months, as required by the statute in regard to that school. These young gentlemen are debited by the court with their vacations during the period of eighteen months, which reduced the literal attendance to fourteen months and a half. Davis, P. J., in announcing the decision, said: "Now, nothing can be clearer as a legal proposition than that the condition of the law has not been complied with. It is said, and probably with truth, that it has been the custom for these institutions to grant such diplomas upon an attendance of this shorter period of time, upon the assumption that what the statute meant was two law-school terms of such period of time as those terms might be fixed at by the authorities of the college, and that the intermediate period of time was to be counted as part of the eighteen months. If that were the true construction, it would be equally as proper to have certified that each applicant had attended twenty-four months. The statute, we think, meant an actual attendance for a period of not less than eighteen months. The object of the statute seems to us very plain, to conform the terms of admission to the rules which have always prevailed in respect to students in the offices of attorneys. In each case the year is to be counted as such, provided the vacation does not exceed three

months. The eighteen months required by the law, therefore, may be fully filled by allowing the same three months' vacation that is allowed by the rules to students in law offices, giving, for the two years, six months of vacation, and leaving eighteen months for the time of the regular study. We have no doubt that that was the intention of the Legislature in passing the act of 1860." It is stated, on behalf of the faculty of the law school, that "the special law under which the present graduates have been seeking admission was enacted during the past winter through the action of the students themselves, without the intervention of officers of the school, and will soon expire. The students value greatly the privilege of being admitted as attorneys and counsellors at once, instead of as attorneys only, and the law gave them this privilege." It was probably this peculiar feature of the law that induced the court to make a strict construction. We cannot say we blame the court for defeating the legislative evasion of the court rules.

We are so often asked our opinion on this matter of admission that we have concluded to announce our creed as follows: First, a law-school education is infinitely better than that obtainable in an attorney's office. Second, no court should admit an attorney without an examination conducted by or under the direction of the court. Third, the present court examinations are very inadequate and unequal, being general either too easy or too difficult. Fourth, this special legislation in behalf of any particular law school or all law schools is very unseemly. Fifth, there ought to be no discrimination between attorneys and counsellors, but one examination should suffice to admit the candidates as both. Sixth, it would be well to have a State board of examiners. Seventh, every law school ought to have at least a two years' course. Eighth, a graduate from such a school ought to have some allowance made him on the term of study—say six months. Ninth, some time preliminarily spent in an attorney's office is indispensable. Tenth, the term of study should be three years, or three and a half, with an allowance of three months for vacation in every year, for those not attending a law school; and to law school attendants the ordinary school vacations should be allowed.

The charge has been made in a newspaper in the city of New York that Judge Spier, of the Superior Court of that city, is sitting beyond the constitutional limit of seventy years of age. Some lawyer, who was at college with him in 1828, guesses that he must be seventy-three years old. This is a very grave accusation if true, and if not true, it is very indecent. It would be supposed that the lawyer who makes it would have tried to inform himself of the truth before making it, as he easily might have done by consulting the files of the office of the secretary of State, where every judge is by law bound, on election, to file a certificate of his age and the time when his official term will expire. Judge

Spier in 1874 filed a certificate that he was then sixty-one years of age, and that his term of office would expire December 31, 1882. This is rather better than guesses founded on events half a century old.

The Code of Criminal Procedure has become a law. Thus the second step of the four steps toward general codification has been taken. Our practice is now codified. The principles remain *in nubibus*. We hope in two years that this great, necessary, and inevitable work will be completed, and that we may thus have a complete, harmonious and practicable legal system.

There is a startling rumor in the air respecting a new legal departure. It is that our Court of Appeals, taking advantage of the temporary indisposition and absence of their chief, have not only adjourned to Saratoga, but have gone thither from Albany on horseback, headed, we suppose, by the gallant and imposing clerk as drum-major. The "man on horseback" has long been the bugbear of our politicians; how much more should we be afraid of seven judicial men on horseback! A lawyer on horseback is an anomaly. The original centaur was a physician, and there seems some propriety in that arrangement, because he did not have to harness up to visit his patients. Let these grave judges (and clerk) however recall what is said by David: "A horse is a vain thing for safety!" (Absalom, however, found no more safety in an ass.) They should also remember that although you can lead a horse to the (Saratoga) water, you cannot make him drink. Nothing but a donkey would drink of those nauseous Springs. It may be that this invasion of Saratoga from the south will prove more fortunate than one from the north about a century ago. We have remarked the chief's absence, but recalling his recent elaborate opinion in the case of *Harris v. White*, *ante*, 424, (in which there is a great deal of horse sense) we fear, from the intimate knowledge of horses, of "driving to harness," of "pools," and the apparent fondness for horse-flesh there displayed, that he would have only too gladly joined in the judicial horse irruption. It is to be hoped that the court will not imitate the example of Judge Cowen, who, it is said, used to go about on horseback, arrive at the court town before light, rattle up the clerk and sheriff, open and adjourn court, and be off before breakfast, when he was feeling cross from indigestion.

Some time since, a correspondent of the New York *Herald*, writing on the Insufficiency of Judicial Remuneration in this State, with express reference to Judge Choate's resignation on account of the inadequacy of his salary of \$4,000, said: "The following information may interest some of your readers: Barbour's Supreme Court Reports, from 1847 to 1877, contain 11,616 reported cases or thereabouts. Volume 67, as those of your readers who are lawyers will know, contains a list of Barbour's

cases — appealed, as affirmed, approved, modified, overruled, or reversed. On totalling up this list, I find that the whole number of the above decisions appealed from is 1,020, of which number 428 cases, or nearly fifty per cent, were either reversed or overruled. Comment is needless. The 'people' imagine that they are very economical in underpaying the judges, and also in not trusting them with office during life or good behavior." This is indorsed by the *Canada Legal News*. It is a very unfair and misleading statement. The right basis of comparison is not the 1,020 appeals with the 428 reversals, but the 428 reversals with the 11,616 reported cases. This shows less than three per cent of error. The writer, being an English barrister, has fallen into the natural error of not distinguishing between Federal judges, like Judge Choate, and our State judges. The latter have for eleven years received \$7,000 salary, and have an allowance for expenses of \$2,000; while in the city of New York their salary is more than twice the former sum. Their term of office is fourteen years. Our judges do not complain of the salary nor of the tenure, and they both suit our people.

NOTES OF CASES.

IS a newspaper a "periodical?" A question of importance to the proprietors of newspapers very recently came before the Master of the Rolls, in *Walter v. Howe*, namely, whether the proprietor of a newspaper has such an interest in articles originally published by him as entitles him to prohibit others from publishing them. The defendants published and advertised, at the price of one penny, a pamphlet entitled "The Life and Work of Benjamin Disraeli, reprinted from the *Times*;" the contents of which were almost an exact reprint of the biographical memoir of Lord Beaconsfield which appeared in the columns of the *Times*. The proprietors of the latter paper accordingly moved to restrain the publication of the pamphlet in question, alleging that the publication by the defendants would seriously affect certain arrangements made by the plaintiffs themselves for the republication of the article. The English Copyright Act provides that in order to entitle the proprietor of copyright in any book to maintain proceedings for the infringement of such copyright, the book must have been registered in the prescribed manner; that "book" is to be construed to mean "every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published;" and that the proprietor of copyright in any "encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts," shall be entitled to all the benefits of registration upon registering such work in pursuance of the act. The applicability of these provisions to newspapers, says the *Law Times*, "has once, and apparently only once, previously formed the subject of judicial consideration. In *Cow v. Land and Water Journal Company*, 21 L. T. (N. S.)

548; L. R., 9 Eq. 324, it was decided by Vice-Chancellor Malins that the proprietor of a newspaper has, without registration, such a property in its contents as will entitle him to sue in respect of a piracy, and that a newspaper does not require to be registered under the Copyright Act, such a publication being within neither its policy nor its words. In the opinion of the vice-chancellor, a newspaper was not a 'book' within section 2, nor was it a 'periodical work,' or work published in parts, within the 19th section. This decision the Master of the Rolls has declined to follow. In his view, the *Times* is a 'periodical work' within the meaning of section 19, and inasmuch as it is not registered under the act, he held that its proprietors were not entitled to institute proceedings in respect of the alleged offense, and refused to grant an injunction. The authorities are therefore now directly at variance, and the question awaits the determination of a higher court."

In *State v. Moore*, New Jersey Court of Errors and Appeals, it has just been held that a statute extending the time limited for the prosecution of a crime is *ex post facto* and void as to a crime which would have been barred by the original statute. This decision reverses the decision of the Supreme Court, 13 Vroom, 208. That decision was pronounced by Beasley, C. J., and Van Syckel, J., Dixon, J., dissenting. The present decision is by six judges, to five dissenting, that the law was *ex post facto*, and by seven judges to four dissenting, that it impaired vested rights. From the *New Jersey Law Journal* we get the following reports of the opinions, *pro* and *con*. Dixon, J., said: "It appears to be settled in civil cases that when a right of action is barred by lapse of time and interests in property are dependent upon it, the Legislature has not the power to change the statute so as to affect the case. Whether this depends upon general principles or on constitutional provision or both is not settled. Applying this doctrine to criminal matters, the citizen has a vested right to liberty until he commits an offense; then he is subject to be prosecuted; he retains his right to liberty subject to the State's right to punish him. The statute of limitation takes away the power to punish after a certain time. After the lapse of the limed time the right to punish is gone and the flaw in the citizen's title to life and liberty is removed. The words of the act relating to criminal cases are stronger than those of the act relating to civil cases. The bases of the protection of life and liberty are the same as those of the protection of property. The protection thrown around life and liberty is much stronger than that which is made for property. The chief justice suggested that to hold that the criminal had a vested right in the matter, ran into the absurd, as involving the notion of an expectation on the part of the criminal and reliance on the statute. This overlooks the true ground on which the bar to the civil action is based. It is not the reliance or expectation but the right accrued which makes the bar inviolable. The other view would make it"

ficient that the time had begun to run, and this no court has ever held. The second position taken by the plaintiff in error is that the act of 1879 is an *ex post facto* law. A law like this is open to all the objections that can be made to any *ex post facto* law and produces all the evil results which such a law can produce. If such a law may be passed, the Legislature has power to make a law for the purpose of punishing a man who was dispensable before. No man who had fallen under the imputation of crime, however innocent he might be, could ever become safe against prosecution. The constitutional prohibition is made for the protection of the innocent. An innocent man may be the victim of circumstances which may lead to his punishment as a criminal; he preserves carefully the evidence in his favor until the bar of the statute gives him security, and then he loses the means of proving his innocence, and if a prosecution is afterward brought he may be unjustly condemned. Even the guilty are entitled to some consideration after they have lived in dread of disgrace until the time when they are assured by the law of the State that they shall be free, and have repented of their crimes, and formed relations and associations with others as respectable members of society. I conclude that the law is an *ex post facto* law, in derogation of vested rights, unconstitutional and invalid." Van Syckel, J., dissenting: "According to an unbroken line of judicial decisions, a law cannot increase or diminish the penalty or make a crime of an act which was not so before, but I am unable to find any prohibition against reviving the right to prosecute. The act of 1879 does not create a crime or increase a penalty. It simply fixes a time in which to prosecute. The time for prosecution is no part of a crime or punishment. The cases relied upon do not cover the ground. To adopt the theory advanced would overturn the principles of all criminal law, which is to hold up the fear and certainty of punishment for crime. He referred to the danger of extending the meaning of the constitutional prohibition. The act of 1879 only modified the mode of criminal procedure. As to the second question, is the act contrary to the fourteenth article of the Federal Constitution, that no person shall be deprived of life, liberty, etc., without the process of law? None of these rights are denied this defendant by this law. The fact that one has committed a crime and believes that he is free from prosecution, and is disappointed, may create undue sympathy. The Legislature, whenever the public good requires it, may revive the right to prosecute. There was a great mistake as to vested rights. All vested rights are not free from disturbance by the Legislature. Vested rights are not in themselves inalienable, but only so far as they relate to property rights. Courts ought to be careful how they attempt to overrule the express acts of the Legislature. The power of declaring laws to be unconstitutional is a very high prerogative and should be exercised with the greatest caution. The law-making power belongs to the Legislature and not to the courts. The question for the courts is not whether the law is wise or not;

they can only annul such acts of the Legislature as are clearly forbidden by the Constitution." The *Journal* says: "This case differs from that of *Commonwealth v. Duffy* decided January 3, 1881, by the Supreme Court of Pennsylvania and reported in 23 Alb. L. J. 292. In that case the statute extending the time was passed before the period of limitation in the defendant's case had elapsed. The Court of Errors admitted and distinctly asserted the power of the Legislature to do this. They only held that the time could not be extended after the limited time in any particular case had already elapsed." We may add that the contrary of the doctrine of the *Duffy* case was held by our Supreme Court (Mullin, P. J., and Talcott, J.; Smith, J., dissenting) in *People v. Lord*, 12 Hun, 282.

CURIOUS CASES OF NEGLIGENCE.

SEVERAL recent cases of negligence seem to deserve a place among the humorous phases of the law. In *Camden and Philadelphia Steam Ferry Company v. Monaghan*, Pennsylvania Supreme Court, February 24, 1881, 10 W. N. C. 47, the plaintiff was a passenger by the defendant's ferry-boat from Camden to Philadelphia. As the boat approached the wharf she arose from her seat, along with the other passengers, and at the moment of the collision she was standing inside the cabin. The boat struck the bridge with such force as to throw the plaintiff down and produce the injury complained of. The court said: "Of course, it is true that if she had remained in her seat she would not have been injured, but it does not necessarily follow that her act of leaving her seat was contributory negligence. Had she occupied a manifest place of danger, as, for instance, a position very near to the end of the boat where there was no railing, and been precipitated into the water by the shock of the collision, the contention of the defendant would be much more appropriate, and would, perhaps, be conclusive against her. But the position she was in at the moment of the accident was not one of apparent danger at all. * * * It is the uniform habit of persons riding on steamboats to be upon their feet at will while the boat is in motion, and especially as it approaches the landing. It is one of the most comfortable and satisfactory features of steamboat travel that passengers are at liberty to move about from place to place on the vessel while it is in motion." Inasmuch as seats are usually provided for less than half the passengers, the argument of the ferry company seems particularly impudent.

Another case was in an English county court, where the widow of a medical man sued the owner and occupant of a house for injury inflicted on her by the bite of a dog belonging to one of them. The dog was savage when chained, as they well knew. The plaintiff who was dependent on charity, had gone to the house to solicit aid, bearing a general letter of introduction. Not knowing the regular visitor's entrance, she inquired the way, and was directed to the back gates or tradesmen's entrance.

She entered through an open door, and seeing no bell, or other means of signalling her arrival, she went to the foot of a staircase on one side of the stable-yard, and was there bitten by the dog, which was chained. It was held that she was on the premises for an unlawful purpose, namely, begging, and that the letter of introduction did not take her out of the category of beggars, not being addressed to anybody in particular. The court also held that there was no negligence on the part of the defendants, and that the plaintiff was herself negligent. Poor woman! she ought to have presented her letter to the dog. This case has excited considerable discussion in the English law journals. In the last number of the *Law Journal* a correspondent says: "Let me assure you that I have not 'taken up the cudgels on behalf of genteel beggars.' Persons of this description constitute, in my opinion, one of the minor pests of society."

The action of *Buckley v. Fitzgerald*, in Ireland, was brought to recover damages for injuries occasioned to the plaintiff's wife by a bull. Popham sold to Fitzgerald certain young bulls, which the vendor agreed to deliver at Bandon railway station, to be there taken charge of by the vendor. The animals were, as alleged, driven in a careless manner, without ring or rope, through the town of Bandon (in abandoned manner, as it were). Mrs. Buckley, the plaintiff's wife, stated that she was sitting at her kitchen fire, about half-past nine o'clock in the morning, with a child in her arms, when she noticed a large bull in the street. She went to close the door, but the bull rushed against her and knocked her down, and then ran into the kitchen. She called as loudly as she could for assistance, and while she was sitting on the floor she saw another bull trying to get in. Some men then came and drove the animal out, but the sight left her eyes, and she became insensible. She sustained a slight concussion of the spine besides the fright. The jury found negligence, but could not agree whether the animals were in charge of the defendant's servants. So their verdict was set aside. How woman-like it was to go and shut the door when she saw the bull in the street! What more unlikely than that a bull should try to enter a house! But it is the unexpected that always happens. Probably the bull would never have thought of going in if he had not seen himself thus snubbed. This we know is a trait of the national Bull—to try to get in at every open door and every door shut against him—as in India, Afghanistan and South Africa, but although there is a tradition about an esthetic bull in a china shop, this is the first instance to our knowledge of a culinary bull in a kitchen.

Coombe v. Moore was heard at Westminster, May 9th, before Mr. Justice Bowen and a jury. The parties were neighbors, living about 200 yards apart. The defendant is an American, and on July 4th last he was desirous of celebrating the anniversary of the declaration of the independence of the United States of America, and had invited several friends to his house on the occasion, and part of the entertainment which he had prepared for his

guests was a display of fire-works. July 4th was a Sunday; and when the Sunday had passed, between twelve and one o'clock on the morning of the 5th, some fire-works were let off in the defendant's garden. The reports of the fire-works were described by witnesses as having a sound like an explosion; and evidence was given that twelve or fourteen rockets had been let off on the occasion in question. The plaintiffs were aroused by the first report, and Mr. Coombe went down stairs, followed by Mrs. Coombe. While he was in his garden, he saw four or five rockets, the sticks and cases of which fell into his garden. Mrs. Coombe was much alarmed, and an attack of hysteria supervened, which was followed by neuralgia. Under the doctor's advice, she went by sea for a trip to Ireland, which improved, though it did not quite restore, her health. Now who can conceive a case more harrowing to the feelings of the British citizen? And yet, thanks to native magnanimity, the jury let off the defendant for one farthing damages! If the hysterical lady had gone to the window she would have discovered that the day of judgment was not at hand. But she probably wanted a jaunt, and so worked upon her husband's feelings. A supplementary journey to Paris would undoubtedly have quite restored her health.

Moore v. Whitehaven Hematite Iron and Steel Co., in the Whitehaven county court, was an action of damages for the killing of an employee in a colliery, by the fall of masses of ice adhering to the sides of the shaft. Here it seems the "reaper death" made use of an icicle.

FELLOW-SERVANTS AND MASTERS.

THE Employers' Liability Act has brought into prominence the law of fellow-servants and masters. The advocates of this bill in seeking to make a master liable in certain cases for injuries inflicted upon one of his servants by another, have disregarded the foundation of this branch of the common law. To obtain a clear idea of the anomalous character of such a liability it would be well to take a brief glance at the established rules of law applicable to the general subject of co-employees and their employers. A master is not liable to his servant for the negligence of a fellow-servant, but he is always responsible for his own neglect. If he knowingly hires a careless servant, he is negligent himself, and whenever he discovers habits of carelessness in his employees, he should discharge or correct them. The master must also provide safe machinery and materials for his servants, and give them a secure place to work in. If he falls in any of these respects, he cannot fall back upon the excuse that a co-servant was negligent. To justify the title of fellow-servants it is not enough that the employees have a common master. A workman in a mill is not the fellow-servant of his master's coachman, and he may sue his master for injuries caused by the coachman's negligence. Again, a laborer is not the fellow-servant of his master's general superintendent. Such a person is the master's representative, and his acts are his master's acts.

These are the general principles of law which define a master's liability to his servant for injuries caused by fellow-servants. It is customary to give as a reason for the rule which generally exempts an employer from such responsibility that the employee takes upon himself the risks of the service, but this statement is hardly satisfactory. When the rule was first laid down,

the court seemed to consider only the public policy of adopting this or another doctrine.* Lord Abinger merely said that the consequences of a rule which could allow this responsibility would be alarming. "The master, for example, would be liable to the servant for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen." We apprehend that the ordinary explanation of the law established by this decision was an after-thought, and that it does not go to the root of the matter. It is an axiom that a man should be answerable for his own negligence. The next step is to render him responsible for the careless act of his agent or servant. This responsibility involves something more than an axiom. It must be proved to exist for each class of cases. It is sometimes said that this liability depends on the principal's rights of control and selection. It is dependent rather upon the theory of transferred identity, of which these rights are simply incidents. The world at large sees the master through his servants. Their deed is his deed. When, however, a fellow-servant is injured, there is no transferred identity. His relations with his master are direct. He does not see his master through the servant who injured him. This is a case in which the rule of liability for an agent's negligence must not be applied, for rules and the reasons for them should be co-extensive. Should a master, then, be liable to his servant for injuries caused by a fellow-servant? As well might a servant after injuring himself look to his master for damages. We can now explain the whole law of master and servant. A superintendent stands between employer and employee, and is naturally identified with the former, for whom he is empowered to act *in loco magistri*. This rule is inconsistent with the doctrine that a servant assumes the risks of the service, for these risks would include the negligence of a general overseer. Nor are we less able to account for the case of the coachman and the mill-hand. Each of them is as to the other an outsider, and to each of them as such, the master may be liable. The master has, in fact, two distinct capacities as the employer of each. Why should we seek to explain the exemption from responsibility of a master for injuries inflicted by one of his servants upon another by asserting that a servant contracts to assume the risks of his employment? There is no necessity for such an explanation. This responsibility does not, in the nature of things, exist, and whenever it is imposed by statute, it must be regarded as an excrecence upon the contract of service. A statute of this character is incorrectly said to take away an implied contract on the servant's part to assume certain dangers. In reality, it adds an unnecessary contract on the master's part to increase his risks. It creates an additional collateral contract as impertinent as a contract of lease or of life insurance.

MEMNON.

REMOVAL OF CAUSE—EXCLUSION BY STATE OF CITIZENS OF COLOR FROM JURY.

UNITED STATES SUPREME COURT, MAY, 1881.

NEAL V. STATE OF DELAWARE.

The petition of the plaintiff in error—a man of color, indicted for rape in one of the courts of Delaware—for the removal of the prosecution into the Circuit Court of the United States, was properly disregarded.

The Constitution of Delaware, adopted in 1831 (the words of which have never been changed), gave the right of suf-

frage (with a few special exceptions) to free white male citizens. And the statute of the State (adopted in 1848 and never repealed), restricts the selection of jurors to those qualified to vote at a general State election.

The legal effect of the adoption of the amendments to the Federal Constitution, and the laws passed for their enforcement, was to annul so much of the State Constitution as was inconsistent therewith, including the provision confining suffrage to the white race; and thenceforward the jury statute was enlarged in its operation so as to render colored citizens, otherwise qualified, competent to serve on juries in the State courts.

The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes.

In this case, that presumption is strengthened and becomes conclusive, not only by reason of the direct adjudication of the State court, recognizing the modification of the State Constitution by reason of the amendments to the National Constitution, but by the entire absence of any statutory enactments, since the adoption of the amendments, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, their legal effect upon the Constitution and laws of the State.

Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that the case was one embraced by section 641 of the Revised Statutes, and therefore removable into the Circuit Court of the United States.

The alleged exclusion from the grand jury that found and from the petit jury that was summoned to try this indictment, of citizens of the African race, because of their race, did not result from the Constitution or laws of the State as expounded by its highest judicial tribunal; and consequently the accused was not entitled to the removal of the prosecution into the Circuit Court. Such exclusion, however, if made by the jury commissioners, without authority derived from the Constitution and laws of the State, was a violation of the prisoner's rights, under the Constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error to the State court.

Upon the showing made by the accused the motions to quash the indictment and the panels of jurors should have been sustained.

The doctrines announced in *Strauder v. West Virginia*, *Virginia v. Rives* and *Ex parte Virginia* (100 U. S. 303, 313 and 339), reaffirmed.

IN error to the Court of Oyer and Terminer of New Castle county, State of Delaware, to review the proceedings of that court in the trial of the plaintiff in error, William Neal. The facts appear in the opinion.

HARLAN, J. The plaintiff in error, a citizen of the African race, was, on the 11th May, 1880, indicted in the court of General Sessions of the Peace and Jail Delivery of New Castle county, in the State of Delaware, for the crime of rape—an offense punishable, under the laws of that State, with death. The indictment, upon writ of *certiorari* sued out by the attorney-general of the State, was removed for trial into the court of Oyer and Terminer for the same county—the highest judicial tribunal of Delaware in which the decision of such a case could be had. In the latter court, the accused, by counsel specially assigned for his defense, filed a petition, verified by his oath, for the removal of the prosecution into the Circuit Court of the United States for the district of Delaware.

The general grounds alleged for removal were that the grand jurors who returned the indictment, and the petit jurors who were summoned to try the case, were of the white race exclusively; that all citizens of the African race, though otherwise qualified, had, by

* *Priestley v. Fowler*, 3 M. & W. 1, decided in 1837.

virtue of the Constitution and laws of the State, been excluded from the lists of grand and petit jurors, because of their race and color; that in fact, persons of that race, though otherwise qualified, have always, in said county and State, been excluded because of their color, from service on juries; and consequently, that the accused had been, and in the trial of his case would be, denied the equal protection of the laws, and the full and equal benefit of all laws and proceedings in that State for the security of his person as is enjoyed by the white race.

The removal was denied, as were motions subsequently made in behalf of the accused to quash the indictment and the panels of grand and petit jurors. A trial was had before a jury composed wholly of white persons, and, a verdict of guilty having been returned, it was, on the 27th May, 1880, adjudged that the accused suffer death by hanging. From that judgment this writ of error has been prosecuted.

The assignments of error are numerous, but they are all embraced by the general proposition that the court erred as well in proceeding with the trial after the petition for removal was filed, as in denying the motions to quash the indictment, and the panels of jurors.

The first question to which our attention will be directed relates to the assertion, by the accused, of the right of removal under section 641 of the Revised Statutes. That section declares that "when any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of the citizens of the United States, * * * such suit or prosecution may, upon the petition of such defendant filed in said State court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State court shall cease," etc.

In *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, id. 313, and *Ex parte Virginia*, id. 339, that section of the Revised Statutes was the subject of careful examination, in connection with section 1,977, which declares that "all persons within the jurisdiction of the United States shall have the same right, in every State and Territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like pains, penalties, taxes, licenses, and exactions of every kind and no other." We also considered the validity and scope of the act of Congress, approved March 1, 1875, which, among other things, declares that "no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified from service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude." (18 Stat., pt. 3, 336.)

In those cases it was ruled that these statutory enactments were constitutional exertions of the power to pass appropriate legislation for the enforcement of the provisions of the Fourteenth Amendment, which was designed, primarily, as we held, to secure to the colored race, thereby invested with the rights, privileges, and responsibilities of citizenship, the enjoyment of all the civil rights, that under the law, are enjoyed by white persons; that while a State, consistently with the purposes for which that amendment was adopted, may confine the selection of jurors to males, to freeholders, to citizens, to persons within

certain ages, or to persons having educational qualifications, a denial to citizens of the African race, because of their color, of the right or privilege accorded to white citizens, of participating, as jurors, in the administration of justice, is a discrimination against the former inconsistent with the amendment, and within the power of Congress, by appropriate legislation, to prevent; that to compel a colored man to submit to a trial before a jury drawn from a panel from which was excluded, because of their color, every man of his race, however well qualified by education and character to discharge the functions of jurors, was a denial of the equal protection of the laws; and that such exclusion of the black race from juries because of their color was not less forbidden by law than would be the exclusion from juries, in the States where the blacks have the majority, of the white race, because of their color.

But it was also ruled, in the cases cited, that the constitutional amendment was broader than the provisions of section 641 of the Revised Statutes; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials arising from judicial action after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges, or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which section 641 refers, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from juries because of their race.

The essential question therefore is, whether, at the time the petition for removal was filed, citizens of the African race, otherwise qualified, were, by reason of the Constitution and laws of Delaware, excluded from service on juries because of their color. The court below, all the judges concurring, held that no such exclusion was required or authorized by the Constitution or laws of the State, and consequently, that the case was not embraced by the removal statute as construed by this court.

Upon the correctness of this position depends the validity of all the proceedings subsequent to the filing of the petition.

The Constitution of Delaware, adopted in 1831 (the words of which upon the subject of suffrage had not been changed when the petition for removal was filed, nor since), restricts the right of suffrage at general elections to free white male citizens, of the age of twenty-two years and upwards, who had resided in the State one year next before the election, and the last month thereof in the county where he offers to vote, and who, within two years next before the election, had paid a county tax, which shall have been assessed at least six months before such election—the prerequisite of a payment of tax being dispensed with in the case of free white male citizens between twenty-one and twenty-two years of age, having the prescribed residence in the State and county. The only persons excluded by that Constitution from suffrage are those in the military, naval, or marine service of the United States, stationed in Delaware

idiots, insane persons, paupers, and those convicted of felonies.

The statutes of Delaware, adopted in 1848, and in force at the trial of this case, provided for an annual selection, by the levy court of the county, of persons to serve as grand and petit jurors, and from those so selected the prothonotary and clerk of the peace were required to draw the names of such as should serve for that year, if summoned. They further provided that all qualified to vote at the general election, being "sober and judicious persons," shall be liable to serve as jurors, except public officers of the State or of the United States, counsellors and attorneys at law, ordained ministers of the gospel, officers of colleges, teachers of public schools, practicing physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons over seventy years of age.

It is thus seen that the statute, by its reference to the constitutional qualifications of voters, apparently restricts the selection of jurors to *white* male citizens, being voters, and sober and judicious persons. And although it only declares that such citizens shall be *liable* to serve as jurors, the settled construction of the State court, prior to the adoption of the Fifteenth Amendment, was that no citizen of the African race was competent, under the law, to serve on a jury.

Now, the argument on behalf of the accused is, that since the statute adopted the standard of voters as the standard for jurors, and since Delaware has never, by any separate or official action of its own, changed the language of its Constitution in reference to the class who may exercise the elective franchise, the *State* is to be regarded, in the sense of the amendment and of the laws enacted for its enforcement, as denying to the colored race within its limits, to this day, the right, upon equal terms with the white race, to participate as jurors in the administration of justice—and this, notwithstanding the adoption of the Fifteenth Amendment and its admitted legal effect upon the Constitution and laws of all the States of the Union.

But to this argument, when urged in the court below, the State court replied, as does the attorney-general of the State here, that although the State had never, by a convention, or popular vote, formally abrogated the provision in its State Constitution restricting suffrage to white citizens, that result had necessarily followed, as matter of law, from the incorporation of the Fourteenth and Fifteenth Amendments into the fundamental law of the nation; that since the adoption of the latter amendment neither the legislative, executive, nor judicial authorities of the State had, in any mode, recognized, as an existing part of its Constitution, that provision which, in words, discriminates against citizens of the African race in the matter of suffrage; and consequently, that the statute prescribing the qualification of jurors by reference to the qualifications for voters should be construed as referring to the State Constitution, as modified or affected by the Fifteenth Amendment.

The question thus presented is of the highest moment to that race, the security of whose rights of life, liberty and property, and to the equal protection of the laws, was the primary object of the recent amendments to the National Constitution. Its solution is confessedly attended by many difficulties of a serious nature, which might have been avoided by more explicit language in the statutes passed for the enforcement of the amendments. Much has been left by the legislative department to mere judicial construction. But upon the fullest consideration we have been able to give the subject, our conclusion is that the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from its Constitution and laws.

Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from

the State Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward, the statute which prescribed the qualification of jurors was, itself, enlarged in its operation so as to embrace all who, by the State Constitution, as modified by the supreme law of the land, were qualified to vote at a general election. The presumption should be indulged, in the first instance, that the State recognizes, as is its plain duty, an amendment of the Federal Constitution, from the time of its adoption, as binding on all of its citizens and every department of its government, and to be enforced, within its limits, without reference to any inconsistent provisions in its own Constitution or statutes. In this case, that presumption is strengthened, and indeed, becomes conclusive, not only by the direct adjudication of the State court as to what is the fundamental law of Delaware, but by the entire absence of any statutory enactments or any adjudication since the adoption of the Fifteenth Amendment, indicating that the State, by its constituted authorities, does not recognize, in the fullest legal sense, the binding force of that amendment and its effect in modifying the State Constitution upon the subject of suffrage.

This abundantly appears from the separate opinions, in this case, of the judges composing the court of Oyer and Terminer. Comegys, C. J., alluding to the fifteenth amendment, and the act of March 1, 1875, said: "Returning to the point—that our laws forbid the selection of colored persons as jurors. We answer this by saying that we have no such laws. * * * The fourteenth amendment, therefore, and the act of 1875 passed by Congress as appropriate legislation for its enforcement, or either, are superior to our State Constitution and it had to give way to them, and it did so give way, and was repealed, so far as the word 'white' is mentioned therein as a qualification for a voter at a general election, as soon as the amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this State from that time forth. Ever since the last civil rights bill was passed by Congress, negroes have been admitted as witnesses in all cases, civil and criminal, tried in our courts; whereas, before, they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is, then, an excision or erasure of the word 'white' in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there. We have, then, no law of this State forbidding the levy court to select negroes as jurors, because they are negroes, if in their judgment they are otherwise qualified." Wales, J., said: "We know, from actual and personal knowledge of the history of times, that since the adoption of the fifteenth amendment to the Federal Constitution the provision in the Constitution of Delaware limiting the right to vote to free white male citizens has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this State with the same freedom as the whites. It is not necessary to prove this fact. * * * But there is really no difficulty in reaching the conclusion that under the law regulating the selection of jurors the colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward and make one unvarying standard for the qualification of a juror, to wit, that he should be

qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever, thereafter, might become qualified voters in the State, whether by virtue of amendment to its Constitution or by virtue of 'the supreme law of the land,' that overrides and supplants State Constitutions and State laws, *eo instanti* became qualified for selection and service as jurors. * * * The right secured to the colored man under the fourteenth amendment and the civil rights laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no State law can for that cause alone exclude him from the jury box, nor can a State officer be permitted, in the performance of his official duties, to purposely keep the colored man off the jury lists." Houston, J., concurred in the opinion of the other judges, and expressed his surprise that the petition for removal contained the statement that the colored man is not a voter in Delaware by its Constitution and laws. That, he said, "is not true, and ought not to be asserted; because there is not a lawyer of any political party, that has ever doubted, since the adoption of the fourteenth amendment to the Constitution of the United States, that the word 'white,' in our Constitution, was entirely stricken out. That goes to the root of the whole matter, and there is no discrimination in the Constitution or laws of our State against colored men as jurors."

There is another consideration upon this branch of the case which is entitled to weight. In some of the States, particularly those in which slavery formerly existed, no alteration of the Constitution was possible except in the particular mode prescribed, unless, indeed, the people assumed to disregard the express limitations which their own fundamental law imposed upon the power of amendment. If the Constitution is obeyed, no alteration of its provisions could, in some of the States, be effected short of several years. And if the position taken by counsel be correct, so long as the mere language of a State Constitution, as originally framed and adopted, is inconsistent with that equality of civil rights secured by the recent amendments to the Federal Constitution, every civil suit or criminal prosecution in that State against a colored man, would be removable, under section 641 of the Revised Statutes, into the Circuit Court of the United States, although the State, by all its organs of authority—legislative, executive and judicial—should recognize, without reservation or qualification, the legal effect as well of the amendments, as of the statutes enacted to enforce them. We cannot believe that section was intended by Congress to be so far-reaching in its results, or that its reasonable construction requires us to hold that the State of Delaware, by its Constitution and laws, denies or prevents, or impairs the enforcement, in its judicial tribunals, of rights secured by any law providing for the equal civil rights of citizens of the United States. Had the State, since the adoption of the fourteenth amendment, passed any statute in conflict with its provisions, or with the laws enacted for their enforcement, or had its judicial tribunals, by their decisions, repudiated that amendment as a part of the supreme law of the land, or declared the acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was such a denial, upon its part, of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State, as under the Constitution, and within the meaning of section 641, would authorize a removal of the suit or prosecution to the Circuit Court of the United States. No such case is presented here. The discrimination complained of does not result from the Constitution or laws of the State, as expounded by its highest judicial tribunal; and consequently it could not be made manifest until after the

trial commenced in the State court. The prosecution against the plaintiff in error was not, therefore, removable into the Circuit Court, under section 641. In thus construing the statute we do not withhold from a party claiming that he is denied, or cannot enforce in the judicial tribunals of the State his constitutional equality of civil rights, all opportunity of appealing to the courts of the Union for the redress of his wrongs. For if not entitled, under the statute, to the removal of the suit or prosecution, he may, when denied, at the trial in the State court, or in the execution of its judgment, any right, privilege, or immunity given or secured to him by the Constitution or laws of the United States, bring the case here for review.

What we have said leads to the conclusion that the State court did not err in disregarding the petition for removal.

The remaining question relates to the denial of the motions to quash the indictment and the panels of jurors. The grounds upon which the motions are placed were formally and distinctly stated, and are fully set out in the bill of exceptions. They were the same as those assigned in the verified petition filed by the accused for the removal of the prosecution into the Circuit Court of the United States, viz., that from the grand jury that found, and from the petit jury that was summoned to try the indictment, citizens of the African race, qualified in all respects to serve as jurors, were excluded from the panels, because of their race and color; and that in fact persons of that race, though possessing all the requisite qualifications have always, in that county and State, been excluded because of their race from serving on juries. That colored persons have always been excluded from juries in the courts of Delaware was conceded in argument, and was likewise conceded in the court below. The chief justice, however, accompanied that concession with the remark in reference to this case, "that none but white men were selected is in nowise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity, to sit as jurors." The exceptions, he said, were rare.

Although for the reasons we have given, the accused was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting jurors were guilty of the offense charged in the defendant's petition. A denial, upon their part, of the right of the accused to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia v. Rives*, "the court will correct the wrong, will quash the indictment or the panel; or if not, the error will be corrected in a superior court," and ultimately in this court upon review. 105 U. S. 322.

We repeat what was said in that case, that while a colored citizen, party to a trial involving his life, liberty or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury, in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it is a right to which he is entitled, "that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color." So that we need only inquire whether, upon the showing made by the accused, the court erred in overruling the motions to quash the indictment and the panels of jurors.

We are informed by the bill of exceptions that when

the motions to quash were made, it was agreed between the State, by its attorney-general, and the prisoner, by his counsel, with the assent of the court, that the statements and allegations in the petition for removal "should be taken and treated, and given the same force and effect, in the consideration and decision" of the motions "as if said statements and allegations were made and verified by the defendant in a separate and distinct affidavit." The only object which the prisoner's counsel could have had in filing the affidavit was to establish the grounds upon which the motions to quash were rested. It was in the discretion of the court to hear the motions upon affidavit. No counter-affidavits were filed in behalf of the prosecution. Nor does it appear that at the trial the State, by its attorney-general, controverted, in any form, the allegation, made with the utmost directness, that the officers of the State had purposely excluded from the juries, because of their color, citizens of the African race, qualified to perform jury service. Nor does the bill of exceptions disclose any suggestion or intimation, upon the part of the State, of any objection to the prisoner's affidavit as evidence in support of the motions. Under these circumstances, without any evidence, by affidavit, or otherwise, upon the part of the State, the motions to quash were submitted for determination. They were overruled, upon the ground that "no evidence had been produced, or offered by the accused" to prove that the alleged exclusion of colored persons from the juries was because of their color. The court said that such fact of exclusion could not be established by the circumstance that no persons of the African race were, in fact, on the panels; but "should have been proven affirmatively on the part of the defendant, and by competent testimony, outside of his affidavit, before said motions to quash could be granted."

Thereupon—the bill of exceptions proceeds—before the trial commenced, and before the accused had even been arraigned, or had pleaded to the indictment, he further moved the court to permit him to produce, as witnesses in support of the motion to quash, "the commissioners of the levy court, and the clerk and bailiff of said levy court, and that the court should issue by its clerk subpoenas for said persons as witnesses to testify as aforesaid." To the granting of that motion the attorney-general of the State objected, and his objection was sustained. The bill shows that the motion to go into further proof was denied "on the ground that full time to produce such witnesses to make such proof had existed before the motion was heard; that application for leave to summons witnesses to support a motion which had been argued and refused, because of want of proof, when sufficient time had existed for its production, was without precedent in the Court of Oyer and Terminer in this State, and therefore in this case the motion must be treated as coming too late to be granted."

It may be argued that the ruling of the court whereby the prisoner was denied the privilege, after the motions to quash were overruled, and before the trial commenced, of making further proof in support of the charge that both grand and petit juries had been selected in violation of the Constitution and laws of the United States, is not the subject of review in this court. Without discussing that proposition, we may remark, with entire respect for the court below, that the circumstances, in our judgment, warranted more indulgence, in the matter of time, than was granted to a prisoner whose life was at stake, and who was too poor to employ counsel of his own selection. If it be suggested that the commissioners, when summoned, could not have been compelled to testify, it may be answered that they might not have claimed any such exemption. But that objection, however plausible or weighty, did not apply to the clerk and bailiff of the levy court. The clerk of the Court of Oyer and Ter-

miner was himself, as we are advised by the opinion of the chief justice, the clerk of the levy court, attending its sessions and assisting in the transaction of its business. That officer, we may presume, was present in court when the application to examine him as a witness was made. He and the bailiff were in a position perhaps to clearly sustain or clearly disprove the allegation that the grand and petit juries were organized upon the principle of excluding therefrom all colored persons, because of their race—a charge involving the fairness and integrity of the whole proceeding against the prisoner.

But passing by this ruling of the court below as insufficient in itself to authorize a reversal of the judgment, we are of opinion that the motions to quash, sustained by the affidavit of the accused—which appears to have been filed in support of the motions, without objection to its competency as evidence, and was uncontradicted by counter affidavits, or even by a formal denial of the grounds assigned—should have been sustained. If, under the practice which obtains in the courts of the State, the affidavit of the prisoner could not, if objected to, be used as evidence in support of a motion to quash, the State could waive that objection, either expressly or by not making it at the proper time. No such objection appears to have been made by its attorney-general at the trial. On the contrary, the agreement that the prisoner's verified petition should be treated as an affidavit "in the consideration and decision" of the motions, implied, as we think, that the State was willing to risk their determination upon the case as made by that affidavit, in connection, of course, with any facts of which the court might take judicial notice. The showing thus made, including, as it did, the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State—although its colored population exceeded twenty thousand in 1870, and in 1880 exceeded twenty-six thousand, in a total population of less than one hundred and fifty thousand—presented a *prima facie* case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the Constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed, was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte Virginia*, we said, and now repeat, that "a State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning." *Ex parte Virginia*, 100 U. S. 339.

The judgment of the Court of Oyer and Terminer is reversed, with directions to set aside the judgment

and verdict, as well as the order denying the motion to quash the indictment and panels of jurors, and for such proceedings, upon a further hearing of those motions, as may be consistent with the principles of this opinion.

WAITE, C. J., dissenting. I am unable to concur in this judgment. We said in *Virginia v. Rives*, 100 U. S. 322, that the mere fact that persons of color had not been allowed to serve on juries where colored men were interested, was not enough to show that the defendants had been discriminated against because of their race. That is all that was shown in this case on the motions to quash, except that the accused swore in an affidavit that the exclusion of colored men from juries in Delaware had been because of their race. I cannot believe that the refusal of the court, on such an affidavit unsupported by any evidence, to quash the indictment and quash the panel of jurors because the defendant had been discriminated against on account of his race, was such an error in law as to justify a reversal of the judgment. As the motions had once been submitted on the affidavit of the defendant alone and decided, it rested in the discretion of the court to allow a rehearing and permit further evidence to be introduced. The refusal of the court to do so cannot, as I think, be assigned for error here.

TAXATION OF NATIONAL BANK SHARES.

UNITED STATES CIRCUIT COURT, N. D. NEW YORK,
APRIL, 1881.

FIRST NATIONAL BANK OF UTICA V. WATERS.

In an application by a National bank for an injunction to restrain a State tax collector from collecting a tax upon its shares, *held*, that when the laws of the State for the taxation of general corporations and the exemption of their shares did not furnish the rule for the taxation of moneyed corporations or of capital invested in private banking, or of personal property generally, the fact that one rate of taxation was imposed upon shareholders in corporations other than banks and another higher one upon those on banks, was not a ground for granting the relief asked for. It would seem that the term "moneyed capital in the hands of individual citizens," used in United States Revised Statutes, section 5219, relating to the taxation of National bank shares, more aptly describes ready money or capital invested in private banking than that invested in other corporations.

Held, also, that a departure from the statutory requirements for the assessment of taxes amounting only to an irregularity, and not rendering the tax void, would not be ground for enjoining its collection.

ACTION to restrain the collection of a tax. Sufficient facts appear in the opinion.

Ward Hunt, Jr., and Miller & Fincke, for complainant.

Alfred C. Coze, for defendants.

WALLACE, D. J. The complainant moves for a preliminary injunction to restrain the defendants from the collection of taxes assessed against its several shareholders on the ground, first, that the laws of this State impose one rule of assessment and taxation upon shareholders in corporations other than banking associations, and another upon banks, whereby a higher taxation incidentally rests upon the latter, and as to shareholders of National banking associations, thereby violates the rule of uniformity prescribed by section 5219, Revised Statutes United States; and on the second ground, that the particular tax in this case was illegal, because of a departure in imposing it from the statutory requirements prescribed for the assessment and collection of taxes.

The defendant Waters is tax collector for the ward

in the city of Utica in which the complainant's bank is located. The defendant Kohler is treasurer of Oneida county, and has no control over the collector and no part in collecting the tax until the collector has returned his warrant unsatisfied. While he may be a proper party, he is not a necessary one to the controversy, and it is to be determined as though the collector were the sole defendant.

Upon the first ground, on which the motion is predicated, some remarks in the opinion of *Albany City Bank v. Maher* may suggest the inference that I was disposed to hold, that if the laws of the State did make a discrimination for the purpose of taxation between shareholders in National banks and shareholders in corporations generally, against the former, the taxation under such laws would be illegal as contravening the law of Congress. But that case did not involve the point now made, and was argued and considered solely upon the provisions of the tax laws of 1880, and without regard to that section of the general laws which exempts shareholders from taxation when the corporation is taxed upon its capital stock or personal property.

Assuming that bank shareholders are taxed by the laws of this State at a higher rate than is imposed upon shareholders in other than moneyed corporations, the question now is, are they taxed at a greater rate than is assessed "upon other moneyed capital in the hands of individual citizens of the State" within the meaning of the law of Congress. Does the taxation imposed by the laws of the State upon individuals, on account of that part of their personal property represented by shares of stock in corporations other than moneyed corporations, constitute the test and rule by which to determine what taxation is imposed upon moneyed capital in the hands of individual citizens, or is that test to be found in the laws which tax personal property generally? Or does the taxation of neither of these subjects of taxation furnish the test, and is it to be found in the taxation imposed by the laws of the State upon that part of the personal property of its citizens, which consists of money or shares of stock in moneyed corporations?

These questions have been answered adversely to the complainant's theory in several cases which have been considered by the Supreme Court of the United States.

It was the object of the act of Congress to permit the State, which creates corporations or allows them to exercise their franchises within its limits, to tax them as its own policy may dictate, and by its system to foster them by light taxation or discouraging them by onerous taxation, without thereby establishing a rule to control its taxation of the shares held by its citizens in National banks.

The States have no power to tax the capital of National Banking Associations, but are granted the power to tax the moneyed capital of its citizens invested in such shares to the same extent as though it remained uninvested therein. The citizens of a State may invest their moneyed capital as they choose, and must accept the measure of taxation which is imposed by the State on the character of the investment they have selected. If they choose to invest it in corporations or joint-stock companies, they must submit to have it taxed upon the principles which the State has adopted, or may adopt for the taxation of such corporations or joint-stock companies. As the policy of the State may dictate different modes and measures of taxation for different classes of corporations, it would be difficult, if not impossible, to ascertain the measure of taxation for National bank shares by that prescribed for capital invested in other corporations. Thus, while life insurance companies are taxed by a franchise tax and taxation of the shares exempted, other corporations are taxed upon their capital stock, while in others

still the shareholders are taxed upon their shares. Which class of corporations would furnish the rule of taxation of shareholders in National banks? The section should be so construed as to obviate this difficulty and prescribe a rule capable of practical application.

Recognizing the force of such considerations, it has been held that the State, by exempting certain classes of taxable property, partially or wholly, from taxation, does not thereby adopt a rule of taxation which must be applied to National bank shares under the law of Congress. As was said by the chief justice in *Hepburn v. School Directors*, 23 Wall. 480: "It could not have been the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt."

In *People v. Commissioners*, 4 Wall. 244, a deduction or allowance was made under the laws of the State in assessments against individuals and insurance companies on account of investments in the securities of the United States, while none was made in assessing the relator upon his shares in a National bank, and the tax was sustained. In *Gorgas' Appeal*, 79 Penn. St. 149, the State laws exempted all mortgages, judgments, recognizances or moneys owing upon articles of agreement for the sale of real estate, and it was held that such exemption did not preclude the State from taxing National bank shares to the same extent that moneyed capital other than of the character exempted was taxed. In *Hepburn v. School Directors*, 23 Wall. 480, the precise question presented in *Gorgas' Appeal* was ruled in the same way. When an exemption or deduction is allowed by the laws of the State, which is of such general operation as to affect all classes of taxable property, it must be allowed in assessing shares in National banks, because it necessarily is the rule of assessment. The deduction was of this character in *Albany Exchange Nat. Bank v. Hills*, and because it was so recognized in assessing the National bank shares, the assessment was declared void.

Moneyed capital cannot be said to be exempt from taxation by the laws of this State, because that portion of it which is invested in the shares of various classes of corporations is exempt. Not only does the State tax moneyed capital generally, but the capital invested in these corporations is taxed in the hands of corporations. If thereby any irregularity is produced, more would result if shareholders in National banks were wholly relieved from taxation.

Precisely what is signified by the language of the act of Congress, which declares that the taxation shall not be at a greater rate than is imposed by the laws of the State upon "moneyed capital in the hands of individual citizens," has never been judicially declared, although it has several times been determined what was not such moneyed capital.

In *Lionberger v. Rouse*, 9 Wall. 468, it is stated that the enactment was intended to place National banks on an equality with State banks, as to the taxation of their shares by the State. In *Hepburn v. School District*, 23 Wall. 484, it is said that moneyed capital, as used in the section, signifies something more than money lent out at interest, and comprehends investments in stocks and securities. In *Adams v. Mayor of Nashville*, 95 U. S. 19, the opinion is that "the act was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in National banks should not be taxed at a greater rate than like property similarly invested."

It would seem that the term "moneyed capital in the hands of individual citizens" more aptly describes ready money or capital invested in private banking than it does capital invested in manufacturing corporations, insurance companies and the like. As originally used in the National Banking Act, section 41, implied something different from capital invested

in State banking corporations, because it was provided originally that the taxation by the States should not exceed that imposed on moneyed capital in the hands of individual citizens or that imposed "upon the shares in any of the banks organized under authority of the State." 13 Statutes at Large, 112. It is hardly appropriate to call shares in manufacturing or insurance corporations "moneyed capital in the hands of individual citizens," and if it had been intended to include all capital thus invested, it would have been easy to do so under some such comprehensive term as personal property. It seems more reasonable to believe that while Congress was legislating to place National bank shares on an equality with State bank shares, it was thought expedient to place them on an equality also with the capital employed in private banking, and thus relieve them from the danger to which corporations are sometimes exposed by local prejudices.

But whether this view is correct or not within the cases referred to, the laws of this State, for the taxation of general corporations and the exemption of their shares, does not furnish the rule for the taxation of moneyed corporations, or of capital invested in private banking, or of personal property generally, and the complainant must fall upon this branch of its case.

As to the second ground upon which the motion rests, as the collector is a ministerial officer who must obey the mandate in his hands for the collection of the tax, the complainant cannot succeed unless the tax is void, because illegal as distinguished from irregular. The assessment-roll and warrant annexed for the collection of the taxes constitute the mandate of the officer, and the legality of his proceedings under them may be determined by the principles which apply to the case of an officer acting under a judgment and execution.

The rule is thus stated in *Erskine v. Holmback*, 14 Wall. 613. If an officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to a ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then, in such cases, the order or process will give full and entire protection to the ministerial officer against any prosecution which the party aggrieved may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process issued.

Tested by this rule, the collector in the present case is protected by his warrant in collecting the tax.

Doubtless the fair construction of the Revised Statutes, and the charter of the city of Utica, requires that when the assessment-roll for a given ward is delivered by the board of supervisors to the treasurer of the city of Utica, the amount of the tax paid by each tax payer shall have been extended and shall appear upon the roll. But every thing had been done which was required to give the board of supervisors jurisdiction, for the purposes of equalization of taxes and for carrying out the details of the assessment, which the assessors had made. The board of supervisors had determined the rate, and the assessors had determined the valuation. It was the duty of the city clerk of Utica to extend the tax. He omitted to do so, as to the stockholders of the complainant, until after the roll had been delivered to the treasurer. From the nature of the act, and from the character of the official to whom it is intrusted, the act is evidently a clerical one. No substantial injury could result from the omission to perform it. The computation and insertion of the amount of the tax after the roll had been delivered to the treasurer was an irregularity. It was done by the

person whose duty it was to do it. It was done after all the data to be ascertained by the assessors and the board of supervisors had been ascertained according to law. In effect and character, it was as though the clerk of a court in entering a judgment had computed the sum adjudged due when the verdict of a jury or the decision of a judge had determined every thing essential to the judgment, except the result of a mathematical computation. No one would contend that such a judgment would be void.

When the assessment-roll and warrant came to the hands of the collector, they were apparently regular. In the case of *Albany City Bank v. Maher*, the assessors had omitted to perform an act prerequisite to their authority to make any assessment, and the assessment was therefore void. Here it was simply irregular. In *Bellinger v. Gray*, 51 N. Y. 610, and in *Westfall v. Pratzon*, 49 id. 349, the defect in the proceedings by which the tax was imposed appeared in the papers which constituted the process of the collector for collecting the tax.

The complainant cannot succeed upon either branch of its case.

Motion for injunction denied.

NEW YORK COURT OF APPEALS ABSTRACT.

CONTRACT—AGREEMENT TO FURNISH EVIDENCE FOR SUIT NOT NECESSARILY ILLEGAL.—B. was indebted upon a mortgage he had executed. H., without authority from B., paid the amount of the mortgage to a receiver, in whose hands it was, and the receiver satisfied and discharged the mortgage and delivered it, with the satisfaction, to H. Thereafter an action to foreclose the mortgage was commenced by one claiming to own it, and B. pleaded payment. Thereafter H. and B. made an agreement in writing in which, after reciting the above facts, it was agreed on the part of H. to furnish to B. the papers and evidence necessary to defeat the action, and B. and T., a junior mortgagee, on their part, in consideration that H. should furnish such papers and that thereby such action should be defeated and a recovery on the mortgage finally prevented, agreed to pay H. half the amount of the mortgage. *Held*, that the contract was not, on its face, illegal, and the circumstances did not render it so. The respective rights and obligations of H. and B., growing out of the payment by H., were not free from doubt, and there was no objection if B. availed himself of the act of H. in his agreeing to pay him in part for his advances. There is no authority for so extensive a proposition as this, that every agreement made by a third person to furnish evidence in a litigation, for a compensation, contingent upon the event, is illegal. In *Stanley v. Jones*, 7 Bing. 369, it was held that an agreement made by a third person to communicate to one claiming to have been defrauded such information as would enable him to recover damages for the fraud, and to endeavor to procure evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. But in that case the one making the offer was an entire stranger in interest to the proposed litigation, and the court said that such an agreement was illegal from its manifest tendency to prevent justice. Here, H. had an interest in the subject of the litigation. The mere fact that the agreement might furnish a temptation to H. to prevaricate or furnish false testimony, did not stamp the agreement as illegal *per se*. Judgment affirmed. *Wellington v. Kelly*. Opinion by Andrews, J. [Decided March 22, 1881.]

PARTITION—DEVISE OF LAND WITH AUTHORITY TO EXECUTOR TO LEASE AND SELL FOR PURPOSE OF DIVISION VESTS NO TITLE IN BENEFICIARY—CONSTRUCTION OF WILL.—Testator left six children. His will, after

giving a small pecuniary legacy and some household articles, gives five-sixths of his residuary estate to five of his children, as follows: "I will and bequeath unto A, B, C, D and E five-sixths of all the residue and remainder of all my estate, both real and personal of every name and nature, to be equally divided between them." The remaining one-sixth he gave to a trustee in trust, to "to pay over to my son F the interest" during life, with authority, in a certain contingency, to pay any part of the principal, and at F's death to pay the "surplus then remaining in his hands" to F's children. The final clause was this: "I will, authorize and empower my executor, hereinafter named, to sell and convey by deed, any and all my real estate, at such time and in such manner as he shall think it proper for the interest of my estate, and to rent and lease the same until thus sold. Also, I do hereby appoint my son William T. Morse executor," etc. *Held*, that the will created a valid express trust in the executor, under the Revised Statutes, to sell lands for the benefit of legatees under 1 R. S. 728, § 55, subd. 2, and that the children of the testator took no title or estate in the land. One of testator's sons could not, therefore, maintain an action for the partition of the land. Authority to an executor to sell lands vests no estate in him, unless accompanied with a right to receive the rents and profits, but the lands descend to the heirs or pass to the devisees, subject to the power. 2 R. S. 729, § 56; 4 Kent Com. 321; *Crittenden v. Fairchild*, 41 N. Y. 299; *Hetzl v. Barber*, 69 id. 1; *Prentice v. Janssen*, 79 id. 478. In this will the power of sale is accompanied by the power to rent, which carries with it the right to receive the rents and profits, and it is clear that the power of sale was conferred for the purpose of conversion and distribution of the proceeds of sale among testator's children. See *Fisher v. Banta*, 66 N. Y. 438; *Marsh v. Wheeler*, 2 Edw. Ch. 156; *Klunier v. Rogers*, 42 N. Y. 531; *Moncrief v. Rosa*, 50 id. 481. See, also, sustaining the general conclusion, *Vernon v. Vernon*, 53 N. Y. 351, and cases cited; *Brewster v. Striker*, 2 id. 19. If partition should be allowed, the object of the testator would be frustrated by allowing a portion of the beneficiaries to bind the others and compel a sale by an election to reconvert their particular shares into realty. *Holloway v. Radcliff*, 23 Ben. 163; *Craig v. Leslie*, 3 Wheat. 577; *Snell's Priso. of Eq.* 169-171. Judgment affirmed. *Morse v. Morse*. Opinion by Andrews, J. [Decided April 19, 1881.]

RECEIVER—CANNOT RATIFY ACT TO THE PREJUDICE OF HIS TRUST—RETAINING CHECKS CLAIMED TO EFFECT TRANSFER OF CREDIT.—In an action by the receiver of an insolvent bank to recover the amount of an over draft, it was sought by defendant to reduce the amount due from him by applying to his credit balances due from the bank to certain depositors, which such depositors had attempted, by checks drawn on the bank about the time of its failure, to transfer to defendant's account. Certain of these checks which were accepted by an officer of the bank, came into the receiver's hands and were retained by him, and it was claimed by defendant that this retention amounted to a ratification of the act of the officer of the bank who received them. *Held*, that the act of the receiver could not be so construed. He was the mere officer of the court and powerless to do any thing except as provided by law or directed by the court. The receiver is described as an officer of the court, a trustee for the creditors and a representative of the corporation. *Devendorf v. Barclay*, 23 Barb. 659. It has been held that he cannot waive a technical defense (*McEwert v. Lawrence*, Hoff. Ch. 176), or the rights of the creditors for whose protection he was appointed, *Reilly v. Dunsbury*, 10 J. & S. 238. See, also, *High on Receiver*, § 186. If under the authority derived from the stat-

into the receiver in this case had the power to allow a set-off (2 R. S. 489, §§ 68, 74, Laws 1849, ch. 228, § 11), that power did not extend to a case where no mutual debts subsisted at the date of his appointment and a demand had been afterward assigned to effect such purpose. In re Van Allen, 37 Barb. 231. Judgment affirmed. *Van Dyck v. McQuade*. Opinion by Finch, J.

[Decided April 26, 1881.]

WILL—EXECUTORS IN DIFFERENT STATES—EXECUTOR IN ONE NOT CHARGEABLE WITH ASSETS IN HANDS OF ANOTHER.—S. died in this State, leaving a will, in which she gave legacies to persons in New York and also to persons in Michigan, but directed that the New York legatees should be first paid. She appointed P., a resident of this State, executor for carrying out the provisions of the will "so far as they relate to parties and property in this State," and G., of Michigan, executor "for every thing so far as they relate to parties and property in the State of Michigan and elsewhere." P. presented the will to a surrogate in this State, and it was admitted to probate, and he qualified as executor. Upon an authenticated copy of the will and its probate in this State the will was admitted to probate in Michigan, and G. qualified as executor. P. took possession of testatrix's assets in New York, and after paying her debts here there was nothing left for distribution to the legatees. After payment of her debts in Michigan there was left in the hands of the Michigan executor more than enough to pay the New York legatees. P. demanded from the Michigan executor enough of the funds of testatrix in his hands to pay the New York legatees, but payment was refused. *Held*, that P. was not bound to bring action in the Michigan courts to compel the executor there to pay over the assets in his hands, or a sufficiency thereof to pay the New York legatees, and that he could not be charged with the Michigan assets, for a failure to do so. Testatrix had the power to name P. executor for this State, and G. for Michigan (3 Redf. on Wills, 53-72; Williams on Exrs. 217; Despard v. Churchill, 53 N. Y. 192; Hartnett v. Wandell, 60 Id. 350); and to confine each in his duties to the State for which he was appointed. The Michigan executor has the same authority in his State that the New York one has in his, and neither is responsible for the assets in possession of the other. The administration in Michigan is in no respect auxiliary to that in New York. In each State the executor derives his title from the will and not from the letters issued to him. Even if P. and G. were joint executors in this State, P. could not have compelled the surrender by G. of assets in his hands, and would not have been chargeable with them. *Burt v. Burt*, 41 N. Y. 46; *Adair v. Bremmer*, 74 Id. 539. In the cases, *Shultz v. Pulver*, 11 Wend. 363, and *Matter of Butler*, 38 N. Y. 397, in which executors were charged with assets out of the State, there was no administration elsewhere but in this State. Judgment affirmed. *Sherman v. Page*. Opinion by Earl, J.

[Decided April 19, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

EMINENT DOMAIN—TITLE TO LAND APPROPRIATED DOES NOT VEST IN STATE UNTIL COMPENSATION PAID—CANAL—WHAT IS.—The State of Indiana, under its internal improvement act, located a canal through the lands of C. in that State, entered the lands and constructed works designed for a canal. The canal was in part completed, water let in, and to some extent navigated, but not in the portion that passed through C.'s land. The banks were built on that portion, and water let in, but no navigation took place, and a lock *near by* was never sufficiently completed to allow boats

to pass through. No compensation was made C. for the lands, other than the benefit to be derived by him from the canal. Thereafter the State leased the power from the water running through the canal. Under the later Indiana decisions, when lands were taken by the State under the internal improvement laws, and just compensation made to the owners, the title in fee was transferred from the owner to the State. *Water-works Co. v. Burkhart*, 41 Ind. 304; *Nelson v. Fleming*, 56 Id. 310. The earlier decisions were the other way. *Edgerton v. Huff*, 26 Ind. 35. But until compensation has been made title does not pass. *Rubottom v. McClure*, 8 Blackf. 508; *Hankins v. Lawrence*, id. 256. See, also, to the same effect, elsewhere, *Roxford v. Knight*, 11 N. Y. 314; *Nichols v. Som. & Ken. R. Co.*, 43 Me. 359; *Cushman v. Smith*, 34 Id. 258. *Held*, that even if the benefit to C. from the opening and operation of the canal would have been sufficient compensation for the lands appropriated therefor, there was not such a canal constructed as the internal improvement act contemplated, and consequently there was not compensation for the land taken from C., and the title to the land never vested in the State, but remained in C. A canal in the sense that term implies in this connection means a navigable public highway for the transportation of persons and property. It must not only be in a condition to hold water that can be used for navigation, but it must have in it, as part of the structure itself, the water to be navigated ready for use. Such an instrumentality for "the advancement of the wealth, prosperity and character of the State" (*Rubottom v. McClure*, *supra*, 507) might confer benefits that would be a just compensation for the private property taken for its use, but until such a structure is actually furnished complete, it can in no proper sense be said that the works have been constructed from which the benefits that are to make the compensation can proceed. A mill-race carrying water for hydraulic purposes is not enough. There must be a canal fitted in all respects for navigation and open to public use, before the benefits can accrue to the owner which are under the law to overcome his claim for damages. Decree of U. S. Circ. Ct., Indiana, affirmed. *Kennedy v. City of Indianapolis*. Opinion by Waite, C. J.

[Decided March 30, 1881.]

INFANT—JURISDICTION OF FEDERAL COURT AS TO—PERSONAL SERVICE—WHEN REQUIRED TO GIVE JURISDICTION.—Plaintiff, an insurance company, brought action in the United States Circuit Court for the district of Michigan, against an infant, to have cancelled, as fraudulent and void, a policy issued by plaintiff upon the life of the defendant's father for the benefit of defendant, and to enjoin defendant from maintaining any suit thereupon. The infant was not at the time a resident of Michigan, but had left that State and gone to Minnesota to reside. No personal service of process was made upon him, but upon a report by the marshal of the fact that defendant had temporarily left the State, and that he made service on his general guardian, this was declared sufficient service by the Circuit Court, which thereupon appointed a guardian *ad litem*, who appeared and represented the infant in the suit. The infant had no property in Michigan. *Held*, that the Circuit Court obtained no jurisdiction of the infant, and a decree against such infant was void. The jurisdiction possessed by the English courts of chancery from the supposed delegation of the authority of the crown as *paterfamilias* is more frequently exercised in this country by the courts of the States than by the courts of the United States. It is the State, and not the Federal Government, except in the Territories and the District of Columbia, which stands, with reference to the persons and property or infants, in the situation of *paterfamilias*.

patria. Accordingly, provision is made by law in all the States for the appointment of such guardians, whose duties and powers are carefully defined. The authority of the Federal courts can only be invoked within the limits of a State for such an appointment where property of the infant is involved in legal proceedings before them, and needs the care and supervision of an officer of that kind. In such a case, to preserve the property from destruction or waste, the Federal courts may appoint a guardian to take care of it pending the proceedings. And those courts will always see that a proper guardian *ad litem* has charge of the infant's interests where his property is involved in proceedings before them. This is the extent of their authority. The statute of Michigan requiring the general guardian of an infant to "appear for and represent his ward in all legal suits and proceedings, unless when another person is appointed for the purpose as guardian or next friend," does not change the necessity of service of process upon the defendants in a case before a court of the United States where a personal contract alone is involved. It may be otherwise in the State courts; it may be, that by their practice, the service of process upon a general guardian, or his appearance without service, is deemed sufficient for their jurisdiction. In some States such may be the fact, but the State law cannot determine for the Federal courts what shall be deemed sufficient service of process or sufficient appearance of parties. Substituted service, by publication, against non-resident or absent parties, allowed in some States in purely personal actions, is not permitted in the Federal courts. Such service can only be resorted to where some claim or lien upon real or personal property is sought to be enforced, and the decision of the court will then only affect property of the party within the district. R. S., § 738. In all cases brought to enforce or cancel personal contracts, or to recover damages for their violation, the statute requires a personal service of process upon the defendants, or their voluntary appearance. And the equity rules qualify the statute only so far as to allow, in cases of husband and wife, a copy of the subpoena to be delivered to the husband, and in other cases a copy to be left at the dwelling-house, or usual place of abode of the defendant, with some person who is a member of or resident in the family. In either mode, the defendant is to be served within the district, and until such service or his appearance, the court has no jurisdiction to proceed or to render a decree affecting his rights or interest. There being here no property of the infant defendant within the district of Michigan, which the court could lay hold of—and he being absent from it—there was no foundation laid for any progress by the court in the case. It never acquired jurisdiction over the infant; it could therefore appoint no guardian *ad litem* for him, and the decree rendered against him was ineffectual for any purpose. Cases considered and distinguished, *Preston v. Dunn*, 25 Ala. 513; *Robb v. Lessee*, 15 Ohio, 699; *Gronfier v. Puymiro*, 19 Cal. 629; *Bustead v. Yates*, 4 Dana (Ky.), 429. See, also, *Pennoyer v. Neff*, 95 U. S. 714. Judgment of U. S. Circuit Court, Minnesota, affirmed. *New York Life Insurance Co. v. Bangs*. Opinion by Field, J. [Decided May 2, 1881.]

MUNICIPAL BONDS—JURISDICTION—STATE STATUTE REQUIRING VALIDITY TO BE DETERMINED BY COUNTY COURT, WHEN VALID.—In an action in the United States Circuit Court brought against a county in Arkansas, upon county warrants, by a citizen of another State, the defense was that on January 4, 1876, the County Court of the county made an order in conformity to the act of the Arkansas legislature of January 6, 1867, calling in all the outstanding warrants of the county, including those sued on in this case, for the

purpose of examining, cancelling, and re-issuing the same, fixing Friday, the 7th day of April of that year, as the limit of time for presentation of said warrants. The order notified all persons holding these warrants that they might deposit them with the clerk any time prior to that day, and that on failure to do so the holders of said warrants would be forever barred from any claim on their account against the county. These warrants not being presented, were formally declared to be barred by order of the County Court. The warrants were issued after the act mentioned was passed, and at the time the order calling them in was issued were the property of a citizen of Arkansas. This suit was commenced before the time limited by the order for bringing in the warrants had expired. *Held*, that the statute of Arkansas mentioned was valid, and the order a proper one, and that the holder of the warrants having failed to comply with it, his right to recover upon them was barred. Judgment of U. S. Circ. Ct., E. D. Arkansas, reversed. *Ouachita County v. Wolcott*. Opinion by Miller, J. [Decided April 11, 1881.]

TITLE — TO GOVERNMENT LANDS — SUBJECT TO RIGHT OF WAY PREVIOUSLY GRANTED TO RAILROAD COMPANY.—Congress in 1866 made two grants, one of lands to the State of Kansas, for the benefit of the St. Joseph and Denver City Railroad Company, in the construction of a railroad from Elwood in that State to its junction with the Union Pacific via Maryville; the other of a right of way directly to the company itself. The lands consisted of alternate sections, designated by odd numbers, on each side of the line of the proposed road. Their grant was subject to the condition that, if at the time the line of the road was definitely fixed, the United States had sold any section or a part thereof, or the right of pre-emption or homestead settlement had attached to it, or the same had been otherwise reserved by the United States for any purpose, the secretary of the interior should select an equal quantity of other lands nearest the sections designated, in lieu of those appropriated, which should be held by the State for the same purposes. The grant of the right of way was by words *in present*, containing no reservations or exceptions. *Held*, that the title to the lands attached from the date of the act of Congress. *Missouri, Kansas & T. R. Co. v. Kansas Pacific R. Co.*, 97 U. S. 497-8; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733. And that the right of way vested in the company over such line as it should locate, and all persons acquiring any portion of the public lands after the passage of such act took them subject to the right of way conferred by the act. Judgment of Nebraska Supreme Court reversed. *St. Joseph & Denver City Railroad Co. v. Baldwin*. Opinion by Field, J. [Decided May 2, 1881.]

NORTH CAROLINA SUPREME COURT ABSTRACT.*

JANUARY, 1881.

PARTNERSHIP—AGREEMENT BY ANOTHER WITH LAND OWNER TO WORK LAND ON SHARES.—An agricultural agreement between two persons, one to furnish the outfit and the land, and the other to hire the laborers and superintend the farm during the year, the former to provide money to carry on the business, half of which to be repaid him, and the profits to be divided between them, creates the relation of partners. Where the land owner in such case executed an agricultural lien to R. for advancements to carry on the common business, a partnership debt was thereby created, and the property in the crop vested in R. to secure its pay-

* To appear in 84 North Carolina Reports.

ment. *Holt v. Kernodle*, 1 Ired. 199; *Lewis v. Wilkins*, Phil. Eq. 308, cited; see, also, *Curtis v. Cash*, 84 N. C. 41; *Reynolds v. Pool*. Opinion by Smith, C. J.

STATUTE OF FRAUDS—AGREEMENT TO PAY DEBT OF ANOTHER.—A parol promise to pay the debt of another out of property placed by the debtor in the hands of the promisor, who converts the same into money, is not within the statute of frauds. It is an original and independent promise founded upon a new consideration. In construing this statute it may be laid down as a general rule that a promise to answer for the debt, default or miscarriage of another, for which that other remains liable, must be in writing; contra, where the other does not remain liable. There are numerous exceptions to this rule. In cases where the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the original contracting parties, the statute does not apply. 1 Smith Lead. Cas. 571; *Leonard v. Vredeburgh*, 8 Johns. 29. The reason is, that the promise is made upon a new and independent consideration, and it matters not whether the original debt continues to subsist or not. See *Olmstead v. Greenly*, 18 Id. 12; *Walt v. Walt*, 23 Vt. 350; *Draughan v. Bantling*, 9 Ired. 10; *Hall v. Robinson*, 8 Id. 56; *Hicks v. Critcher*, Phil. 355; *Threadgill v. McLondon*, 76 N. C. 24; *Stanly v. Hendricks*, 13 Ired. 86; *Mason v. Wilson*. Opinion by Ashe, J.

SURETYSHIP—FACT OF, MUST BE KNOWN TO CREDITOR.—Where the defense set up is that the party sued is only a surety, and the fact of his suretyship does not appear from the instrument signed by him, he must, in order to derive any advantage therefrom, prove that the creditor had knowledge of the suretyship. *Welfare v. Thompson*, 83 N. C. 276; *Cole v. Fox*, Id. 463; *Wilson v. Foot*, 11 Mete. 285; *Manley v. Boycott*, 75 Eng. C. L. 45. *Goodman v.*

SURETYSHIP—DEALINGS BETWEEN CREDITOR AND PRINCIPAL.—A contract entered into between a creditor and principal debtor to release the debtor "from all the indebtedness he holds against him individually, but not the securities which the debtor has given him upon notes or in any other manner," does not operate a discharge of the surety. *Keeler v. Linker*, 82 N. C. 42; *Howerton v. Sprague*, 84 Id. 451; *Stevens v. Martin*. Opinion by Smith, C. J.

MARYLAND COURT OF APPEALS ABSTRACT.*

DEED—WHEN NOTES AND BONDS GIVEN VARIANCE IN QUANTITY NOT GROUND FOR AVOIDANCE.—In 1859, B. purchased at trustee's sale a lot of ground as laid down on a sale-plat of a tract of land belonging to an estate, and described in the deed from the trustee to B., by metes and bounds as fronting a certain number of feet on a street, controlled by a call, and so many on an alley, to be determined by the distance from the point of intersection of the center of a road with the west side of the alley and the place of beginning. In 1868 B. sold the lot to S., part of the purchase-money being paid cash and a redeemable ground rent created for the payment of the balance, a lease being duly executed. The ground rent was extinguished by S. paying the principal in 1873, when a deed in fee was made to him by B. and wife. The description of the property was the same in all these deeds, and the lease and conveyance both referred to the trustee's deed. Shortly after becoming seized of the ground, S., on leasing a part of it, discovered that though he received all the land contained within the boundaries stated in the deeds, yet the dimensions of the lot were consid-

erably less than those mentioned in the deeds. It appeared that B. knew no more about the location and actual dimensions of the lot than S., and that both had equal means of information. On a bill filed by S. to compel B. to make compensation for the alleged deficiency, it was held, that he was not entitled to relief. The rule in such cases is thus stated by Chancellor Kent: "Whenever it appears by definite boundaries, or by words or qualification, as 'more or less,' or as 'containing by estimation,' or the like, that the statement of the quantity of acres in the deed, is more matter of description, or not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermixture of fraud in the case." 4 Kent, 487 (11th ed.). The same rule is laid down by Judge Story, in *Stebbins v. Eddy*, 4 Mason, 420, and was followed in *Jones v. Plater*, 2 Gill, 125; *Stull v. Hurtt*, 9 Id. 446; *Hall v. Mayhew*, 15 Md. 568, and *Slothower v. Gordon*, 23 Md. 1. *Jenkins v. Boigiano*. Opinion by Bartol, C. J.

INJUNCTION—TO RESTRAIN ACTION OF PUBLIC OFFICER UNDER ERRONEOUS AWARD OF CONTRACT BID FOR.—Plaintiff and D. were competing bidders for furnishing supplies of stationery to a city. The city authorities, having control of the award of the contract, gave the award to D. as being the lowest bidder, and plaintiff filed a bill praying that such authorities be enjoined from executing the contract on the ground that plaintiff was in fact the lowest bidder. Held, that the bill presented no claim to the exercise of the preventive power of the court. Applications for an injunction are addressed to the conscience and discretion of the court, and the facts submitted should justify its exercise beyond reasonable doubt. Public wrongs, although involving private injuries, are not to be made the grounds of personal suits, at law or in equity, unless the complainant has sustained special damage, and in many instances the private injury is merged in the public. In exceptional cases, where great principles or large public interests are involved, citizens or corporations may sue in behalf of themselves and their fellow-citizens to arrest some projected violation of constitutional law or abuse of corporate authority. This court has not undertaken to declare that every abuse of a legal authority by a municipal corporation to the prejudice of a tax payer or taxpayers is a ground for equitable interference to prevent injury. On the contrary, recognizing the contrariety of opinion which exists among the most eminent judges as to the right of the courts to interpose to arrest the authority of local governments, in the exercise of lawful powers, they have confined their jurisdiction to cases of *ultra vires*, or clear assumption of powers not granted. See 2 Dill. on Mun. Corp., § 736. *Kelly v. Mayor and City Council of Baltimore*. Opinion by Bowie, J.

WAY—WHEN RIGHT OF, DOES NOT EXIST—IMPLIED RESERVATION.—S. and M. owned adjoining houses on West street, in Baltimore city, with rear lots extending back to Gould lane. These two houses were built in 1830, by the owner of the whole of the vacant lot, the first house (the one now owned by S.) having a front of fifteen feet, and the second (the one now owned by M.) having a front in the lower story of twelve feet and a half, and in the upper stories of fifteen feet, thus leaving an alley of two feet and a half between them, covered by the joists which supported the second floor of the second house; these joists projected over the alley and into the adjoining wall of the first house. The alley thus covered was open to the street and extended back between the houses about thirty feet. At its inner terminus two gates were placed which opened respectively into the rear premises and yards of each house, and it was used by the occupants of each as a common passage-way, to and from the street. Each house had a front door

* Appearing in 55 Maryland Reports.

opening upon the street, and from the end of the alley a fence was built which extended back to Gould lane, and divided the lot into two parts, giving to each a width of fifteen feet, with access into each yard from the lane. The drainage and sewerage from each lot were carried off to the lane. The owner of this property and his widow were owners successively till 1865, when the entire property was sold under order of the orphan's court to W., who in the same year sold the second house and lot to C., from whom M., through *mesne* conveyance derived title, in 1874. This conveyance to C. was an absolute and unqualified grant describing the property by metes and bounds, which included the whole of the alley, and contained no reservation of the right to use the same for the benefit of the house and lot retained by W. W. retained ownership of the first house and lot until 1868; when he sold and conveyed the same to S. by a similar grant, which embraced no part of the alley. In 1878, M. prevented S. from using the alley by placing upon it buildings and other obstructions. In an action by S. against M., to recover damages for closing and obstructing the alley, it was *held*, that S. could not recover, as the law did not attach to the unqualified grant from W. to C., of the second house and lot, an implied reservation of the use of the alley, for the house and premises retained by W.; and that the alley was not a way of necessity. (2) That the fact that a part of the house granted by W. to C., which was above the alley, was supported by the wall of the house retained by W., did not make a case of reciprocal easements. See *Janes v. Jenkins*, 34 Md. 1; *Palmer v. Fletcher*, 1 Lev. 122; *Nicholas v. Chamberlain*, 3 Cro. Jac. 121; *Wheeldon v. Burrows*, L. R., 12 Ch. D. 81; *Tenant v. Goldwin*, 2 Ld. Ry. 1089; *Pyer v. Carter*, 1 H. & N. 916; *Ewart v. Cochraus*, 9 Juv. 325; *White v. Bass*, 7 H. & N. 722; *Pinnington v. Galland*, 9 Exch. 1; *Watts v. Kelson*, L. R., 6 Ch. App. 169; *Crossley v. Lightowler*, L. R., 2 Ch. App. 478; *Ellis v. Manch. Car. Co.*, L. R., 2 C. P. D. 13; *Currier Co. v. Corbett*, 2 Dr. & S. 355; *Cox v. Matthews*, 1 Vent. 237; *Rosewell v. Pryor*, 6 Mod. 116; *Brakely v. Sharp*, 2 Stock. Ch. 209; *Kilgour v. Ashcom*, 5 H. & J. 82; *Seibert v. Levan*, 8 Barr. 383; *Burr v. Mills*, 21 Wend. 202; *Preble v. Reed*, 17 Mo. 175; *Carbrey v. Willis*, 7 Allen, 364; *Randall v. McLaughlin*, 10 Id. 368; *Swanborough v. Coventry*, 9 Bing. 395. *Mitchell v. Seipel*. Opinion by Miller, J.

MASSACHUSETTS SUPREME JUDICIAL COURT ABSTRACT.

JANUARY 1881.

EVIDENCE—PAROL TO SHOW THAT PARTY SIGNING WRITTEN CONTRACT WAS MISLED.—Evidence showing that a contract for the leasing of household furniture by defendant to plaintiff, which was signed by plaintiff by affixing his mark, was understood by plaintiff at the time it was made to be a contract of sale; that before it was signed plaintiff orally agreed to purchase the property; that he could not read; that the contract was not read to him, and that nothing was said about leasing. *Held*, admissible to show fraud in procuring the execution of the contract. In the absence of fraud or imposition, it is presumed that the terms of a written contract were known and assented to by the parties who signed it; that they either read it, or were informed of its contents, or were willing to assent to its terms without reading it. This presumption is not defeated by showing that the contract signed was different from that which one or the other supposed he was signing. It is not permitted to show that another contract was the real contract, because the parties have chosen to put their agreement in writing as the better way to preserve its terms; and parol evidence cannot be admitted to vary it. But this familiar rule does not exclude evidence which tends to show that

the written contract was, by some fraud or imposition, never in fact freely and intelligently signed by the party sought to be charged. It may always be shown that he was not possessed of the requisite capacity, or that his signature was obtained by fraud. *Seiden v. Myers*, 20 How. 507. A party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining its character, is no more bound than if it were a forgery. *Walker v. Ebert*, 29 Wis. 194; *Foster v. MacKinnon*, L. R., 4 C. P. 704, 711. *Trambly v. Ricard*. Opinion by Colt, J.

FIXTURES—TRADE ERECTIONS WITH CONSENT OF LANDLORD—RIGHTS OF LESSEE—BAKE-OVEN.—K., the lessee of premises, a baker, erected thereon a bake-house and oven, under an agreement with B., the agent of the owner, that if K. "should be taken away or any thing should happen," B. would "take it off his hands at a fair valuation." The bake-house was built of brick walls set on ordinary stone wall foundations, and the oven was built of brick inside the house, resting on stone foundations, embedded in the ground. The premises were afterward leased to plaintiff, as tenant at will. In an action for the conversion of the oven and bake-house by plaintiff, against the owner, plaintiff testified that he purchased of K. the entire bakery property, including the bake-house and oven, and that before he did so B. agreed that plaintiff might remove what he purchased, including the oven. Upon receiving notice to quit, plaintiff attempted to remove the bake-house and oven, but was forbidden to do so by the owner. *Held*, that there was sufficient evidence to warrant a finding for plaintiff. It is settled that when one erects a building for a temporary purpose on the land of another, with the knowledge and consent of the owner, an agreement for the separate ownership of the building and a right to remove it may be implied from the circumstances and conduct of the parties. There was evidence which, under the decisions, would fully warrant a jury in finding that before the house and oven were built, an agreement that it should remain the personal property of Kent was made with him by the authorized agent of the defendant. *Curtiss v. Hoyt*, 19 Conn. 154; *Prince v. Case*, 10 Id. 375; *Smith v. Benson*, 1 Hill, 176. In this view the plaintiff could maintain trover for the conversion of the building and materials as personal property. The case is distinguishable from those where it is held that trover will not lie for the conversion of trade fixtures which have become part of the realty so long as they remain annexed, although removable by the tenant during the term. *Guthrie v. Jones*, 108 Mass. 191; *Marshall v. Lloyd*, 2 M. & W. 450; *Dolliver v. Ela*, 128 Mass. 557. *Korbe v. Barbour*. Opinion by Colt, J.

SURETYSHIP—BOND FOR OFFICIAL CHOSEN FOR FIXED TERM NOT CONTINUING ONE.—A corporation having authority to appoint such officers as the by-laws may provide, who shall be elected in the manner therein provided, was in the custom of electing a treasurer triennially, though the by-laws made no provision in reference to the term of office. In 1874 the corporation "voted to proceed to the choice of officers for the ensuing term of three years;" and under this vote "made choice of R. for treasurer." R. thereupon gave a bond for the faithful performance of his duties and the payment to his successor of the funds of the corporation in his possession. *Held*, that the bond was not a continuing one, and the sureties thereon would not be liable for a default of R. occurring after the expiration of the three years for which he was chosen. Where the tenure of the office is for a year or any fixed period of time, the sureties upon the bond given for the faithful performance by the incumbent of the duties of the office are not liable for any de-

faults of the principal occurring under a new appointment after the year or other fixed period has expired, unless the bond contains stipulations that the sureties shall be liable during any successive terms of office to which the principal may be elected or appointed. This is upon the ground that by virtue of his re-election the principal enters upon a new office which is not contemplated or provided for in the bond. *Bigelow v. Bridge*, 8 Mass. 275; *Chelmsford Co. v. Demarest*, 7 Gray, 1; *Middlesex Manuf. Co. v. Lawrence*, 1 Allen, 339; *Lexington & West Camb. R. Co. v. Elwell*, 8 id. 371. On the other hand, if the office is for an indefinite and not a fixed period of time, the sureties on a bond given for the faithful performance of the duties of the office, which does not contain any stipulation limiting the period for which they shall be liable, are liable so long as the principal shall continuously hold the office. *Amherst Bank v. Root*, 2 Metc. 522; *Worcester Bank v. Reed*, 9 Mass. 267; *Dedham Bank v. Chickering*, 3 Pick. 335; *Cambridge v. Fifield*, 126 Mass. 428; *Commonwealth v. Reading Savings Bank*, 129 id. 73. *Trustees of Richardson School Fund v. Dean*. Opinion by Morton, J.

NEW BOOKS AND NEW EDITIONS.

REDFIELD'S LAW AND PRACTICE OF SURROGATE'S COURTS.

The Law and Practice of Surrogates' Courts of the State of New York. By Amasa A. Redfield. Second edition. Rewritten and enlarged. New York: Baker, Voorhis & Co., 1881. Pp. xxiii, 976.

THE table of cases cited in this book covers 22 pages, the text 795, the forms 116, the index 63. The first edition was issued in 1875, and has long been out of print. The issue of a new edition has been delayed by the pendency and final adoption of the new code, with its changes of the law. It will be observed that the work professes to be not a mere manual of surrogate court practice, but to give the law of that court as well. Among the changes wrought by the code, it is stated by the author, are the following: 1. Surrogate's Courts are now courts of record. 2. They have jurisdiction to construe and interpret wills of personally, on probate, and to determine the validity of bequests by competent testators. 3. They have (as not heretofore) jurisdiction over testamentary trustees and testamentary guardians—their appointment, removal and accounting. 4. Their jurisdiction to appoint temporary administrators (collectors) is largely extended, and their incidental powers, by way of injunction, etc., are greatly enlarged.

The author also states that he "has not confined himself to a bare statement of the statutes regulating practice in Surrogates' Courts, but has attempted to state, as fully as the limits of the volume would allow, the general principles governing the proof and construction of wills in Surrogates' Courts as well as in the Supreme Court; the control and supervision of executors, administrators, guardians and testamentary trustees, their removal, resignation and accounting, and generally the rules of the statute as well as of the common law relating to these subjects as administered in Surrogates' Courts and in the other courts which have succeeded to the general jurisdiction of the Court of Chancery." The work is therefore designed equally for the surrogate and the practitioner in his court.

Such a work as this cannot be adequately estimated in details by a mere reviewer, but needs to pass the ordeal of practice. We believe that Mr. Redfield's first edition was very favorably regarded. We have examined this sufficiently to be able to say, that it is a capital example of arrangement and treatment. In division, order, and explication it seems to us peculiarly excellent—to that extent, indeed, that we should

be at a loss to suggest any improvement or recall anything superior. In point of details, the author having had a large experience as a practitioner, and as a reporter in these courts, as well as the advantage of a former edition of his present work, and a long period for deliberation and preparation, it is fair to presume that he is accurate and exhaustive in these essentials. There are indeed very few men in this State so well fitted to issue an authoritative and trustworthy treatise on this topic as Mr. Redfield. His style, too, must be praised, for as his work is not done with the scissors, he has a style worth speaking of. In short, the treatise gives the impression of carefulness, research, deliberation and practical experience. In point of typography and paper the book is well nigh perfect—a joy for a printer to contemplate.

WATERMAN ON SPECIFIC PERFORMANCE.

A Practical Treatise on the Law Relating to Specific Performance of Contracts. By Thomas W. Waterman, Counsellor at Law. New York: Baker, Voorhis & Co., 1881. Pp. lvii, 797.

Mr. Waterman is known to the profession by several works which he has edited, by his original works on Set-off and Trespass, and most generally and favorably by the work on New Trials prepared by himself and Mr. Graham. On the present subject there is an excellent English work by Fry, but until now no sufficient American work. The author therefore has the advantages and the disadvantages of being a pioneer.

The treatise is divided into four books, as follows: Book I embraces the definition and nature of the subject, and a general enumeration of the contracts which are capable of being specifically enforced. Book II, parties to the suit, pleadings, injunction, and writ of *ne exeat*. Book III, the grounds on which a decree may be successfully resisted. Book IV, compensation and damages. The subject is subdivided as follows: Who may sue or be sued; Injunction; Incapacity of party; Non-conclusion of contract; Incompleteness, uncertainty, unfairness of contract; Hardship of contract; Inadequacy, Absence or failure of consideration; Contract not mutual; Illegality of contract; Contract *ultra vires*; Pleadings; Writ of *ne exeat*; Statute of frauds; Misrepresentation, fraud or mistake; Inability of courts to enforce part of contract; Defect in subject of contract; Absence or insufficiency of title; non-performance of plaintiff; Acts of plaintiff disentitling him to performance; Lapse of time; Determination of contract; Compensation and damages.

This certainly is not a remarkably scientific arrangement. For example, it is difficult to distinguish between unfairness of contract and hardship of contract, and a contract *ultra vires* is certainly illegal. This, however, is a minor fault. The treatment under these heads is very full and distinct, by sections with sub-headings. We miss the citation of some of the latest cases in this State, but as the table of cases cited covers 51 pages there are probably enough. Our main objection to this book however is, that although it is on Specific Performance it is not sufficiently specific, but trenches on other branches of the law of contract. To illustrate: the courts will not enforce specific performance of a contract founded on a transaction forbidden by law. This is a principle requisite to be discussed in such a work; but in such a work a discussion of what contracts are and what are not forbidden by law is entirely out of place. A work on contract in general is the place for that discussion. So the courts will not enforce specific performance of a contract founded on a transaction constructively fraudulent—account of the fiduciary relation of the parties; but the discussion of what transactions are so constructively fraudulent has no proper place in a work on specific performance. We doubt whether injunction and *ne exeat* have much to do with specific performance of

contracts. These examples suffice to point our criticism. In this book there is a large amount of such misplaced and superfluous discussion. At a guess we should say that by the omission of these topics the work might have been reduced one-quarter in size. This is of course a much less serious fault than the omission of anything essential, and we cannot see that Mr. Waterman has omitted anything essential. He is only guilty of surplussage and redundancy. The essential topics are well treated. The practitioner can certainly find in the book everything pertinent to this subject. Mr. Waterman's style is not unimpeachable. Thus we frequently have a mixture of the strict subjunctive and the indicative form of the subjunctive, as: "if he employ more than one person to bid, or if his object in employing a bidder is to enhance," etc.; and in the second sentence previous, "if it be secretly arranged," etc. The book is very handsomely printed on good paper, but with type superfluously large. Thus the typography has helped the author's mode of treatment in unnecessarily swelling the dimensions of the book. The proof reader has occasionally nodded—"effects" for "affects" (p. 253), naturally affects us unpleasantly. After all, the work is indispensable on this topic, and in a new edition, which will probably soon be called for, the experienced author can correct anything which reflection may teach him to need amendment.

JACOB'S FISHER'S DIGEST.

Volume VI of this great work is at hand. We have repeatedly drawn attention to its merits. The present volume contains the titles Landlord and Tenant—Payer. The moderate price brings it within the means of a majority of the profession. Published by George S. Dossay, New York.

WEEKS' LAW DIRECTORY.

Directory of the Law and Abstract Union of the United States, January, 1881. Containing a synopsis of the laws of all the States, and a list of attorneys and abstractors of title throughout the United States. A. W. C. Weeks, General Manager. Des Moines: Mills & Co., 1881.

This book gives a brief outline of the laws of the several States and Territories, relating to procedure in courts, descent of property, exemptions, negotiable paper, interest, married women, limitations, and taxes. The information given is not full enough to render the work of value to the lawyer, though it may be sufficient for the purposes of business men. So far as we can discover, the law is accurately stated, though in the attempt to condense, expressions are occasionally used that might mislead.

CORRESPONDENCE.

PROFESSIONAL COMPENSATION.

Editor of the Albany Law Journal:

The great body of your readers must be highly pleased with your comments on ex-Judge Countryman's advocacy of the propriety of lawyers seeking and taking business on contingent fees, or strictly speaking, on speculation. There is already too great a tendency to regard the practice of the legal profession in the light of a business merely. One of the dangers to which those lawyers are subject who are known to take cases in this way is to lose light of the fact that they are practicing an honorable and learned profession; and the practice of taking cases on "spec" is apt to breed a disgusting race of "touters," who make it a trade to secure just this kind of cases for just this kind of lawyer. Speculation cases are composed chiefly of accident cases; and physicians, in some instances, who treat the plaintiffs, recommend "a good

lawyer, a friend of mine, who'll take your case without costing you a cent." The touter, be he physician or layman, of course expects his commission. If it be right to make a business of law, is it not right to adopt the methods of business men who strive to get or to increase their business? Yet, who will say that the lawyer may have canvassers and other agents for the purpose? It may come to this.

Respectfully, R. M. B.
New York, June 4, 1881.

Editor of the Albany Law Journal:

Allow me, at the earliest opportunity, in answer to your intimation of last week, to relieve you and the other members of the "faculty" from all responsibility for any "mischievous seeds" that may have been sown by me at the recent commencement exercises of the Albany Law School. It is quite apparent, I think, from the tenor of your article on the subject, that my address had not been submitted before delivery to the faculty, for perusal and correction. Permit me also to dissent from your statement, that I "recommended to lawyers the practice of taking cases on speculation." On the contrary I distinctly suggested that the proper course on the part of attorneys was to leave the initiative to clients, in respect to the mode of ascertaining and providing for compensation. I contended merely that there was nothing improper or immoral on the part of the lawyer in accepting a fair proposal from his client for contingent compensation out of the proceeds of the litigation, if he was satisfied that the claim was just and honest.

Of course this is not the proper time or place to discuss the merits of the controversy. I concede there is something to be said in opposition to the view I have taken, and this you have skillfully summarized in your article. But I cannot omit to notice your extravagant assertion that "this is the first public and authoritative apology for this practice ever uttered in this country." I may be wrong in my contention, but I certainly have company of "great and venerable names" in the profession. I will take the liberty of calling your attention to the case of *Bayard v. McLane*, 3 Harr. (Del.) 139. The parties to this action represented the two leading families in the State of Delaware, in culture, character and social worth. James A. Bayard was the acknowledged leader of the local bar, and a senator of the United States, in which position he has been succeeded by two of his sons and a grandson, the present senator of that name. Allen McLane was a distinguished revolutionary officer, and his son Louis, after practicing law a few years, became successively member of Congress, senator, minister to England, secretary of State and of the treasury. In 1812, Allen McLane, while holding the office of United States collector for the district of Delaware, having seized several vessels of Stephen Girard, for violation of the revenue laws, which he claimed as forfeitures, entered into a contract with his son Louis and Mr. Bayard, by which the two latter were to conduct the litigations through the courts, and were to receive as compensation contingent on success, each one-third of the share allowed by law to the collector from the forfeitures. You will observe that this was not a common case of private right, but a bald speculation all round, with no such alleviating circumstance as you seem to require to justify a "high minded lawyer" in occasionally stooping to receive a contingent fee. Nor was there the slightest "commercial" taint attaching to any of the parties. After the trial of one of the suits, Mr. Bayard was appointed one of the commissioners to negotiate the treaty of Ghent, and died immediately after returning home from his mission, without taking further part in the litigations. In the action to recover for his services, on the contract, the defense was:

1. That the contract was illegal. 2. That it was not performed. It would be difficult to find in the books a case which received more extended and careful consideration. It was argued twice by lawyers of the first rank at the American bar, one of the judges having died after the first argument, lasting thirteen days, which necessitated a reargument, occupying eleven days. The validity and propriety of the agreement was sustained at the bar, among others, by Reverdy Johnson of Baltimore, afterward attorney-general of the United States and senator from Maryland, and Joseph P. Comegys, the present chief justice of Delaware, and was assailed, among others, by John Sergeant and William M. Meredith of Philadelphia. The members of the court, however, were unanimous in reaching the conclusion as announced by Harrington, J., that "there is nothing in the stipulated service that the law ever prohibited, and nothing in the mode of compensation that violates any principle of law or morals." (P. 217.) Is not this a "public and authoritative apology," if one is needed, for the "pernicious" practice you have censured so severely?

There are many other authorities of the same character, which I omit for want of space. I will only call attention to a few recent decisions. The Supreme Court of Wisconsin overruled the objections of champerty and immorality to a similar contract, holding that it was too clear for discussion. The attorneys who made the contract in that case were Edward G. Ryan, afterward chief justice of the State, and Matthew H. Carpenter, the brilliant lawyer and senator, recently deceased. *Ryan v. Martin*, 16 Wis. 59; 18 id. 672. Mr. Justice McArthur, speaking for the Supreme Court of the District of Columbia, said, in a recent case: "All agreements made for mere contingent compensation are generally meritorious, and should be enforced. The most respectable counsel conduct immense litigations with no other hope of reward." *Stanton v. Haskin*, 1 McAr. 558, 562. In another case in this State, where the attorney went so far as to take a formal assignment of the claim and prosecuted it in his own name, for the benefit of the client, under a contract for a contingent fee, the General Term, per Johnson, J., said: "There is nothing necessarily immoral or censurable in aiding and assisting another in the prosecution and collection of a just claim, or one which is believed to be such, by the party assisting, where such assistance is sought in good faith by the party so assisted. On the contrary, such acts from good motives, and for just ends, may be as commendable and praiseworthy as any other acts of benevolence and kindness." *Voorhees v. Dorr*, 51 Barb. 580, 586. The United States Supreme Court have recently held, Chief Justice Waite delivering the opinion, that "there is nothing illegal, immoral or against public policy, in an agreement by an attorney to prosecute a claim, either at a fixed compensation, or for a reasonable percentage upon the amount recovered" (*Wright v. Tebbitts*, 1 Otto, 252); and still later, Clifford, J., speaking for the whole court, said "that the proposition (the propriety of such a contract) is one beyond legitimate controversy!" Does the LAW JOURNAL refuse to recognize these high "authorities?"

Respectfully, E. COUNTRYMAN.

ALBANY, June 6, 1881.

[We shall endeavor to answer our correspondent's closing inquiry next week.—ED. ALB. L. JOUR.]

NOTES.

THE Code of Criminal Procedure having been signed by the governor, goes into effect September 1, 1881. John D. Parsons, Jr., of Albany, N. Y., will publish an edition edited and annotated by A. P. Sprague, who

was one of the advisory committee of the Legislature associated with Mr. Field in the final preparation of this Code. Owing to the advanced state of the editor's notes, the publisher is able to promise the book by August 1st. This will give the profession a month to prepare themselves before the new practice takes effect.—The June number of the *American Law Review* contains the following leading articles: Conversion by purchase, by Nathan Newmark; Street Railways and their Relations to Highways, by W. H. Whittaker.

The *Paterson Daily Press*, in a recent article entitled "An Infamous Offense," remarks: "It is the crime of 'champerty,' we repeat, which there is good reason to believe has been committed by a practitioner who probably calls himself respectable, in two cases of some celebrity which have recently been before our Passaic county courts. In relation to one of these cases the evidence would probably secure conviction of the offender of 'champerty,' in the other there is not such positive proof, but the circumstances are such that in the minds of those familiar with the case there is a moral certainty that the lawyer took the case on speculation, with the understanding that he was to share the 'plunder.' We cannot characterize this dirty business, which no high-minded and clean-handed lawyer would be guilty of for the honor of a noble profession, in any stronger terms than the illustrious authority from whom we have quoted has done. Champerty is not embraced in our New Jersey code of crimes, but is an offense none the less punishable under the common law, and a person guilty of it, if haled before our courts and the facts proven, would be held accountable, and no doubt severely dealt with. It is highly probable that proceedings will be resorted to to bring the party to justice who has been engaged in this rascally business. It is perfectly certain that if any more attempts should be made to victimize at least some of the parties who have been put to causeless annoyance and expense by such burglarious proceedings under the guise of 'law,' every effort will be exhausted to see what the same instrument can do for the protection of society against such attempts at fleecing. Meanwhile it is for reputable members of the bar to have their own opinion on the sort of business which many of them have more than suspected has been going on, and of the unprincipled pettifoggery which thus prostitutes a noble and useful vocation to the basest and most despicable of uses."

Mr. Levi Bishop writes to the *Detroit Free Press* as follows: "Business continues good. The reports of murders and attempts to murder thus far the present year in Michigan foot up as follows: From January to April, 39; in May, 1881, 11; total in five months, 50. This result must be highly satisfactory to the humanitarians, and to the sensational, 'sarcastic' and non-punishment preachers. And still it is urged, with apparent sincerity, that capital punishment does not or would not tend to restrain the commission of this crime. It is this terror which every one feels, inspired by the probability or even the possibility of the death penalty that restrains the crime, and nothing but this king of terrors will restrain it. At the rate we are going how long will it be before society will assert its own protection and that lynch law will be the order of the day! It is no answer to say that juries will not or may not do their duty. Reform the jury system and the mode of selecting jurors if necessary. The criminal code is executed in other countries. It may be and it should be in this. Let us have a punishment adequate to the crime, and let not the memory of the murdered victim be forgotten in a sickly sympathy for the assassin." A bill to restore capital punishment has passed the Michigan House of Representatives, and is pending in the Senate.

The Albany Law Journal.

ALBANY, JUNE 18, 1881.

CURRENT TOPICS.

WE make no apology for calling particular attention to our leader this week, and requesting all our readers to peruse it, because the subject is one of great importance to our profession, and the article is mostly made up of the opinions of the great lights of the bench and bar. In these days, when the besetting temptation of our profession is to make merchandise of their high calling, it will be well to recall these expressions of honored and influential judges and lawyers on the subject of discussion.

We have made a very careful examination, section by section, of the Code of Criminal Procedure, which goes into effect September 1st. Having also had recent occasion to examine the general subject of criminal procedure very exhaustively and minutely, we are struck by the admirable workmanship of this Code—its comprehensiveness, clearness, simplicity, and conciseness. It is noteworthy, also, that comparatively few radical changes are made.

We have never met a more outrageously wrong and illogical decision than that in *State v. Thomas*, *post*, that a statute providing that a man may be criminally punished on proof that he is reputed to keep a place where intoxicating liquors are sold without license, is constitutional. Counsel in that case very cogently urged that the statute "seeks to punish a man for what the people say of him, and not for what he has committed or omitted. In other words, it punishes a man for the words, acts, and opinions of other persons, and not for any offense he has committed himself." This is clearly punishing a man on hearsay. We have the less hesitation in saying this, because the Rhode Island court, in *State v. Beswick*, *post*, hold that a statute which makes such reputation even *prima facie* evidence, is unconstitutional. It is nothing to the purpose that the crime is "peculiar" in its publicity. That seems the best of reasons for requiring the ordinary kind of proof.

We have received from Mr. S. S. Peloubet, of New York city, the first number of a new series of reports published by him, entitled "Civil Procedure Reports, edited by Fred. K. Clark and Geo. D. McCarthy." The scope of the proposed series is thus described by the editors: "The editorial supervision of these reports has been undertaken in the belief that the number and importance of the decisions, regulating the conduct of litigation under the Code of Civil Procedure, require a special series of reports." The present number contains full reports of thirteen cases, all but five of which are

decisions of the Court of Appeals or General Terms of the Supreme Court and Common Pleas, which of course will appear in the regular series of reports of those courts. Thus we are threatened with a new infliction of the worst features of Howard's interminable series. Whatever the future numbers of this series may show, the promise of the opening number is not favorable. In our opinion, a report is not worthy of patronage which is mainly a forerunner of the regular series, which every lawyer must take. In the present number there is some parade of "annotation." The principal "note" is on "examination before trial," more than half of which is taken up with an account of the practice before the Code, and which is stuffed with citations by volume and page of reports, without giving the titles of the cases. The principal Court of Appeals case reported is a *per curiam* opinion of one page, giving all the essentials, but preceded by seven pages of statement and arguments. In the number, consisting of eighty pages, there are only about eighteen pages of opinions, not including several opinions of the court below, appealed from. This is sheer padding. In our judgment all of essential value in this pretentious pamphlet might fully be compassed in ten pages, excluding of course the opinions which are to appear in the regular series. The profession do not desire or need such publications as this, although they may be forced to take them. If there is any improvement in future numbers we shall be glad to chronicle it.

A correspondent of the New York *Daily Register*, in a notice of Mr. Snyder's "Great Speeches by Great Lawyers," advances the following novel ideas: "More than one-fourth of the volume is devoted to specimens of British lawyers and judges. This is to be regretted, because it seems to infer a dearth of American talent, and hence it was necessary to select elsewhere in order to make out the volume. Of course Erskine's and Curran's names are in this selection as the most famous forensic orators. Their fame rests more in the fact that their collected speeches have been published than that they were far above the past and present eloquent lawyers. If the forensic addresses and arguments of Thomas Addis Emmet while at the American bar (and there are more than a dozen extant) were placed side by side with those of Erskine or of Curran, or of any other lawyers, it would plainly be seen that he was their superior in every respect, not only in tact and logic, but in emotional and effective oratory. Every thorough collector of American trials knows of several other American lawyers whose names are not in this volume, whose collected speeches show far more legal acumen and eloquence than those of either Erskine or Curran. The hope for this enterprise rests in the fact that the publishers intend to publish two additional volumes. They will have a wider field and an opportunity to make a better showing of the eloquence of the American bar than is contained in this volume. Mr. Snyder's description and definition of eloquence is new. He says

the secret of it is to know what to say and how to say it. He seems to infer that feeling and occasion have nothing to do in the effect of it. He evidently has never felt eloquence. His definition would not properly apply to poetry or to music, yet the most effective eloquence must contain both of these adapted to the occasion. 'It is the gift of eloquence to breathe round nature an odor more exquisite than the perfume of the rose, and to shed over it a tint more magical than the blush of morning.' The justice of the opening criticism may be estimated when it is known that the volume contains sixteen speeches by American and only eight by British lawyers. The writer seems to mistake the purpose of the volume. It is not to perpetuate simply "eloquent" speeches, but "great" speeches. His comparative estimate of Erskine and Emmet will obtain little acceptance. Erskine's fame does not rest in the publication of his speeches, but the publication of his speeches was induced by his fame. Mr. Emmet was unquestionably a most accomplished advocate. Curran's abilities we have always thought much overrated. But Erskine we believe to have been head and shoulders above them both, and considering the political importance and influence of his forensic efforts, above any advocate of any time. The correspondent is evidently an admirer of the hysterical, "highfalutin," and rainbow-tinted school of oratory, which has so long been the wonder and the bane of our courts of justice, but which has yielded place to a chaster and sounder manner. Evidently he finds Erskine hard reading. Phillips, the "grand, gloomy, and peculiar" man, famous in *crim. con.* cases, would just suit him. He should read Chief Justice Marshall's satirical comments on Pinkney's oratory in the case of the *Nereide*. It may be the "gift of eloquence" to outdo nature in rose-tints and sunrise flushes, but this sort of thing has no proper standing in courts of justice. Let these orators spout to nature and on "the day we celebrate."

Mr. George Ticknor Curtis publishes a pamphlet entitled "The Doctrine of Presumed Dedication of Private Property to Public Use, in its Applications to Railroads." He maintains the following propositions: "1. That in every State, and in regard to every railroad corporation, the contract between the State and that corporation is the sole source to which to look for the authority to regulate freight charges. 2. That unless by fair construction of the contract a legislative power to regulate freight charges has been reserved to the State, the corporation has the same right to regulate its own charges for its services as a private individual. 3. That it is not a fair or just construction of the contract to hold that the general power of altering or amending charters extends to the repeal or abolition of a power to make its own charges which has once been granted to a corporation by the charter." These positions he fortifies with an opinion by the late Judge Curtis that the Wisconsin "Potter law" was unconstitutional. Mr. Curtis also announces his confidence in the childlike innocence of railroad

companies as follows: "If I knew of a well-authenticated case, in which a railroad or any other corporation had obtained, or prevented legislation, by bribery, I should be as readily disposed to promote a prosecution of the offenders as any one in the community. But in forming my opinions of the conduct of railroad managers, I shall never commit the injustice of imputing corruption upon the wholesale assertions that a practice is notorious, which nobody undertakes to prove by any thing more than assertion. I am disposed to believe that 'our modern railroad president' is a much maligned person." And speaking of assessments on office-holders for election purposes, he concludes: "Until I see, therefore, some honest and earnest effort to direct public attention to that which is, beyond all comparison, the greatest and most palpable danger to which our institutions are exposed, I shall hold myself excused for not joining in the clamor against corporations, whose power, opportunities, and means for corruption are as much exaggerated as the honesty and public virtue of their managers is unjustly depreciated." This is very illogical—denying that one great reputed wrong exists because another is not remedied. We wish Mr. Curtis would say something of the propriety of railroad managers issuing free passes to judges and legislators. But he probably knows of no well-authenticated case of the kind.

Mr. Justice Matthews, of the United States Supreme Court, has accepted the invitation of the New York State Bar Association to deliver the annual address before that body at their next meeting in this city. Justice Matthews stands in the first rank as an advocate and an orator. His appearance on this occasion, so kindly accorded, will be warmly welcomed by our profession in this State, who have formed from reputation so high an estimate of his brilliant intellectual endowments and the charms of his address.

Senator Jacobs proposes to permit the Supreme Court reporter to publish four volumes yearly, instead of three, as now limited.

NOTES OF CASES.

IN connection with our recent article on Larceny of Animals, *ante*, p. 444, should be read a case decided in the Birmingham (Eng.) county court, May 9th, a report of which is given in the *Law Times* of May 28th. The title of the case is not given. The question was of property in carrier pigeons under training. The court thus stated the case: "The plaintiff, who is a dealer in pigeons of this description, was training the bird, and it was for this purpose that on the day in question he had taken it from its home at Aston to Castle Bromwich, a distance of between five and six miles, and there turned it loose, in the expectation that the pigeon would find its way back to its home at Aston. In returning, as was believed, to its home, and whilst flying in that direction over land which the defend-

ant occupied at Castle Bromwich, the defendant shot at and killed the pigeon. The questions for consideration are: First, whether the plaintiff can be said to have a property in the pigeon, which was admittedly tame and reclaimed; and if so, then, secondly, whether by the act of taking the pigeon away from its home for the purpose of training it, and there releasing it, the plaintiff lost his property in the bird, and thereby his right to bring this action to recover damages for the killing of it by the defendant. Whether in fact by releasing it in the manner stated he abandoned the property he otherwise would have had in it whilst in his possession; in short, whether the pigeon, in consequence of plaintiff's action, lost its character of a tame pigeon and became *feræ naturæ*." After referring to and commenting on *Devell v. Saunders*, Cro. Jac. 490; *Reg. v. Cory*, 10 Cox's C. C. 23; *Reg. v. Thistle*, L. R., 1 C. C. 158; *Child v. Greenhill*, Cro. Cas. 553; *Reg. v. Brooks*, 4 C. & P. 131; *Reg. v. Cheafor*, 21 L. J. 43, M. C.; *Taylor v. Newman*, 4 B. & S. 89, the court thus concluded: "There appears to be a connection between the soil and animals *feræ naturæ*, so far as the ownership in both is concerned. In an ordinary case, if the owner of a reclaimed pigeon chooses to take it from its home, and set it free on soil that does not belong to him, having no further care or thought about it, or if the bird escapes, and betakes itself to its natural liberty, this would, I think, amount to an abandonment of the previous reclamation, and it would again become *feræ naturæ*; but I cannot think that what the plaintiff has done in this case, the taking away of the bird and releasing him for the purpose of training, teaching it his lesson in short, can amount to an abandonment of his property in the pigeon. This temporary release from the plaintiff's custody for the purpose indicated could never be intended by the plaintiff to be an abandonment of the valuable property he possessed in the pigeon. The plaintiff was merely following the ordinary method of teaching the bird so as to cause it to become more useful and of greater value. After the best consideration I can give to the matter, I have arrived at the conclusion that the property, which the English law, following the Roman in this respect, allows individuals to possess in pigeons is a special possessory property, a right to have them protected whilst on the owner's property, or under his control. No case that I have found goes so far as to say that the owner of pigeons can have an absolute property in them at all times and in all places. *Devell v. Sanders*, if correct, decides there can be no such absolute property. If I thought that the plaintiff by his act had lost the possession or *custodia* of the pigeon, his property in the pigeon, in my opinion, would have been gone, and I should have been obliged to decide that this action could not have been maintained; but in the present case, for the reasons already stated, I think the reclaimed character of the pigeon ought not to be considered as abandoned, but that it continued notwithstanding the act of the plaintiff, and that being so, I hold, for the reasons given, that the property in the pigeon continued in the owner, and

that the plaintiff is entitled to the verdict. I have not arrived at this decision without much hesitation and some doubt." "In ancient times the question was by no means of the importance it has in recent times become. A vast amount of capital, indeed, is now invested in these birds; a very extensive traffic in them is carried on both at home and abroad. It is much to be desired that this important question, on which so much property depends, should not remain doubtful, but should be decided by the high court." The *Law Times* thinks "a somewhat dangerous principle is admitted" here.

In *Dicks v. Yates*, English Court of Appeal, May 24th, *Law Times*, May 28th, the question was whether the defendant, Edmund Yates, by publishing in the *World* a novel or serial story by Miss Braddon under the title of "Splendid Misery," had infringed the copyright in that title, which was claimed by the plaintiff from his publication in December, January, and February, 1874-5, in his weekly periodical known as *Every Week*, of a work of fiction called "Splendid Misery; or East End and West End," written by Colin H. Hazlewood, and illustrated by R. Huttula. Jessel, M. R., called attention to the differences between *Every Week* and the *World*. The first was a collection of novels, the second was a newspaper, with from time to time a *feuilleton* containing weekly installments of a story or novel. The two papers were of a totally different character, were brought out at a different price, and were addressed to a totally different class of readers. Two more perfectly different objects to which a paper could be directed it was difficult to discover. As to the legal questions the question whether there could be a copyright in the particular title, he was of opinion that there could not. The words "Splendid Misery" were old, and the combination was really a common and hackneyed term. It was proved to have been the title of a novel published in 1801, and there was no invention or originality by the plaintiff in such a combination any more than in the words "miserable sinners." Then it was said that user of the words by the plaintiff might entitle him, as in the case of a trade-mark, to restrain any one else from publishing a work under that title, lest the public should mistake it for his work. In the two titles themselves there were remarkable differences. The one was "Splendid Misery; or, East and West End, by Colin H. Hazlewood. The other "Splendid Misery," by Miss Braddon, author of "Lady Audley's Secret," etc. No serious argument, therefore, on the question of trade-mark could be, or indeed was, raised. Assuming there was copyright in a title—and he was not going to say that there could not be—what did it mean? It was the right of multiplying copies of an original work, and it must be shown that the work was original; if not, then there could be no copyright. How could this title be said to be original when the very same words had been used for the very same purpose some eighty years ago? It was no answer to say that people had forgotten the older novel. There was no evidence to show

that Mr. Hazlewood did not copy the title of the novel of 1801, or that he invented those words. On the ground, therefore, of no proof of the plaintiff's title, he was clearly of opinion that the plaintiff's action failed, and the appeal must be allowed. James, L. J., concurred. Literary property was liable to invasion in three different modes: 1. By literary piracy, when, for instance, after the publication of a work in this country some one either reprinted the work in this country or introduced a reprint of it from abroad. 2. When a man in bringing out a work appropriated the fruits of another man's previous literary labors, that was literary larceny. Another mode, and one quite irrespective of copyright, was when a man appropriated the title of another man's work; that was not an infringement of copyright, but a common-law fraud, punishable as such. In this case it was perfectly idle to suggest that Miss Braddon's novel called "Splendid Misery" was either a literary piracy, a literary larceny, or a commercial fraud, and there was no pretense whatever for bringing this action. Lush, L. J., concurred. James, L. J., added that in his opinion there could be no copyright in the title or name of a book. Lush, L. J., declined to express an opinion on that point. Mr. Drone says "the mere title of a book, magazine, newspaper, or other publication, is not a subject of copyright;" but that it may be of trade-mark. (Copyright, 145.)

In *Farmers' Fire Insurance Co. v. Moyer*, Pennsylvania Supreme Court, March 17, 1881, 10 W. N. C. 129, the owner of a barn temporarily placed a portable steam threshing-machine in the neighborhood thereof for immediate use, and in consequence of the explosion of the machine the barn was destroyed by fire. In an action by him against the insurance company, wherein said barn was insured, to recover his loss, *held*, that the use of such machine not being expressly prohibited by the charter and by-laws of said company, nor by the provisions of the policy, the plaintiff was entitled to recover, unless the use of said machine materially increased the risk of the company, and that whether said risk was so materially increased or not was properly left to the jury. The court said: "The 26th article of the by-laws prohibits the insuring of any building 'situated within fifty yards of a railroad on which steam power is employed, or of any forges, foundries, furnaces, rolling-mills, powder-mills paper and oil-mills, cotton-mills, or in general any mills, factories, or machineries driven by steam power.' But the property in the case in hand is embraced by neither the letter nor spirit of this prohibition. Again, article 34 provides: 'If the owner of an insured building should convert it to some other purpose, or should carry on therein any of the trades specified in article 26, the policy of such insured building shall not be considered valid or binding upon this company for such length of time as it shall be appropriated to such purpose.' Neither is the plaintiff's case taken 'up by this provision; for this contemplates the conversion of the building to a purpose other than that for which it was used at the time of its

insurance; an adaptation of it to some one of the occupations or trades mentioned in article 26. But the plaintiff's barn was converted to no such purpose, it was insured as a barn, and as a barn it was burned. These, however, seem to be all the regulations of this company which have even a remote bearing upon this subject. But it is only by a strained inference that either of them can be made to bear on the plaintiff's case, and it certainly would be out of all character to allow a forfeiture to be worked in favor of the company through the operation of a mere inference. There being therefore no express prohibition found in the policy or rules of the company against the use of a machine of this kind in the vicinity of the barn, the question was at most one of increase of risk, and that was properly left to the jury. There is not much doubt but that the immediate occasion of the fire was the explosion of the boiler, by which the machine was driven; but this was one of those pure accidents that is not to be considered any more than the accidental breaking of a glass lantern, had that been the occasion of the fire. Accidents will happen more frequently, perhaps, with steam engines than some other machines; nevertheless they are accidents, and as such, are beyond human forecast, and if insurance companies desire to prohibit even the temporary use of steam on or near the premises they insure, they should provide against such use in their policies, but it will not do for them to attempt to make rules and regulations, intended for a very different condition of things, cover an emergency not previously contemplated."

THE ETHICS OF PROFESSIONAL COMPENSATION.

IN his communication to this JOURNAL last week, Judge Countryman says that we were in error in stating that he "recommended" the practice of attorneys being contingently interested in the subject of litigation as a means of compensation; that he simply vindicated the practice against the charges of immorality and impropriety; and that he "recommended" that the suggestion should in every case come from the client. Judge Countryman certainly spoke strongly in support of the practice; but if he does not think this amounts to a "recommendation," we shall not quarrel with him over that word. But he seems to have some instinctive doubt of the propriety of the practice; else why leave it to the client to make the advance? If the practice is right, this is a false delicacy; if wrong, the lawyer cannot shield himself by saying, "my client tempted me." A man who unlawfully keeps and sells poison cannot escape by pleading that the customer asked him for it.

Judge Countryman says we are "extravagant" in pronouncing his the first public apology for the practice ever pronounced in this country. We had practitioners in mind in saying that. We should hardly call a judicial expression an "apology" for a practice. But let us see how his judicial authorities stand. The Delaware case is the

most elaborate defense of the practice which he cites. Mr. Bayard was undoubtedly a highly respectable man and lawyer, but he lived in a State where there never had been any public sense opposed to the practice. Champerty and maintenance never existed in that State. So he held slaves, we suppose, and thought it right. He took a single claim to collect for a percentage; it does not appear that he was in the habit of doing this thing. We hardly think his son, the present senator, would advocate such a practice in these days. But what is said on this subject in the Delaware case is *obiter*, after all, for the court held that Mr. Bayard had not performed his part of the contract, and therefore there could be no recovery on it.

In *Voorhies v. Dorr*, 51 Barb. 586, the question did not arise and was not discussed. The action was by a layman to recover an agreed compensation for the defendant lawyer's use of the plaintiff's name in a lawsuit, and what the court said was in reference to that contract.

The language which Judge Countryman attributes to Chief Justice Waite, in *Wright v. Tebbetts*, 1 Otto, 252, is not the language of the judge, but of the reporter's head-note. All that the judge said on the subject was: "*After the service had been rendered, and after, as was supposed, the claim had been secured, Wright agreed to pay ten per cent of the amount eventually realized, as compensation for the labor done. We see no reason to find fault with this.*"

The court did use the language quoted from *Stanton v. Haskin*, 1 McArthur, 558; S. C., 27 Am. Rep. 612. But it was *obiter*. If Judge Countryman had pursued his quotation one sentence, he would have found this: "But in this case there is an effort to recover land, not as a measure of compensation, but as a part of the very property in controversy." And the court refused to enforce the agreement between the attorney and client, by which the former was to have one-third of the land recovered.

The Wisconsin cases cited by Judge Countryman, while they pronounce the practice lawful, afford no breath of sanction of the morality or propriety of the practice.

This examination reduces Judge Countryman's array of indorsers to a very small showing. Now let us look at the other side, commencing at home, and coming from the time when the practice was unlawful down to the present time, when it is lawful. Chancellor Kent said, in *Arden v. Patterson*, 5 Johns. Ch. 48: "The purchase of a lawsuit by an attorney is champerty in its most odious form; and it ought equally to be condemned on principles of public policy. It would lead to fraud, oppression, and corruption. As a sworn minister of the courts of justice, the attorney ought not to be permitted to avail himself of the knowledge which he acquires in his professional character, to speculate in lawsuits. The precedent would tend to corrupt the profession, and produce lasting mischief to the community."

The arguments on this side of this question have never been better presented than by ex-Judge Samuel Hand, of this city, who, in his address as president of the New York State Bar Association,

in 1879, after rehearsing the common arguments in favor of the practice, said: "It is urged that practices, which before the Code were universally regarded in the profession as disreputable, unworthy, demoralizing, and tending to degrade the profession and impair the administration of justice, are not changed in their character, because they may possibly have ceased to be illegal, or to be absolutely prohibited by statute; or because a law removing restraints upon them has been passed at a time when it seemed to be the fashion to throw down every legal barrier to, and restraint upon, the admission of an attorney, or his practice when admitted, and to rely solely upon the diligence, the integrity and honor of men as a sufficient safeguard. It is also urged that the character of these practices remains the same as ever; that they are still, as ever, demoralizing, deteriorating in their tendency; that they do, as ever, tend to barratry, to stirring up of suits, the encouragement of litigation, and the tampering with evidence. That they are an easy and tempting source of large profits to able and adroit lawyers; that such cases, with proper management, are sure to succeed before juries, and that it is rare that a case cannot, on some question, be got before a jury; that the communistic tendencies of the present time produce enormous verdicts—fortunes in themselves; that such temptations are calculated to drag away the profession from its moorings, and its regular, steady business, to these barratrous speculations; that while there may be no harm in arranging for a contingent fee with a poor man, who applies to an attorney, yet the tendency of permitting such arrangements is to set members of the profession advertising for such cases, soliciting at the expense of all manly and professional dignity, persons who are known to have causes of action, and inducing them to violate constantly the statute against the advancing of moneys as an inducement to placing suits in their hands. It is said that worthless persons, having nothing, risking nothing, are induced under this system to present and swear through simulated causes of action, relying upon attorneys to furnish all necessary moneys and divide the profits if successful. All these mischiefs and irregularities are, it is insisted, injurious to the standing before the world and to the inward tone of the profession."

On the same occasion, Mr. Tracy C. Becker, of Buffalo, in an essay on Contracts for Contingent Compensation for Legal Services, remarked: "I cannot conceive of any serious argument that will convince any one that such speculations are not demoralizing and dangerous in the extreme." "With the frequency of contracts for contingent compensation the money changers and speculators insidiously, yet surely, gain a foothold on the threshold of that noble edifice. Would it not be well to imitate that great law-giver and moralist who, when he found them clinging about another temple two thousand years ago, scrupled not to overturn their tables, and to drive them forth lest their presence should pollute the sacred place?"

Although the practice in question is now lawful

in this State, the courts do not seem to regard it with much favor. In *Voorhies v. McCartney*, 51 N. Y. 390, the commission of appeals held that an attorney under such circumstances, bringing an action in the name of another, is still liable for the defendant's costs; and Gray, C., observed: "The repeal of the former laws upon that subject has not legalized such contracts; it made such transactions by lawyers only tolerable by leaving such of them as might choose to embark in such enterprises upon the same footing as other speculators, any one of whom may employ an attorney to bring an action in which he is beneficially interested in the name of another."

In *Coughlin v. N. Y. C. & H. R. R. Co.*, 71 N. Y. 443; S. C., 27 Am. Rep. 75, the court held that in spite of an agreement of the nature in question, the client could release his claim to the defendant and defeat his attorney. The court, Earl, J., remarked: "Its exercise" (i. e., the extraordinary power of the court) "to secure to an attorney the statutory fees, small in amount and easily ascertainable, was just and proper, and could lead to no abuse. But to exercise it so as to enforce all contracts between clients and attorneys, however extraordinary, is quite another thing. Here the attorneys were contractors. They took the job to carry this suit through, and to furnish all the labor and money needed for that purpose, and they are no more entitled to the protection which they now seek than any other person not a lawyer would have been, if he had taken the same contract. When a party has the whole legal and equitable title to a cause of action, public policy and private right are best subserved by permitting him to settle and discharge that, if he desires to, without the intervention of his attorneys."

Now to go outside our own State. In *Duke v. Harper*, 66 Mo. 51; S. C., 27 Am. Rep. 314, the court said: "But there is nothing in the law of champerty as expounded by Blackstone and Bouvier, and the American courts in the adjudicated cases which we have cited, that is not applicable to our condition. The race of intermeddlers and busybodies is not extinct. It was never confined to Great Britain, and the little band of refugees who landed from the May Flower on the coast of New England were not entirely free from the vice of intermeddling in the concerns of other people. It is as prevalent a vice in the United States as it ever was in England, and we do not see but that a law restraining intermeddlers from stirring up strife and litigation betwixt their neighbors is wholesome and necessary, even in Missouri. A man having a doubtful claim to property in the possession of another, who would hesitate to incur the expense of testing its validity, will readily agree that one who will bear the burden of the contest, and take part of the recovery for his pay, may institute the suit in his name. Such contracts are champertous and should be so held on principle everywhere."

In *Adye v. Hanna*, 47 Iowa, 264; S. C., 29 Am. Rep. 484, the court held that an attorney's agreement to pay any judgment against his client if he

would appeal and pay his fees, is void, and remarked: "In another respect it is in conflict with the policy of the law, which promotes and upholds purity and justice in the administration of remedies in the courts. The attorneys bound by the contract become liable in the place of their client. They have the most powerful motive to pervert justice and corrupt its source, in order to escape the liability they have assumed. They are officers of the court, and as such ought to be trusted by judges as well as clients. Their duty does not require them to pervert the law or deceive those clothed with the power to administer it. On the contrary, it forbids them, under the heaviest penalties, to do any act that may have such an effect. They are to aid the courts in the administration of justice. Their duty requires them to endeavor to secure to their client his rights under the law and nothing more. For such services the law will secure them compensation from their clients. It requires neither arguments nor explanations to show what great temptations would be placed before the attorney to violate his duty and to endeavor to corrupt the fountain of justice, were he to take the place of his client and become responsible for all liabilities incident to a decision adverse to him. The law will not permit members of the legal profession to be assailed with temptations so dangerous in their character. They have the most grave duties to perform in the administration of justice; they stand before the world, as a class, distinguished for honor, integrity, and public virtue. The law will be careful to recognize no rules or principles which in their application to the practice of courts or business of attorneys may tend to corrupt the legal profession, or rob it of the high character it has always maintained."

In Pennsylvania, Chief Justice Gibson characterizes the practice as "questionable." *Foster v. Jack*, 4 Watts, 339. Judge Rogers says it is a "subject of regret." Judge Kane, in *Ex parte Plitt*, 2 Wall. Jr., 452, says: "It is not a practice to be generally commended."

From Chief Justice Sharswood's admirable essay on Professional Ethics we extract the following: "A horde of pettifogging, barratrous, custom-seeking, money-making lawyers, is one of the greatest curses with which any community can be visited." "Except in this class of cases" (undefended claims) "agreements between counsel and client that the compensation of the former shall depend upon final success in the lawsuit—in other words, contingent fees—however common such agreements may be, are of a very dangerous tendency, and to be declined in all ordinary cases." "It is to be observed, then, that such a contract changes entirely the relation of counsel to the cause. It reduces him from his high position as an officer of the court, and a minister of justice, to that of a party litigating his own claim. Having now a deep personal interest in the event of the controversy, he will cease to consider himself subject to the ordinary rules of professional conduct. He is tempted to make success, at all hazards and by all means, the sole end of his exertions. He becomes blind to the merits of the case, and

would find it difficult to persuade himself, no matter what state of facts might be developed in the progress of the proceedings, as to the true character of the transaction, that it was his duty to retire from it. It places his client and himself in a new and dangerous relation. They are no longer attorney and client, but partners. He has now an interest which gives him a right to speak as principal, not merely to advise as to the law and abide by instructions. It is either unfair to him or unfair to the client. If he thinks the result doubtful, he throws all his time, learning and skill away upon what, in his estimation, is an uncertain chance. If he believes that the result will be success, he receives in this way a higher compensation than he is justly entitled to receive. It is an undue encouragement to litigation. Men who would not think of entering on a lawsuit, if they knew that they must compensate their lawyer whether they win or lose, are ready upon such a contingent agreement to try their chances with any kind of a claim. It makes the law more of a lottery than it is. The worst consequence is yet to be told—its effect upon professional character. It turns lawyers into higglers with their clients. Of course it is not meant that these are always its actual results; but they are its inevitable tendencies—in many instances its practical working. To drive a favorable bargain with the suitor in the first place, the difficulties of the case are magnified and multiplied, and advantage taken of that very confidence which led him to intrust his interests to the protection of the advocate. The parties are necessarily not on an equal footing in making such a bargain. A high sense of honor may prevent counsel from abusing his position and knowledge; but all have not such high and nice sense of honor. If our example goes toward making the practice of agreement for contingent fees general, we assist in placing such temptations in the way of our professional brethren of all degrees—the young, the inexperienced, and the unwary, as well as those whose age and experience have taught them that a lawyer's honor is his brightest jewel, and to be guarded from being sullied, even from the breath of suspicion, with the most sedulous care."

Chief Justice Sharswood, in the same essay, quotes the following advice from Price on Limitation and Lien, characterizing the author as "a gentleman of the largest experience and highest character for integrity and learning at the Philadelphia bar": "Permit me to advise and earnestly to admonish you, for the preservation of professional honor and integrity, to avoid the temptation of bargaining for fees or shares of any estate or other claim, contingent upon a successful recovery. The practice directly leads to a disturbance of the peace of society, and to an infidelity to the professional obligation promised to the court, in which is implied an absence of desire or effort, of one in the ministry of the temple of justice, to obtain a success that is not just as well as lawful. It is true, as a just equivalent for many cases honorably advocated and incompetently paid by the poor, a compensation may and

will be received, the more liberal because of the ability produced by success; but let it be the result of no bargain, exacted as a price before the service is rendered, but rather the grateful return for benefits already conferred."

If our language on this subject is deemed "severe," what will be said to that of the foregoing extracts? Does our correspondent refuse to recognize these high authorities?

VALIDITY OF STATUTE PRESCRIBING CHARACTER OF EVIDENCE.

RHODE ISLAND SUPREME COURT, FEBRUARY 5, 1881.

STATE OF RHODE ISLAND V. BESWICK.*

A statute of Rhode Island which forbids, under a penalty, the keeping for sale of spirituous liquors, provides that "it shall not be necessary to prove an actual sale of the liquors enumerated in any building, shop, saloon, place, or tenement, in order to establish the fact that any of said liquors are there kept for sale; but the notorious character of any such premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tipping shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises for the purposes of sale within this State." Held, that the statute, by making the recited circumstances *prima facie* evidence against an accused, is unconstitutional and void, in depriving the accused of the protection of the common-law principle that every person is to be presumed innocent until he is proved guilty, as recognized in the Constitution of Rhode Island, and in violating the provision that an accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land."

The statute also provided "that no negative allegations of any kind need be averred or proved in any complaint." Held, that this did not violate any constitutional right of the accused person.

EXCEPTIONS to the Court of Common Pleas in a prosecution for a violation of this statute.

"If any person shall keep or suffer to be kept on his premises or possessions, or under his charge, for the purpose of sale, in violation of the preceding sections of this act or any of them, any ale, wine, rum, or other strong or malt liquors, or any mixed liquors, a part of which is ale, wine, rum, or other strong or malt liquors, he shall on conviction, be fined twenty dollars and be imprisoned in the county jail ten days."

Other facts appear in the opinion.

Samuel P. Colt, Assistant Attorney-General, for the State.

Hugh J. Carrol & Charles E. Gorman, for defendant.

DURFEE, C. J. The complaint is in the form provided by Public Laws Rhode Island, chapter 797, of March 18, 1880, for prosecutions under Public Laws Rhode Island, chapter 508, sections 18 and 19, of June 25, 1875. The complaint is for a violation of section 19. One objection to it is that section 19 no longer exists, having been repealed by Public Laws Rhode Island, chapter 653, section 2, of February 20, 1878. But chapter 653, section 2, while it repeals section 19 as it originally existed, re-enacts it in an amended form as section 19 of chapter 508. It must therefore be taken as section 19 of chapter 508 in respect of offenses subsequently committed. Other objections relate to the form of the complaint, which the defendant contends is fatally defective in that it does not contain the usual negative averments. Chapter 797, section 2, provides that "no negative allegations of any kind need be

* To appear in 18 Rhode Island Reports.

averred or proved in any complaint under said chapter 508." If this provision is valid, the objections to the form of the complaint fall to the ground. The defendant contends that it is unconstitutional, being in violation of the rights of the accused "to be informed of the nature and cause of the accusation," and not to be "deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." We do not think, however, that the provision is in derogation of either of these rights. The Constitution does not secure to the accused any particular form of complaint or accusation, but only information which will enable him to defend and protect himself. It does not exact the technicalities of criminal pleading, but only that degree of clearness and precision which is reasonably necessary to identify the offense which is the subject of the charge. We think the complaint here meets this requirement. No negative averments would be required by the rules of criminal pleading if the exceptions to the prohibition were not incorporated by reference in the prohibitory clause. But for the reference the burden would fall on the accused if he were within an exception, to show it by way of defense. So too the burden would be cast upon him if the reference were stricken out by amendment, and certainly if the legislature can throw this burden on the accused by such an amendment, it cannot be unconstitutional for it to accomplish the same result by direct and original enactment. The only effect of the enactment is to require that if any of the few persons who are privileged to sell intoxicating liquors are prosecuted for selling or keeping for sale, they shall show that they are privileged in defense, instead of requiring the prosecution to show in every case that the accused is not privileged. We can but think that the requirement is as constitutional as it is reasonable.

The defendant contends that if the negative averments were unnecessary, yet inasmuch as the complaint alleges that the keeping was without lawful authority, it was incumbent on the prosecution to prove it. We do not think so. The statute only makes it necessary for the prosecution to prove a keeping for sale, which is presumably unlawful, unless the defendant shows that he is licensed or privileged. *Commonwealth v. Tuttle*, 12 Cush. 502; *Commonwealth v. Carpenter*, 100 Mass. 204.

The other exception raises the question whether section 4 of chapter 797 is constitutional. The language of section 4 is as follows, to wit:

"It shall not be necessary to prove an actual sale of the liquors enumerated in sections 18 and 19 of said chapter 508 in any building, shop, saloon, place, or tenement, in order to establish the fact that any of said liquors are there kept for sale; but the notorious character of any such premises, or the notoriously bad or intemperate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog-shops, tippling-shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises for the purposes of sale within this State."

The State submitted, in support of the complaint, besides other evidence, evidence to show that the place kept by the defendant had the reputation of being a grog-shop, that it was frequented by men of intemperate habits, and that the implements and appurtenances were there which are usually to be found in a grog-shop. The defendant offered no testimony, but requested the court in effect to instruct the jury that they could not find him guilty unless they were convinced of his guilt beyond a reasonable doubt, and that testimony of the kind above recited would not of itself be sufficient to warrant a conviction. The court did not comply with these requests, but instructed the

jury as follows, to wit: "*Prima facie* evidence is that which appears to be sufficient proof respecting the matter in question until something appears to controvert it; but which may be contradicted, rebutted, or explained. *Prima facie* evidence is sufficient to establish the fact unless rebutted; hence if the character of the place as one notorious for the sale of liquors, or if the fact that the usual implements and appurtenances were kept there, are proved to your satisfaction, that is sufficient to convict, if not rebutted." The defendant excepted both to the charge and to the refusal to charge.

It will be observed that the statute makes proof of the facts mentioned in it not only evidence against the accused, but *prima facie* evidence of his guilt, so that upon proof of them it is not only the right but the duty of the jury to convict, unless the presumption is rebutted by other evidence, though of course such other evidence may be elicited from the witnesses for the State as well as given by witnesses for the defendant. *Commonwealth v. Pillsbury*, 12 Gray, 127. The question then is, whether a statute is constitutional which makes it the duty of a jury, impaneled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, or upon simple proof that the place is frequented by persons of notoriously bad or intemperate character, or upon proof that he has there the implements and appurtenances of a grog-shop or tippling-shop, without more, unless there be other evidence to rebut or control it.

We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common-law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." What is meant by "the judgment of his peers" is the judgment of a jury, and certainly he does not have the judgment of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the General Assembly were to enact that if any person were generally reputed to be guilty of a murder it should be *prima facie* evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the judgment of his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt.

The provision is that the accused shall not be deprived of his life, liberty, or property, "unless by the judgment of his peers or the law of the land." It may be argued that even if the accused does not have the judgment of his peers he is nevertheless convicted by "the law of the land." This phrase has a historical origin. It was borrowed from *Magna Charta*, and, as has been repeatedly decided, means the same as "due process of law." The question then is,

whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to "due process of law."

The answer to the question depends on the meaning of the phrases "due process of law" and "the law of the land." The phrases have never received a perfectly satisfactory definition. One or the other of them occurs in all or nearly all the Constitutions of the several States and in the Constitution of the United States, and it is well settled that in this country the provisions in which they occur were intended to operate as limitations on the legislative power of the several States and of the United States. It follows, if the provision is a limitation on the legislative power, that a legislative enactment is not necessarily "the law of the land," even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily "due process of law." It is also settled that these provisions secure to every citizen, except in the matter of taxation, a judicial trial before he can be deprived of life, liberty, or property. The definition of "due process of law," given by Judge Edwards in *Westervelt v. Gregg*, 12 N. Y. 202, 209, is quoted by Judge Cooley in his work on Constitutional Limitations, 355, with approval, and is in our opinion not only concise but very accurate. "Due process of law undoubtedly means," he says, "in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights." The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty. "This rule," said Judge Selden, in *People v. Toynbee*, 2 Park. Cr. 490, 523, "will be found specifically incorporated into many of our State Constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.' Indeed to hold that a Legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the Legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defense left to him, and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted, can be abrogated by the Legislature. It is not one of those great and immemorial rights which lie imbedded in the phrase 'the law of the land.'" See Cooley Const. Limit. *351-*357; *Clark v. Mitchell*, 64 Mo. 564; *Pursons v. Russell*, 11 Mich. 113, 121; *Hoke v. Henderson*, 4 Dev. 1; *Taylor v. Porter*, 4 Hill (N. Y.), 140; *Embury v. Connor*, 3 N. Y. 511, 517; *Wynehamer v. People*, 13 id. 378; *People v. Toynbee*, 20 Barb. (S. C.) 168; also on appeal, 2 Park. Cr. 490, and see particularly the remarks of Selden, J., 524-7.

Our attention has been called to *Commonwealth v. Williams*, 6 Gray, 1, and *State v. Hurley*, 54 Me. 562, in which it was decided that statutes providing that in prosecutions for selling spirituous and intoxicating liquors, delivery in or from any building or place other

than a dwelling-house, "shall be deemed *prima facie* evidence of a sale," were constitutional. It cannot be denied that those cases are weighty precedents for the prosecution. But in the first of them Judge Thomas dissented from his associates in an able opinion, and both of them differ from the case at bar in this, that the fact which the statutes make *prima facie* evidence of a sale, to wit, delivery, is a necessary constituent of a sale, whereas the facts which are made *prima facie* evidence by our statute may not only exist without the offense, but the offense may exist without the facts. They do not necessarily enter into its commission. If this difference is not enough to distinguish the case at bar from the cases cited, we can only say that we must rather adhere to our own judgment, which seems to accord with that which was entertained by the higher courts of New York, than defer to the judgment of the courts which decided those cases, however highly we respect it.

In the testimony submitted was this, to wit: a witness asked the defendant what he sold, and the defendant replied "beer." The court instructed the jury that beer is a well known malt liquor, and that if the defendant sold under that name something which was not a malt liquor, it ought to appear in the testimony, or otherwise, the jury should presume it was a malt liquor. We think this was error. We do not think there is any presumption of law, that when a man speaks of beer he means a malt liquor, but we think what he means is purely a question of fact for the jury. It is matter of common knowledge that there are beverages containing neither malt nor any other intoxicating ingredients which are called beers.

The exceptions relating to the form and sufficiency of the complaint, and to the absence of testimony showing want of lawful authority, are therefore overruled. The other exceptions relating to the charge of the court are sustained, and the cause is remanded to the Court of Common Pleas for a new trial.

CONNECTICUT SUPREME COURT OF ERRORS, MARCH TERM, 1890.

STATE OF CONNECTICUT V. THOMAS.*

A statute of Connecticut provides that "every person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale, without having a license therefor, shall be fined," etc. *Held*, not unconstitutional. The statute treats such a reputation, where clearly established, as decisive evidence that liquors are in fact kept there for sale. The defendant is at liberty to show that the reputation is unfounded.

PROSECUTION for keeping a place where it was reputed that intoxicating liquors were sold under a statute providing as follows: "Every person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale, without having a license therefor, shall be fined," etc. Defendant was convicted and moved for a new trial.

J. B. Curtis, for defendant.

J. H. Olmstead, State's Attorney, for the State.

PARK, C. J. The object of the statute under consideration, like that of other statutes upon the same subject, is to prevent the unlawful traffic in intoxicating liquors. One section forbids all unlicensed persons to keep such liquors with intent to sell them. Keeping such liquors for such purpose would be perfectly harmless, if it could be certain that nothing would follow from it. But the statute takes it for granted that where such liquors are thus kept, opportunities will present themselves for carrying the intent into execution, and sales of the liquor will in fact be made. For

* Appearing in 47 Connecticut Reports.

this reason the keeping of such liquors for such a purpose is regarded as equivalent to the selling of them. Another statute forbids the keeping open on the Sabbath day of any place in which it is reputed that intoxicating liquors are exposed for sale. The keeping open of such places, if that was all, would be no worse than the keeping open of the places without such liquors and without such reputation. But the Legislature saw that if such places were suffered to be kept open, intoxicating liquors would be sold in them, and that keeping open was only another name for selling liquors; and all experience verifies the conclusion. Drunkards frequent such places as flies frequent the shambles of a butcher; and one could as easily be prevented as the other. It might as well be claimed that the statute against keeping open such places on Sunday is unconstitutional, as that the statute under consideration is so. The language of the statute is as follows: "Every person who shall keep a place in which it is reputed that intoxicating liquors are kept for sale, without having a license therefor, shall," etc. This court, in the case of *State v. Morgan*, 40 Conn. 44, said that "this statute was intended to reach places where intoxicating liquors are kept for sale, and such places only. * * * The statute seems to presume that if a place has the reputation of being one where intoxicating liquors are kept for sale, it is a place where such liquors are in fact kept for sale, and therefore makes it criminal for a man to keep a place which has such reputation." All that can be said is, that the statute treats a place having such reputation, unexplained and uncontradicted, just as it treats a place where such liquors are in fact sold, or are in fact kept for sale, because the two places are really of the same character.

It is little to the purpose to talk about natural rights in such cases, and the danger of convicting innocent men upon insufficient evidence. The crime of selling intoxicating liquors is peculiar. Other crimes seek concealment, but the business of selling such liquors cannot be successfully carried on in secrecy. The occupation requires the broad light of day. A liquor establishment is as well known to the community in which it exists, as a grocery, dry goods, mechanical or manufacturing establishment would be. Its customers are easily distinguishable from others; they can be easily recognized at a distance. They loiter about the establishment as drones about a hive, and constitute a sign for the place as unmistakable as one in letters over the door. The ground upon which the defendant claims the statute to be unconstitutional is that the crime is made to consist in the reputation of the place, irrespective of its actual character. Here is the defendant's error. The crime consists in the character of the place; and its reputation, unexplained and uncontradicted, is taken as conclusive evidence of its character as a place where intoxicating liquors are in fact sold.

The counsel for the defendant on the argument of the case to the jury claimed, and asked the court to charge the jury, that the statute in question was unconstitutional, and that the jury were judges of the law, as well as of the fact, and that if they conscientiously believed that the statute was unconstitutional they had a right to so decide. The court charged them that they were judges of the law as well as of the facts, but that they were as much bound by the law as the judge on the bench, and that it was not to be supposed that they would decide that the statute in question was not valid when the Supreme Court of the State had held it to be valid. The counsel for the defendant complain of this charge and ask for a new trial on account of it. They say that the Supreme Court had never held the statute constitutional and so that the judge misled the jury and prevented them from freely exercising their right to judge for them-

selves of the validity of the law. They say that the judge had a right to instruct them as to what the law was, and that he might express his own opinion as strongly as he pleased, but that he had no right to add to the influence of his own opinion with the jury the weight of a supposed decision of the Supreme Court, when no such decision had in fact ever been made.

The whole objection then lies to the fact of the judge's reference to a supposed opinion of this court. Now it can really have made little difference whether the court had actually made such a decision, so long as the judge was right in his view of the law and this court was prepared to sustain him in that view. The most that can be said is that the jury were misled into taking the only view of the law that they could correctly have taken. The defendant lost a possible chance of the jury's erroneously deciding the law in his favor. This ground for a new trial does not commend itself to our sense of justice. But we need not decide whether, if that were the precise state of the case, it would be a sufficient ground for granting a new trial. This court had in fact decided the question as to the validity of the statute. In the case of *State v. Morgan*, before referred to, the court had this very statute under consideration, and then gave it such a construction as to take it wholly out of the question now made with regard to its constitutionality. The point now made against its constitutionality is, that it undertakes to punish a man for the reputation which his house has acquired, while such reputation may have no basis of fact, and may have grown out of the mere idle or malicious talk of his neighbors. The passage we have before quoted from the opinion in that case shows that the court construed the statute as intending only such reputation as was founded upon and so a legitimate proof of actual sales of liquor; and that it was open to any person prosecuted under the statute to show that the reputation was an unjust one and without foundation. With this qualification there could be no danger of his being convicted upon an unfounded reputation. The judge very properly therefore regarded the question of the constitutionality of the statute as already disposed of by the court.

There is no error in the judgment below and a new trial is not advised.

In this opinion the other judges concurred.

JUDGMENT FOR PART OF ENTIRE DEMAND BAR TO ACTION FOR REMAINDER.

CONNECTICUT SUPREME COURT OF ERRORS.

BURRITT V. BELFY.*

While a suit for several months' rent was pending in a court, the rent being payable monthly under a parol lease for a term of years, another suit was brought before justice of the peace for an additional month's rent, which was due when the former suit was brought, a judgment was taken for the same. Both suits were general assumpsit for use and occupation. *Held*, that a judgment in the second suit was a bar to the first suit. The principle that a judgment for a part of an entire demand is a bar to any other suit for another part of the same demand, is everywhere inflexibly maintained. Where several payments have become due upon a single agreement, express or implied, the demand is to be regarded as an entire one. The omission to plead the first suit in a complaint of the second was not a waiver of the right to plead the judgment in bar of the first suit.

ASSUMPSIT for use and occupation of real estate, brought to the City Court of the city of Waterbury. The case is fully stated in the opinion.

J. W. Webster and *J. O'Neill*, for plaintiff in error.

E. F. Cole, for defendant in error.

* To appear in 47 Connecticut Reports.

LOOMIS, J. Under a parol lease for a term of years, the defendant, from the 1st of October, 1875, till the 1st of November, 1877, occupied certain real estate belonging to the plaintiff for an agreed rent of \$37.50 per month, payable monthly in advance. The rent was not paid according to agreement, and on the 1st of October, 1877, there was due the plaintiff the sum of \$173.63, and on that day the present suit was commenced, returnable to the City Court of the city of Waterbury, holden on the first Monday of December, 1877, for the purpose of recovering the rent due prior to the 1st of October, 1877. On the 1st day of November, 1877, the plaintiff commenced another suit, returnable before a justice of the peace on the 10th day of November, 1877, to recover for the rent due for the month of October, 1877. Both actions were general assumpsit for use and occupation only, and all the rent was due when the first suit was brought. The justice suit was first tried, in which the plaintiff filed his bill of particulars for "one month's rent from October 1st, 1877, to November 1st, 1877, \$37.50," and recovered judgment for the amount claimed, with costs, which was paid and satisfied by the defendant after execution was issued.

In the present action the plaintiff filed his bill of particulars "for twenty-four months' rent up to October 1st, 1877, at \$37.50 per month," giving credit for the amount received, and showing a balance of \$136.13.

The defendant pleaded the general issue, with notice that the recovery and satisfaction of the judgment before the justice upon a part of the same cause of action would be claimed as a bar to this action.

The City Court decided that it was no bar, and the ruling was sustained by the Superior Court. The question comes before this court for review on the defendant's motion in error.

The legal proposition that a judgment for a part of one entire demand is a conclusive bar to any other suit for another part of the same demand is everywhere inflexibly maintained.

There are some cases of great hardship where this court has applied the principle, showing how firmly it has been adhered to. In *Town of Marlborough v. Sisson*, 31 Conn. 332, the defendants had removed a pauper from the town of East Haddam to the plaintiff town, and left him there, for the purpose of throwing the burden on the plaintiff. The pauper had no settlement in this State and the plaintiff had to assume the expense of his support, and afterward brought a suit for damages and expenses up to the time of trial and recovered judgment. The plaintiff then requested the defendants to remove the pauper, which they refused to do, and Marlborough afterward brought another suit to recover for the expenses incurred since the former judgment. It was held that the former recovery, though an inadequate one, was a bar to the action.

In *Pinney v. Barnes*, 17 Conn. 420, a suit had been brought in the name of the judge of probate against an executor after his removal from office, on his probate bond, for neglect to pay over to his successor money in his hands belonging to the estate, and judgment was recovered for a certain sum. On a *scire facias* afterward brought on the judgment it appears that the testator had given by his will certain legacies payable when the legatees should arrive at the age of eighteen years. At the time of the former judgment they had not arrived at that age, but the defendant had in his hands money belonging to the estate derived from the sale of lands sufficient to pay these legacies, but on the trial of the first suit no claim was made or evidence offered relative to these legacies, as they were not then due and the action had been instituted and was prosecuted solely for the benefit of those entitled to the residuum. It was held by a majority of the

court that the former judgment was an absolute bar. Williams, C. J., in his dissenting opinion did not attack the principle referred to, but thought the court ought to lift the veil that concealed the real parties, and that the claims of these minor legatees ought to be considered as a distinct cause of action.

From the numerous cases that support the principle contended for we cite the following: *Lane v. Cook*, 3 Day, 255; *Bunuel v. Pinto*, 2 Conn. 431; *Avery v. Fitch*, 4 id. 362; *Simes v. Zane*, 24 Penn. St. 242; *Logan v. Caffrey*, 30 id. 196; *Reformed Dutch Church of Westfield v. Brown*, 54 Barb. 191; *Hopf v. Myers*, 42 id. 270; *Secor v. Sturgis*, 16 N. Y. 548; *Coggins v. Bullock*, 1 E. D. Smith, 434; *Bendernagle v. Cocks*, 19 Wend. 207; *Guernsey v. Carver*, 8 id. 492; *Stevens v. Lockwood*, 13 id. 644; *Colvin v. Corwin*, 15 id. 557; *Warren v. Comings*, 6 Cush. 103; *Staples v. Goodrich*, 21 Barb. 317; *Willard v. Sperry*, 16 Johns. 121; *Marble v. Keyes*, 9 Gray, 221; *Gibbs v. Cruikshanks*, L. R., 8 C. P. 454; *Lord Bagot v. Williams*, 3 Barn. & Cress. 235. While there is no conflict of authorities relative to the proposition as stated, there is some disagreement in the cases in applying the principle, owing to the difficulty of discriminating between demands which in their nature are single and entire and those which are several. The cases where such difficulties usually arise are those where there are running accounts for goods sold, money lent or paid, or labor performed, at different times; or where there is only one contract with stipulations for payments or acts to be done at different times, and more than one payment has become due when the first suit is brought. The case at bar belongs to the last mentioned class, and we are called upon to determine whether the cause of action was entire or several; and for this purpose we will invoke the aid of such general rules as the best authorities have prescribed.

In *Badger v. Titcomb*, 15 Pick. 409, a leading case in Massachusetts on this subject, it was held that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered a several contract, though arising out of one and the same agreement. And the court held that a running account for goods sold and delivered, money loaned, or money had and received at different times, will not constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an agreement may be inferred; and Wilde, J., in giving the opinion, says that the case of *Guernsey v. Carver*, 8 Wend. 492, which holds that a running account for goods sold at different times, if all are due, is an entire demand incapable of being split up into separate suits, is not good law.

Afterward Cowen, J., in *Bendernagle v. Cocks*, 19 Wend. 207, in a very able opinion attempts to vindicate the decisions of the courts of New York against the attack of Judge Wilde.

Upon the merits of this conflict it is not necessary for us to pass, because we think the case at bar may be brought within the saving clause of Judge Wilde's rule, and be made an entire demand by the effect of the implied agreement upon which the action is founded. We ought, however, to remark in passing, that the later decisions by the courts of New York show some concession to the position taken in *Badger v. Titcomb*.

In *Secor v. Sturgis*, 16 N. Y. 548, the case of *Colvin v. Corwin*, 15 Wend. 557, was overruled, which held that the purchase by the defendant of lottery tickets at two different times and places, of two different agents of the plaintiff, constituted one entire demand, and the case of *Guernsey v. Carver*, *supra*, was somewhat qualified. Strong, J., in giving the opinion, says: "The true distinction between demands or rights of action which

are single and entire and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. In the case of torts each trespass or conversion or fraud gives a right of action and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action in such case is the stipulation, which is in the nature of a several contract. * * * Usually in case of a running account it may be fairly implied that it is in pursuance of an agreement that an account may be opened or continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, when they arise at different times, a single or entire demand or cause of action."

In further illustration of the application of the principle referred to we will notice two other recent cases decided by the courts of New York, where the facts were quite like those of the case under consideration.

In *Coggins v. Bulwinkle*, 1 E. D. Smith, 434, the defendant, by written contract, became security that each of four seamen named should report on board a certain ship and proceed to sea, and in default thereof he agreed to refund certain wages advanced by the plaintiff and pay damages. All the seamen made default and did not appear at all on board the ship. The plaintiff first brought an action of covenant, alleging a breach in the default of one seaman, and recovered. Afterward he brought three other suits upon the same agreement, alleging the separate default of each of the others. The court, Woodruff, J., giving the opinion, held that the agreement was single and entire and could not be split up into four suits for breaches, all of which had occurred at the same time; and the first judgment was held a bar to all the other suits.

In *Reformed Dutch Church v. Brown*, 54 Barb. 191, the defendant's testator had agreed in writing to pay \$100 yearly for three years, for the purpose of supporting the preaching of the gospel at a place named. After all three of the yearly payments had become due and unpaid, suit was commenced for the \$100 due at the end of the first year and judgment recovered. Afterward another action was brought for the remaining sums. It was held that the first judgment was a bar.

In the case at bar it is manifest that an action might have been brought for each month's rent as it became due, and so far the cause of action would have been several. But after all the payments have become due and the consideration is executed, in determining whether the cause of action is single and entire or several, regard should be had to the obligation of the defendant under the contract at the time the action is brought. If there are several payments due under one and the same contract, they then become consolidated, as one obligation on the part of the defendant and one demand on the part of the plaintiff. So that if this action was founded on the express contract, we should hold that all the payments due should be included in one action. But here the action is not predicated on the promise to pay monthly, and the breaches of that promise, but simply on his implied contract arising from the use and occupation, which was one continuous and entire thing. There is only one promise founded on one consideration, and there is

unum debitum, one debt, which the defendant owes. So that the demand is clearly single and entire within all the authorities, and the plaintiff had no right to split it up for the purpose of bringing several actions, and having done so, the first valid judgment on the merits for a part of the claim became an effectual bar to this action for the residue.

The result of the plaintiff's attempt to split his cause of action will be the loss of the principal part of his debt, which is to be regretted. But the law ceases to be law, it ceases to promote justice, if it is changed for every case. The greatest good to the greatest number requires a firm adherence to just general principles. Should we concede to the plaintiff in this case the right he claims to maintain these two suits, it would of necessity concede also his right to split his cause of action into twenty-five parts, one for each month's occupancy. Such a result would be simply intolerable. The two old maxims of the law on which our decision rests, "*Nemo debet bis vexari pro eadem causa*," and "*Interest reipublice ut sit finis litium*," are embodiments of wisdom and justice.

It may be suggested that in the cases where the principle we have referred to has been applied, the second suit was barred by the judgment in the one previously brought, which is reversed in this case.

It is usually to be expected that recovery will be had in the suit first brought, and would doubtless have been so here if both suits had been returnable before the same court. But does the reversal of the natural order alter the principle? We see no reason for it except that the first suit at the time it is brought is not vexatious, while the second one is. But if the second suit goes into a valid judgment on its merits, we do not see why it must not merge the entire demand, the same as if rendered in the suit first brought. We do not find any particular discussion of this point, but the rule is laid down to this effect in the well-considered case of *Secor v. Sturgis*, supra. The court says, "The rule is fully established that an entire claim cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits."

Again, as the defendant might have pleaded the pendency of the first suit in abatement of the second, it is suggested whether his omission to do so may not be considered a waiver of his right to plead the matter in bar.

The rule of law on which we base our decision is in the interest of the debtor and may undoubtedly be waived by him.

It was held in *Mills v. Garrison*, 3 Keyes, 40, that it might be waived by an agreement for that purpose. But in this case there is no ground of waiver at all, unless it is the omission to plead the pendency of the first suit in abatement. We do not see how this can waive any thing except what is involved in the order of pleading; and a neglect to plead in abatement surely waives no legitimate matter in bar. *Marble v. Keyes*, 9 Gray, 221.

There was error in the judgment complained of and it is reversed.

In this opinion the other judges concurred.

ONE NOT INJURED BY NUISANCE MAY NOT ABATE.

RHODE ISLAND SUPREME COURT, JANUARY 29, 1861.

BOWDEN V. LEWIS.*

An individual has no right to injure or destroy the property of another because it is so situated as to be a public nuisance

*To appear in 13 Rhode Island Reports.

unless such individual is exercising the public right which is obstructed by it, nor even then if he can reasonably avoid it.

- A. built an illegal structure in a tide river and in front of the villa lots of B. B. destroyed the structure and A. brought trespass for the injury. *Held*, that B. could not justify the trespass because the value of the lots was diminished by the structure. As the structure had never been used, B. was not injured by the use. As the law recognizes no easement nor right of property in a landscape, B. could not rightfully destroy the structure merely because it was unsightly. *Held*, further, that B. could not justify the trespass because the structure made access to the lots by water less convenient, it not appearing that any one had used the water way to approach the lots.

DEFENDANTS petition for a new trial. The opinion states the case.

Charles H. Parkhurst, for plaintiff.

Bosworth & Champlin and Charles Hart, for defendants.

DURFEE, C. J. This is trespass against the defendants for entering upon certain oyster lots in Barrington river, which the plaintiff occupied as such under lease from the State, and digging up and destroying the plaintiff's oysters growing there, and pulling down the plaintiff's building there erected, carrying away the materials and converting them to their own use. The alleged trespass was committed in November, 1879. It appeared in evidence that the building was erected in October, 1879, by the plaintiff for use in connection with his oyster business in Barrington; that Barrington river was a public navigable river in which the tide ebbed and flowed; that the plaintiff was a lessee of the oyster lots, but had no authority from the State or General Assembly to erect the building; that on the contrary, he had applied to the harbor commissioners for permission to erect it, and they had not only refused permission, but had expressly forbidden him to erect it, and after he had partly erected it, had notified him to remove it. It also appeared in evidence that the defendants, Lewis and Fenner, were trustees under the will of the late Allen Mathewson, and as such were owners of certain real estate on the west bank of Barrington river, which had been platted for sale as villa lots; that the building was erected near said estate, and directly opposite the lower or outermost end of it; that to a certain extent it interfered with the approach by water to said real estate, though there was no testimony that either the defendants or any other person had actually ever approached or had occasion to approach said real estate by way of the river after the erection of the building, and it was undisputed that if they had had occasion so to approach it, the building, while it might have somewhat incommoded, would not have prevented them. Testimony was also offered, and to some extent admitted, to show that the erection of the building had diminished the market or salable value of the villa lots. The defendants requested the court to instruct the jury: first, that where a party may maintain an action for a nuisance, he may enter and abate it of his own motion; second, that any person who suffers special damage by a public nuisance may abate the same of his own motion; and third, that if it appeared from the testimony that the existence of the building was unlawful, no action would lie for its removal. The court refused so to instruct the jury, but did instruct them, that though the building was wrongfully erected the defendants could not justify the destruction of it without showing that they suffered some special injury from it, or were obstructed by it in the exercise of their rights; that they had no right to pull it down simply because it lessened the value of their land; and that though it might obstruct somewhat the approach by water to their land, still if they had reasonably

convenient access which they could use without injuring the building, they were bound to avoid injuring it, and that they would not be justified in injuring it unless the injury was necessary to the actual exercise of their right. The defendants, against whom verdict was rendered, petition for a new trial for error in the instructions, and in the refusals to instruct.

The case presents two questions, namely: Did the defendants have the right to tear down the building, first, because it lessened the value of their villa lots; or second, because it rendered them somewhat less convenient of access by water?

1. The testimony does not distinctly show how the building lessened the value of the villa lots, but we presume it was supposed to lessen their value either because it was unsightly, or because it was intended to be used in a disagreeable manner, or for a disagreeable business, or possibly for all these reasons combined. The question is, then, whether the defendants had a right to tear it down on account of such an injury. We think not. A person who is specially injured by a public nuisance undoubtedly has a right to abate it under certain circumstances, but in our opinion he has the right only when he is specially injured by it *qua* public nuisance. For instance, if a nuisance is such because it obstructs a highway, the right to abate it exists only in favor of a person who is specially injured by it as an obstruction to the highway, and not in favor of a person whose special injury is that he loses in consequence of it a favorite view from one of his windows, or the sight of the church clock. The loss of the view, or of the sight of the clock, is purely a private matter, and the person who suffers the loss can have no right to abate the obstruction on account of it, unless he can show that the obstruction is, on account of it, a private as well as a public nuisance. Now, the injury to the defendants resulting from the unsightliness of the building, or from the purposes for which it was intended, was just such a purely private matter, and therefore they cannot justify tearing the building down simply on the ground that it was a public nuisance, but they must also show that on account of its unsightliness, or of the purposes for which it was intended, it was likewise as to them a private nuisance. This they have not done. The building had never been used, and therefore could not have been a nuisance on account of its uses. And the defendants had no right to abate it simply because it was a blot upon the landscape, for the law does not recognize any easement or right of property in a landscape or prospect. "For prospect," said Wray, C. J., in *Aldred's* case, 9 Rep. 57 b, 58 b, "which is matter only of delight and not of necessity, no action lies for stopping thereof; and yet it is a great commendation of a house if it has a long and large prospect, unde dicitur, laudaturque domus longos qui prospectit agros."

2. Did the defendants have the right to tear the building down because it rendered their villa lots less convenient of access by water? We think not. There was no evidence that either the defendants or any other person had occasion to go to or from the villa lots by water, or even attempted to go to or from them, after the erection of the building, or that the defendants or any other persons were ever deterred by it from going to or from them. There was therefore no evidence on which the defendants could have maintained an action at law; for an action at law does not lie against the author of a public nuisance without proof of special damage, not merely anticipated, but actually received. The only possible ground on which it can be contended that an action would lie in favor of the defendants is, that the building was opposite the lower end of their estate, on what may be termed its water front. But when we consider that no special damage actually did result from it as a public nuisance, and especially when we consider, that being remova-

ble, it might have been removed before any resulted, we do not think an action could be maintained even on that ground. Supposing it to be true, then, as the defendants contend, that there is a right to abate whenever there is a right to bring an action, the defendants did not show a right to abate by showing a right to bring an action. *President of Harvard College v. Stearns*, 15 Gray, 1; *Brainard v. Connecticut River R. Co.*, 7 Cush. 508, 510.

We think the instruction given to the jury to the effect that an individual has no right to injure or destroy the property of another, because it is so situated as to be a public nuisance, unless he is in the exercise of the public right which is obstructed by it, and not even then if he can reasonably avoid it, was according to the precedents and substantially correct. *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Dimes v. Pelley*, 15 id. 276; *Batman v. Bluck*, 18 id. 870; *State v. Keeran*, 6 R. I. 497; *Brown v. Perkins*, 12 Gray, 89; *Cobb v. Bennett*, 75 Penn. St. 328; *Clark v. Lake St. Clair, etc., Ice Co.*, 24 Mich. 508; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44. A new trial is therefore denied.

Petition dismissed.

UNITED STATES SUPREME COURT ABSTRACT.

CONTRACT—PERFORMANCE PREVENTED BY FAILURE TO PERFORM BY OTHER PARTY—DAMAGES.—Where one party to a contract for services, performed a part of it according to its terms, but was prevented from performing the residue by a failure on the part of the other party, a city, to do its part, *held*, that the first named party might recover compensation for the work actually performed by him. *Planché v. Colburn*, 8 Bing. 14; *Goodman v. Pocock*, 15 Q. B. 576; *Hall v. Ruple*, 10 Barr. 231; *Moulton v. Trask*, 9 Metc. 677; *Hogland v. Moore*, 2 Blackf. 167; *Derby v. Johnson*, 21 Vt. 17. Judgment of U. S. Cir. Ct., N. D. Illinois, affirmed. *City of Chicago v. Tilley*. Opinion by Woods, J.

[Decided Feb. 28, 1881.]

COUNTER-CLAIM—AGAINST UNITED STATES.—Claims for credit can be used in suits against persons indebted to the United States to reduce or extinguish the debt, but not as the foundation of a judgment against the government. *United States v. Eckford*, 6 Wall. 484. Judgment of U. S. Cir. Ct., E. D. Pennsylvania, affirmed. *Schaumburg v. United States*. Opinion by Waite, C. J.

[Decided May 2, 1881.]

INSURANCE—LIFE POLICY—WHAT NOT SUFFICIENT TO ESTABLISH FRAUD IN ACTION TO CANCEL—FORMER ADJUDICATION—EQUITABLE ACTION UPON GROUND OF DEFENSE IN ACTION AT LAW.—(1) An insurance company brought action to cancel policies issued by it upon the life of G., against the widow and child of G., the beneficiaries therein, and to enjoin the enforcement of a judgment obtained in an action at law against it by such widow and child upon such policies. The bill averred that the policies were obtained upon representations that the insured was a person of good health and not subject or predisposed to any bodily infirmity; that at the time he applied for the policies he had conceived the design to commit suicide, but first to obtain an insurance upon his life in favor of his son in order to leave a large amount to him and to his wife; that in pursuance of this design the policies were obtained, and soon afterward he committed suicide by taking poison; and that the wife and son were cognizant of the design of the deceased and conspired with him for its execution. *Held*, that the clearest evidence was necessary to establish plaintiff's case. Evidence that deceased had inquired for insurance

companies whose policies did not except death by suicide; that his death occurred not long after the policies were obtained, and was accompanied by convulsions stated to be similar to those attending death by strychnine, it not being shown that he ever had any strychnine, but only that he was once seen in the druggist's store looking at jars containing various medicines, and among others, one that contained this poison, and no poison being found in his body when submitted to a post mortem examination, and evidence that his wife refused to consent to a post mortem examination and thereafter left the State where the deceased had lived, *held*, not sufficient. (2) In the action at law the company set up fraud in procuring the policies, but afterward withdrew this defense. *Held*, that the judgment at law was a bar to this action. When an action at law is brought upon a contract, the defendant denying its obligation, either from fraud, payment or release, or any other matter affecting its original validity or subsequent discharge, must present his defense for consideration. A recovery is an answer to all future assertions of the invalidity of the contract by reason of any admissible matter which might have been offered to defeat the action. The contract is merged in the judgment. *Cromwell v. County of Sac*, 94 U. S. 351. A suit in equity will not lie to give effect to defenses against a claim when they might have been fully set up in an action at law. There must have been some fraud practiced upon the court or some unconscientious advantage taken of the defendant without any fault or negligence on his part; or there must be some newly-discovered evidence which could not have been obtained at the trial, and which, if produced, would have changed the result, before a court of equity will interfere with the judgment rendered or the contract upon which it was recovered. *Home Ins. Co. v. Stauchfield*, 1 Dill. 424; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 336; *Phoenix Ins. Co. v. Bailey*, 13 Wall. 616. Decree of U. S. Cir. Ct., Minnesota, affirmed. *New York Life Insurance Co. v. Bangs*. Opinion by Field, J.

[Decided May 2, 1881.]

MARITIME LAW—ADMIRALTY PRACTICE ON APPEAL—NEW RULE ESTABLISHED.—"Section 698 of the Revised Statutes provides, that upon the appeal of any cause of admiralty and maritime jurisdiction, a transcript of the record shall be transmitted to this court 'and copies of the proofs and of such entries and papers on file as may be necessary on the hearing of the appeal.' While the act of February 16, 1876 (18 Stat., pt. 3, 815, ch. 77, § 1), limits the review by this court of the judgments and decrees on the instance side of courts of admiralty and maritime jurisdiction to the questions of law arising on the record, and to such rulings of the court below excepted to at the time, as may be presented by a bill of exceptions, and requires the court below to find the facts, no change has been made in the law prescribing what should be included in the transcript sent here on an appeal. For that reason we will not order the testimony which has been sent up in this case to be stricken out. As under our repeated decisions (*The Abbotsford*, 98 U. S. 440, and *The Benefactor* at this term), the facts as found are conclusive on us, it is clear the testimony may not be 'necessary on the hearing of the appeal.' For this reason it may with propriety by consent of counsel be omitted from the printed record. We will not, however, make any order in that behalf, but if it shall be unnecessarily printed against the wishes of either of the parties, we will, on the final determination of the case, give such directions in respect to costs as may seem proper. The section of the Revised Statutes referred to, however, requires only copies of such of the proofs to be sent up 'as may be necessary on the hearing of the appeal.' This gives us power to prescribe by rule what shall be

done in cases where the act of 1875 applies. For the guidance hereafter of parties appealing, and the officers of the courts below in such a case, we therefore now promulgate the following as an additional paragraph, numbered 6, to rule 8: '6. The record in causes of admiralty and maritime jurisdiction, where under the requirements of law the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.' Appeal from U. S. Circ. Ct., S. D. New York. *Marshall v. Steamship Adriatic*. Opinion by Waite, C. J. [Decided March 7, 1881.]

REMOVAL OF CAUSE - CONTENTS OF PETITION - ACTION AUXILIARY TO ACTION IN STATE COURT REMOVABLE. - (1) In case of removal from the State to Federal court, under the act of March 3, 1875, whether it is necessary to aver the citizenship of the parties at the time when the action was commenced, is not decided, but it is held, that whether the petition avers the fact or not is immaterial, provided the fact is shown to exist by any part of the record. *Gold-Washing Co. v. Keyes*, 96 U. S. 199; *Briggs v. Sperry*, 95 Id. 404; *Robertson v. Cessé*, 97 Id. 646. (2) Defendant below had, in another action, obtained a judgment in a State court, upon which she issued a *fiat facias* to a sheriff, who seized real estate of plaintiff below and advertised it for sale. Plaintiff thereupon commenced this action in the State court to restrain the sale of the lands seized, etc., and an injunction was granted. Held, that this suit was removable notwithstanding it was a controversy incidental to the other one. The case, *Bank v. Turnbull*, 16 Wall. 190, distinguished. That was a statutory proceeding to try in a summary way the title to personal property seized in execution. It was nothing more than a method prescribed by the law to enable the court to direct and control its own process, and as decided by this court, was merely auxiliary to, and a draft upon, the original action. Held, also, that it was not an objection to removing it that its purpose was to obtain the writ of injunction to stay proceedings in a State court, which a court of the United States is forbidden to grant by section 720, U. S. R. S. Decree of U. S. Circ. Ct., Louisiana, affirmed. *Bondurant v. Watson*. Opinion by Woods, J. [Decided March 21, 1881.]

REVENUE - PAINTINGS UPON PORCELAIN DO NOT MAKE ARTICLE DECORATED CHINA. - Paintings made upon porcelain by hand, their value depending upon the skill of the artist who painted them, the porcelain ground on which the painting was done not in itself constituting an article of chinaware, do not render such porcelain "decorated china or porcelainware," so as to be dutiable under the schedule imposing duties upon such ware. The articles are simply dutiable as paintings. Judgment of U. S. Circ. Ct., S. D. New York, affirmed. *Arthur v. Jacoby*. Opinion by Waite, C. J. [Decided March 21, 1881.]

UNITED STATES CIRCUIT AND DISTRICT COURT ABSTRACT.*

ATTORNEY - LIABILITY OF, FOR MISCONDUCT OF CASE - DUTIES TO CLIENT. - If an attorney, employed to conduct a cause, undertakes to perform any service in regard to the case which, by his employment, he was not bound to do, unless specially directed by his client,

he will be held to the same strictness in the manner of its discharge as if within the terms of his contract. The undertaking of an attorney is not that he possesses perfect legal knowledge, or the highest degree of skill in relation to the business he undertakes, nor that he will conduct it with the greatest degree of diligence, care and prudence. But the undertaking of an attorney with his client is that he possesses the ordinary legal knowledge and skill common to members of the profession, and that in the discharge of his duties he will exercise ordinary and reasonable diligence, care and prudence. The failure of an attorney to bring to, or exercise in, the discharge of his duties such knowledge or such degree of diligence, care and prudence, would be negligence. To authorize a recovery in damages against an attorney for negligence, not only the negligence must be established, but it must also be shown that the damage claimed was the result of such negligence. See *Gambert v. Hart*, 44 Cal. 542; *Whart. on Neg* 749, 750; *Shearm. & R. on Neg* 211; *Well on Att'y. & Cl.* 235, 236; *Drais v. Hogan*, 50 Cal. 121; *Skillen v. Wallace*, 36 Ind. 319; *Walker v. Goodman*, 30 Ala. 482; *Godefroy v. Jay*, 7 Bing. 413; *Harter v. Morris*, 18 Ohio St. 492; *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Suydam v. Vance*, 2 McLean, 99. *United States Circ. Ct., S. D. Ohio*, Feb. 16, 1881. *Spangler v. Sellers*. Opinion by Swing, D. J.

COPYRIGHT - EXTENT OF, IN LAW REPORTS. - In the absence of any express legislation by the State indicating a contrary principle, a State reporter is entitled to a copyright in his volumes of reports for what is the work of his own mind and hand, notwithstanding it may be true that he can have no copyright in the opinions of the court. The various provisions of law in relation to copyright should have a liberal construction, in order to give effect to what may be considered the inherent right of the author to his own work. See *Wheaton v. Peters*, 8 Pet. 561; *Baker v. Taylor*, 2 Blatchf. 82. *United States Circ. Ct., N. D. Illinois*, Feb. 5, 1881. *Myers v. Callaghan*. Opinion by Drummond, C. J.

JURISDICTION - IN SUITS BY NATIONAL BANKS. - A National bank is not authorized to sue in any Circuit Court of the United States without regard to citizenship. *United States Bank v. Deveau*, 5 Cranch, 85. A National bank is to be regarded, for the purpose of jurisdiction, as a citizen of the State in which it is established or located. *Letson's case*, 2 How. 497; *Manufact. Nat. Bk. v. Baack*, 8 Blatchf. 137; *Cooke v. State Nat. Bk.*, 52 N. Y. 96; *Davis v. Cook*, 8 Nev. 134; *Dill on Rem. Caus.* 61. *United States Circ. Ct., Iowa*, Feb., 1881. *St. Louis National Bank v. Allen*. Opinion by McCrary, C. J.

PROBATE LAW - GRANT OF LETTERS OF ADMINISTRATION NOT IMPEACHABLE COLLATERALLY - SECOND GRANT ON SAME ESTATE VOID. - By the Constitution of Oregon the county court is a court of record, with general jurisdiction of probate matters, to be regulated by law (article 7, §§ 1 and 12); and by statute (Civ. Code, § 860), it has the exclusive power to grant letters of administration upon the estate of a person who at or immediately before his death was an inhabitant of the county. Held, (1) that a decree of the county court of Multnomah county, granting letters to D. upon the estate of P., by which it appears to have been adjudged by said court, upon a proper petition, that P. was an inhabitant of the county at or immediately before his death, cannot be questioned collaterally on the ground that P. was not in fact such inhabitant; (2) that said court having general jurisdiction of the subject-matter - the granting of administration upon the vacant estate of a deceased person - it had the authority to inquire and determine whether, in that particular case, the deceased was an inhabitant of the county or not, and that its decision upon the

* Appearing in 5 Federal Reporter.

question is conclusive, except upon appeal: and (3) that a subsequent decree by the county court of another county, granting letters of administration upon the same estate to H., while the first were in full force and effect, is null and void. Cases referred to: *Cutts v. Haskins*, 9 Mass. 643; *Holyoke v. Haskins*, 5 Pick. 20, and 9 id. 259; *Becket v. Selover*, 7 Cal. 233; *Fletcher v. Sanders*, 7 Dana, 345; *Fisher v. Bassett*, 9 Leigh, 119; *Andrews v. Ivory*, 14 Gratt. 236; *Abbott v. Coburn*, 28 Vt. 667; *Burdett v. Silabee*, 15 Tex. 615; *Johnson v. Beasley*, 65 Mo. 284; *Coltart v. Allen*, 40 Ala. 155; *Irwin v. Scriber*, 18 Cal. 503; *Bumstead v. Read*, 31 Barb. 664; *Bolton v. Brewster*, 32 id. 353; *Roderigas v. East Riv. Sav. Inst.*, 63 N. Y. 480; *Jochumsen v. S. S. Bank*, 3 Allen, 88; *Griffith v. Frazier*, 8 Cranch, 9; *Kane v. Paul*, 14 Pet. 33; *Grignon v. Astor*, 2 How. 836; *Florentine v. Barton*, 2 Wall. 210; *Comstock v. Crawford*, 3 id. 402; *Caujolle v. Ferrie*, 18 id. 480; *Broderick's Will*, 21 id. 509; *Mohr v. Manierre*, 101 U. S. 417; *Dequindre v. Williams*, 31 Ind. 453; *Sbroyer v. Richmond*, 16 Ohio St. 465; *Wanzer v. Howland*, 10 Wis. 15; *Gager v. Henry*, 5 Sawyer, 237. *United States Dist. Ct., Oregon, Jan. 29, 1881. Holmes v. Oregon & California Railway Co.* Opinion by Deady, D. J.

CONNECTICUT SUPREME COURT OF ERRORS ABSTRACT.*

CONFLICT OF LAW—WILL—LEX LOCI—CORPORATION.—A statute of the State of New York provides that "no person having a husband, wife, child, or parent, shall by his will bequeath to any charitable corporation more than one-half of his estate after the payment of his debts, such bequest to be valid to the extent of one-half and no more." *Held*, not to affect a bequest made by a testator domiciled in this State to a charitable corporation located in the State of New York. A bequest was made to a charitable corporation located in the State of Pennsylvania. After the will was made and before the death of the testator the Legislature of Pennsylvania authorized the corporation to transfer its entire property and franchise to a corporation established in the State of New York for the same charitable purpose, which corporation was to become its legal successor and hold and enjoy all its corporate franchises and powers. The Legislature of New York authorized the New York corporation to receive the property and franchise of the Pennsylvania corporation. The transfer was effected, and the New York corporation thereafter carried on, and at the time of the testator's death was carrying on, the same charitable work that had been carried on by the Pennsylvania corporation, using the same means and employing the same agencies. The legacy was a general one, with no directions as to the objects for which or the class of persons for whose benefit the money was to be applied. *Held*, that the legacy lapsed. If the corporation had been made a trustee to carry out a designated trust, another trustee might have been appointed to execute the trust. *Crum v. Bliss*. Opinion by Park, C. J.

MERGER—WHERE EQUITY WILL NOT ALLOW.—J., in 1866, mortgaged to A. an undivided fifth of certain real estate of which A. already owned three-fifths. A. took possession of the interest mortgaged and remained in possession till her death in 1866. Prior to 1862 she had acquired J.'s equity of redemption, and in that year made a will devising the property to G. for life and after his death to K. In 1863 she assigned the mortgage for a valuable consideration to the petitioner. She died in 1866, and G. entered into possession under her devise and was in occupation of it when in 1878 the petitioner brought a bill against G. and K. for the foreclosure of the mortgage. *Held*, (1) that equity

would not regard the mortgage interest and the equity of redemption as merged in one estate where the interest of A. required that they be kept separate, or there was evidence of her intent to keep them so. (2) That A.'s assignment of the mortgage to the petitioner was sufficient evidence of such an intent. (3) That it made no difference that this intent was not declared, or that it did not exist, at the time the two interests became vested in her. *Stantons v. Thompson*, 49 N. H. 272; *Bell v. Woodward*, 34 id. 90; *Lockwood v. Sturdevant*, 6 Conn. 373; *Donalds v. Plumb*, 8 id. 447; *Bassett v. Mason*, 18 id. 131; *Mallory v. Hitchcock*, 29 id. 127; *Delaware & Hud. Canal Co. v. Bonnell*, 48 id. 19; *James v. Morey*, 2 Cow. 243; *Furber v. Muffat*, 18 Ves. Jr. 339. *Goodwin v. Tenney*. Opinion by Loomis, J.

RHODE ISLAND SUPREME COURT ABSTRACT.*

ASSIGNMENT FOR CREDITORS—ONE DELAYING CREDITORS TO PREVENT SACRIFICE OF ASSIGNOR'S PROPERTY INVALID—SECOND ASSIGNMENT—CONVEYS ONLY PROPERTY ACQUIRED AFTER FIRST. (1) The members of a copartnership made a voluntary assignment of their copartnership and individual property in trust for the benefit of their creditors. The trust deed stated that the assets, although amounting in value to threefold the indebtedness, could not be made available for payment of the accruing liabilities, that the interests of the creditors might require the continuance of the business and its gradual closing up, and that the assignors were desirous of equally securing and paying their creditors. For these purposes the trustees received full power to manage the property at their discretion, to invest, reinvest, and change investments, to carry on the business so long as they deemed needful for the creditors' interests, and to prevent shrinkage and loss, and to close up the same to the best advantage, to give new notes and indorsements in place of existing ones and for the assignors' debts, to mortgage the assigned realty and personalty, and to lease the real estate on such terms as they chose. Provided that these powers should cease when a majority in amount of the creditors should so direct. Certain creditors of the firm attached the realty conveyed, and after judgment advertised it for sale on execution, whereupon the trustees filed a bill in equity to enjoin the sale and vacate the attachments. *Held*, on demurrer to the bill, that the assignment was upon its face invalid, as intended to secure an advantage to the assignors by preventing the sacrifice of their property, as tending to hinder and defraud creditors, and as allowing the trustees to exceed a reasonable limit of time in closing up the assignment. *Van Nest v. Yoe*, 1 Sandf. Ch. 4; *Planck v. Schormerhorn*, 3 Barb. Ch. 644; *Burt v. McKinstry*, 4 Minn. 204; *Gere v. Murray*, 6 Minn. 305; *Vernon v. Mortou*, 8 Dana, 247; *Ward v. Trotter*, 3 T. B. Mon. 1; *Phelps v. Curtis*, 50 Ill. 109; *Nicholson v. Leavitt*, 6 N. Y. 510; *Gardner v. Commercial Bank*, 10 Rep. 300; *Dunham v. Waterman*, 17 N. Y. 19; *D'Iveruols v. Leavitt*, 23 Barb. 65. (2) After the attachments were laid upon the property conveyed, the assignors made new and unconditional assignments to the same trustees in order to vacate the attachments under the Rhode Island statute. *Held*, that the earlier assignment being good as against all persons except dissenting creditors, the later assignments could only affect property acquired after the earlier assignment or thereafter becoming attachable or accruing to the assignors as surplus. *Held*, further, that the later assignments could convey the previously assigned property neither by virtue of the statute, nor by operation of law. *Bean v. Smith*, 2 Mason, 22, 274; *Randall v. Phillips*, 3 Mason, 373, 383; *Porter v.*

* Appearing in 47 Connecticut Reports.

* To appear in 19 Rhode Island Reports.

Williams, 9 N. Y. 143; Brownell v. Curtis, 10 Paige, 230, 211; Chapin v. Pease, 10 Conn. 69; Malters v. Culver's Assignee, 1 Duv. 154; Fox v. Willis, 1 Mich. 321; Grimaley v. Hooker, 3 Johns. Eq. 4; Barton v. Vanheythuyssen, 11 Hare, 125; Tate v. Liggat, 3 Leigh, 64; Griffin v. Marquardt, 17 N. Y. 28; Van Housen v. Radcliff, 1d 580; Holland v. Cruft, 20 Pick. 321; Knowles v. Lord, 4 Whart. 500; Pierson v. Manning, 2 Mich. 445; Frow v. Downman, 11 Ala. 380; Luckenbach v. Brickenstein, 5 W. & S. 145; Maas v. Goodman, 2 Hill. 275; Thomason v. Neeley, 50 Miss. 310; Taylor v. Williams, 1 Ired. 249; Williams v. Avent, 5 Ired. Eq. 47; Ward v. Enders, 20 Ill. 519; Waterbury v. Westervelt, 9 N. Y. 586; Bostwick v. Menck, 40 Id. 383; Burtch v. Elliott, 3 Ind. 90; Freeman v. Burnham, 35 Conn. 439; Gardner v. Commercial National Bank. Opinion by Durfee, C. J. (Decided December 18, 1890.)

EASEMENT—TO MAINTAIN RACEWAY—PRESCRIPTION—TIDE-WATER—ACTION FOR DISTURBING POSSESSION. In A. D. 1794, D. received permission from the General Assembly to build a toll-bridge across one of the navigable rivers of the State. The son of D., who was also his devisee, built at one end of the bridge a mill, using for motive power a water-wheel placed between the west pier of the bridge and the west abutment, which were so extended in length as to make the intervening space a tidal raceway. A subsequent owner of the bridge and mill conveyed the bridge to the State in 1870, with full covenants of warranty. Afterward the mill was conveyed to A. During 1873, the millwheel was not in the raceway, being taken out to make room for a better one, which in November, 1873, was ready to be set up. Meanwhile the town of Warren in 1873, under authority from the General Assembly, proceeded to rebuild the bridge and make rip-rap work around the west abutment; stones were carried into the raceway by the current, into the wheel-plot, and along A.'s water front. A. was obliged to remove these before he could set his new wheel, and after getting it into place in May, 1874, he was obliged repeatedly to take up the wheel to clear away new deposits of stones which formed themselves about it. In an action by A. against the town of Warren for injury caused by the stones in the raceway and for obstruction in the water approaches to his land, *Held*, that A. had no prescriptive right to maintain the mill and water-wheel, nor any prescriptive right to have the water flow unobstructed through the raceway—the enjoyment of the water-wheel and the water way depending on the bridge, which was conveyed to the State free from incumbrances. Cases referred to, *Read v. Brookman*, 3 T. R. 151; *Beadle v. Beard*, 12 Rep. 5; *Mayor of Kingston v. Horner*, 1 Cowp. 102; *Powell v. Millbank*, 1d. 103, n.; *Gibson v. Clark*, 1 Jac. & W. 159; *Johnson v. Ireland*, 11 East, 290; *Trotter v. Harris*, 1 Y. & J. 285; *Voight v. Winch*, 2 B. & A. 682; *Jackson v. McCall*, 10 Johns. 377; *Crocker v. Pendleton*, 23 Mo. 330; *Mather v. Ministers of Trinity Church*, 3 Serg. & R. 500; *Carter v. Murott*, 4 Burr. 2162; *Gould v. James*, 6 Cow. 389; *Rogers v. Jones*, 1 Wend. 237; *Engs v. Peckham*, 11 R. I. 210; *Eldridge v. Knott*, 1 Cowp. 214; *Croas v. Mayor of Morristown*, 18 N. J. Eq. 305; *Morton v. Moore*, 15 Gray, 573; *Talinter v. Mayor of Morristown*, 19 N. J. Eq. 46; *Commonwealth v. Upton*, 6 Gray, 473, 478; *People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 315; *Arundel v. McCulloch*, 10 Mass 70; *Renwick v. Morris*, 3 Hill (N. Y.) 621. (2) *Held*, further, that the opportunity enjoyed by A. to use tide-water as a motive power was not an easement. (3) *Held*, further, that A. could not maintain his action on the ground of disturbance to his possession of actual enjoyment. *Lyon v. Fishmongers' Co.*, L. R., 1 App. Cas. 662; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 413; *Metropolitan Board of*

Works v. McCarthy, L. R., 7 H. L. 245; *Rose v. Groves*, 5 M. & G. 613; also, 6 Scott N. R. 645; *Thornton v. Grant*, 10 R. I. 477, 487; *Brayton v. Fall River*, 113 Mass. 213. *Folsom v. Freshborn*. Opinion by Durfee, C. J. (Decided Feb. 5, 1891.)

MISSOURI SUPREME COURT ABSTRACTS.*

EVIDENCE—TELEGRAPH MESSAGES IN COMPANY'S HANDS NOT PRIVILEGED—SUBPOENA—DUCES TECUM—CERTAINTY OF DESCRIPTION REQUIRED—CONSTITUTIONAL LAW. (1) Telegraphic messages in the possession of the officers of the company are not privileged communications. No act of Congress puts them on the same footing with the mails; and no statute of the State or principle of law gives them any different standing from that occupied by any communication made by one through another to a third party, with respect to the liability of the confidant to be called as a witness to produce it or testify to it. The agent of a telegraph company may therefore be compelled by proper process to produce such messages before the grand jury; and no rule of the company can excuse him from liability to punishment for refusal so to do. *Amey v. Long*, 9 East, 473. (2) A subpoena duces tecum to compel the production of telegraphic dispatches should give a reasonably accurate description of the papers wanted, either by date, title, substance or the subject to which they relate. The following description is not sufficiently certain: "Dispatches between Dr. J. C. Nidelet and A. B. Wakefield, and William Ladd and J. C. Nidelet, and William Ladd and Dr. Nidelet, between Warren McChesney and A. B. Wakefield, between Warren McChesney and J. C. Nidelet, between the latter and John S. Phelps, between A. B. Wakefield and John S. Phelps, between the latter and William Ladd, and between Geo. W. Anderson and A. B. Wakefield, sent or received by or between any or all of said parties within fifteen months last past." *Shaftsbury v. Arrowsmith*, 4 Ves. 90; 2 Foul. Eq., ch. 3, § 1, note a.; *United States v. Babcock*, 3 Dill. 567; *Ex parte Brown*, 7 Mo. App. 494. *Ex parte Brown*. Opinion by Henry, J.

LUNATIC—RESCISSON OF CONTRACT BY. An exchange of property made by a person of mind so unsound that the want of mental capacity is apparent to any one of ordinary prudence and observation conversing with him, is of no validity. A guardian subsequently appointed may recover the property of the insane person without tendering back that received by him in exchange. See *Tolson v. Garner*, 15 Mo. 494. *Halley v. Troester*. Opinion by Norton, J.

MUNICIPAL CORPORATION—ORDINANCE OF—PANOL EVIDENCE NOT ADMISSIBLE TO VARY APPARENTLY COMPLETE ORDINANCE. A package of papers, consisting of eight half sheets fastened together with ordinary paper fasteners, bore on the back of the eighth and last sheet the indorsement: "An ordinance for the establishing of the grades of certain streets." On the face of this sheet appeared the title, "An ordinance to re-establish the grades of certain streets," the enacting clause, a single section establishing the grade of a single street, the approving clause and the mayor's signature. The other seven sheets contained what purported to be seven sections, one upon each sheet, establishing the grades of as many different streets. At the bottom of the first sheet was a clause purporting to repeal all conflicting ordinances. In the record of ordinances, this ordinance appeared in the same form as in the original; and the entries on the Journal of the proceedings of the common council corresponded with the indorsement on the back of the eighth half sheet.

* To appear in 73 Missouri Reports

Held, that this sheet alone constituted the ordinance. It was complete and perfect in itself, while the others lacked the requisite indicia of authenticity. The mere fact of their being attached to the eighth was not sufficient. *Held*, also, that parol evidence could not be received to show that the sheets had been transposed by mistake. Such evidence is inadmissible to point out, explain, rectify or supply any omission to sufficiently authenticate an instrument intended for a city ordinance. *Keating v. Skiles*. Opinion by Sherwood, C. J.

NEGLIGENCE FOR WHOSE BENEFIT REQUIREMENT OF RINGING BELL ON LOCOMOTIVE DUTY OF RAILROAD COMPANY AS TO ONE WALKING ON TRACK. The requirement of the statute that the bell shall be rung or the whistle sounded at the approach of a railroad train to the crossing of a public highway, is for the benefit of persons on the highway at or approaching the crossing; failure to comply with the statute will furnish no ground of complaint to a person injured on the track at a distance from the highway. An engineer in charge of a moving train has a right to assume that persons past the age of childhood will heed the usual alarm signals. If, after giving such signals with out effect, he uses such means as in his judgment are, in the emergency, most advisable to prevent collision with a person standing on the track, he is not chargeable with negligence, and the company cannot be held liable for the consequences of a collision, although he failed to use other means which were at hand, provided he is competent and experienced in his business. In this instance the engineer applied the air brakes to the train, but did not attempt to reverse the engine. The mere fact that a train was moving at a dangerous rate of speed will not make the company liable for injuries to a person run over by the engine, if he was himself guilty of contributory negligence. *Bell v. Hannibal & St. Joseph Railroad Co.* Opinion by Napoleon, J.

INSURANCE LAW.

CONFLICT OF LAW—POLICIES ISSUED BY FOREIGN COMPANIES.—Policies of insurance issued by foreign companies doing business in Massachusetts, under the laws thereof, to citizens of Massachusetts, are governed by the laws of the States where the companies were incorporated, and where the contracts were to be performed. *Desmazes v. Mut. Ben. Ins. Co.*, 7 Ins. L. J. 923; *Shattuck v. Mut. L. Ins. Co.*, id. 637; *Whitcomb v. Phoenix L. Ins. Co.*, 8 id. 624. *Contra: Morris v. Penn. Mut. L. Ins. Co.*, 120 Mass. 503, *United States v. C. L. Massachusetts*, Jan. 27, 1881. *Smith v. Mutual Life Insurance Co. of New York*. Opinion by Nelson, D. J. (5 Fed. Rep. 582.)

FIRE POLICY—CONDITIONS IN—NOTICE OF LOSS.—By the terms of a fire policy, notice of a loss was to be given "immediately." *Held*, that the term was not to receive a literal construction, and that the question whether notice had been given immediately was one of fact for the jury. This word and one of like meaning—"forthwith," have frequently been the subject of judicial consideration. In *Trask v. State Fire Ins. Co.*, 29 Penn. St. 196, notice eleven days after the fire was held not to be in season, and that the facts that the secretary of the company received the notice without objection as to time, and gave instructions to the insured as to the form of the statement of his case, and that an agent of the company subsequently made examinations respecting the loss, were not a waiver of the want of due notice. In *Edwards v. Locomotive Ins. Co.*, 75 Penn. St. 378, the policy provided that the insured after a loss "shall forthwith give notice, and within thirty days deliver a particular account of such loss." Notice, which seems to be sufficient from the

"particulars of loss or damage," was given eighteen days after the fire and there were no extenuating circumstances. *Held*, that the policy was not complied with. In *West Branch Ins. Co. v. Helfenstein*, 40 Penn. St. 289, it was held that a similar provision required "due diligence under all the circumstances," and that notice within five days was in due time. In *Railway Passenger Assurance Co. v. Burwell*, 44 Ind. 460, it was held that notice given six days after the injury, which happened in the city where the policy issued and where the agent resided, no reason being given for the delay, was not in due time. In *New York Central Ins. Co. v. National Protection Ins. Co.* 20 Barb. 468, a case of reinsurance, the policy required notice of loss to be given "forthwith." The fire occurred June 15th. The plaintiff knew of it June 18th. Notice to the defendants, the reinsurers, was given by mail June 23d, and was held sufficient. In *Cashan v. N. Western Ins. Co.*, 5 Bias. 478, also a case of reinsurance, the property was first insured by the Fulton Insurance Co. and reinsured by the defendants. The insured was required to "give immediate notice and render a particular account thereof in writing under oath, stating the time, origin and circumstances of the fire." The property was destroyed by fire October 9, 1871. Notice was served on the Fulton Co. December 8. A copy of the proof of loss was sent to defendant January 22. The Fulton Co. was then insolvent and a receiver had been appointed. The notice was held to be in time. *Connecticut Supreme Court of Errors*, March term, 1880. *Lockwood v. Middlesex Mutual Assurance Co.* Opinion by Carpenter, J. (47 Conn. 553.)

RECENT ENGLISH DECISIONS.

INTEREST—COMPOUND IN ABSENCE OF AGREEMENT NOT ALLOWED—PAYMENT UNDER MISTAKE.—The rule of law being that, without an actual agreement to pay compound interest, simple interest only can be charged on a mortgage account, *held* (affirming the judgment of the court below), that no such agreement could be implied from the transactions between the parties, when such interest had been charged by the mortgagee, and paid by the mortgagor under a common misapprehension of their rights; and that an account drawn up and assented to, and signed by the parties under a common mistake as to their rights and obligations, could be reopened. Cases referred to *Skyring v. Greenwood*, 4 B. & C. 281; *Earl Beauchamp v. Winn*, L. R. 6; *H. of L.* 223; *Cooper v. Phibbs*, L. R. 2; *H. of L.* 149; *McCarthy v. Decaix*, 2 Russ. & My. 614; *Livesey v. Livesey*, 3 Russ. 287; *Privy Council*, Feb. 22, 1881. *Daniell v. Sinclair*. Opinion by Sir Robert Collier, 44 L. T. Rep. (N. S.) 257.

WATERCOURSE—RIGHTS OF RIPARIAN OWNER TO USE—WHEN ARTIFICIAL CHANNEL TREATED AS NATURAL.—The plaintiff and defendant were owners in fee of contiguous properties situate upon the slope of a hill. For upward of seventy years the plaintiff and his predecessors in title had used for domestic and farming purposes at their own farmhouse the water flowing from a spring rising in their own land. The course of the water was from the spring of A. to a boundary of the plaintiff's property at B, thence through the defendant's land by a banked-up channel to C, where it again entered the plaintiff's land, and whence it flowed through a covered channel to his farmhouse. The defendant's only use of the water had been by watering a few cattle depastured between the points B. and C., and the plaintiff and his predecessors had been in the habit of entering upon the defendant's land and repairing the embankment between those points. In 1879 the defendant inserted a pipe into the watercourse between the points B. and

C., whereby he carried almost the whole of the water down through his own land to two houses recently erected thereon by himself. The plaintiff's water supply at his farmhouse was thereby cut off, and he claimed an injunction, on the grounds that he had a prescriptive right to exclusive enjoyment, and that the embanked channel was constructed for the sole benefit of himself and his predecessors. *Held*, that in the absence of proof of the date at which the embanked channel was made, and the existence from time immemorial of a watercourse from the spring to the plaintiff's farmhouse being an admitted fact, the watercourse must be considered to have been so made as to give all rights of riparian proprietors to the defendant and his predecessors in title, and that consequently the defendant was within his rights in taking the water for the ordinary domestic use of his houses. *Sutcliffe v. Booth*, 32 L. J. 136, Q. B., approved. *Holker v. Porritt*, L. R., 8 Exch. 116; *Nuttall v. Bracewell*, L. R., 2 Exch. 1; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590. Ch. Div., Feb. 26, 1881. *Roberts v. Richards*. Opinion by Hall, V. C., 44 L. T. Rep. (N. S.) 27.

NEW BOOKS AND NEW EDITIONS.

HARPERS' HISTORIES.

The History of the Decline and Fall of the Roman Empire. By Edward Gibbon, with notes by Dean Milman, M. Guizot, and Dr. William Smith. In six volumes.

The History of England, from the Invasion of Julius Cæsar to the Revolution in 1688. By David Hume, Esq. A new edition, with the author's last corrections and improvements, to which is prefixed a short account of his life, written by himself. In six volumes.

The Rise of the Dutch Republic. A History by John Lothrop Motley, D. C. S., LL. D., corresponding member of the Institute of France, etc. In three volumes.

History of the United Netherlands, from the Death of William the Silent to the Twelve Years' Truce, 1609. By John Lothrop Motley, D. C. S., LL. D., corresponding member of the Institute of France, etc. In four volumes.

The History of England, from the accession of James the Second. By Lord Macaulay. In five volumes.

THE Messrs. Harper have republished the above works in uniform style, in very handsome octavos at a very reasonable price. These are works which not only should be in every lawyer's library, but which every lawyer should read and study. They are the most celebrated works of the four greatest English-writing historians. Three of them treat of some of the most important epochs in history—the decay of the world's greatest empires, the English revolution, and the deliverance of Holland from Spain. They illustrate the two great schools of historical composition—the philosophical, by Gibbon and Hume, the picturesque, by Macaulay and Motley. Three of these writers have each his individual and peculiar style; Motley perhaps cannot be said to have a style marked by any individualities. It is the fashion among those who have never read Gibbon to abuse his style as inflated and monotonous. Even Wordsworth said he could not write English. (But Wordsworth said he himself could write like Shakespeare, if he had a mind. "Yes," said Lamb, "if you had the mind.") But whatever he wrote, it will outlive most of Wordsworth. His style is grand and full of pomp, lacking the crystalline simplicity of Hume and the epigrammatic brilliancy of Macaulay. But where in either of these can you find such a sentence, for idea and expression, as this from Gibbon: "The Greek was a musical and prolific language, which gave a soul to the objects of sense and a body to the abstractions of philosophy"? There is also an occasional gleam of sly humor, as in his description of the emperor Gordian, who flourished in the third century—or rather, did

not flourish, for he was murdered after a reign of thirty-six days. He says: "Twenty-two acknowledged concubines and a library of sixty-two thousand volumes attested the vanity of his inclinations; and from the productions which he has left behind him, it appears that the former as well as the latter were designed for use rather than for ostentation." This great man will long remain unsurpassed in massive comprehension, breadth of scholarship, power of generalization, and dignity of style befitting a grand subject. However much we must dissent from his skepticism, his chapter on the causes of the rise and progress of Christianity must be read with respect and admiration, and for the moment it may silence if it does not convince. He has given the best concise account of the civil law, which should be studied by every common lawyer. In short, he has monopolized the grandest historical field ever afforded to the scholar. Hume is also depreciated by modern critics, but who has supplanted him? He is said to be an apologist for the Stuarts, but he is at least not a partisan. In one point he is unrivalled among historians, namely, in presenting the arguments, pro and con, which were adduced on the gravest State questions of the times of which he treats. It is said that such arguments never were really used, that they are the creation of the historian's imagination. This detracts nothing from their force. They are the best reasons on both sides, nevertheless, and are stated with a clearness, a fullness, and an impartiality that are unmatched. With Macaulay came a new way of writing history, which we have called the picturesque. We well recollect the delight with which his first volume was greeted, and the impatience with which each succeeding volume was awaited. Nothing like it had been known in literary history since Scott's novels. Nothing in literature can be more graphic or engaging than his description of the state of England under the Stuarts, in his first chapter. Macaulay has had his share of criticism. He is called a partisan of the whigs. But as the toryism of Hume is exaggerated, so is the whiggery of Macaulay. He censures the execution of Charles. As a reporter of parliamentary debates he stands unrivalled. It is just now the fashion to underrate Macaulay, but he will have his revival, and as long as history is read his superb fragment will give delight and instruction. Our own countryman, Motley, of the same brilliant school, is at the head of our historical literature, and has achieved for American letters an honored place abroad. In comparison with him Bancroft is respectably tedious, and Prescott agreeably tame. Motley seized upon an untilled field, and by his genius and his research has made it his own. His theme appeals strongly to American sympathies, and he treats it with the generous ardor of his countrymen. Posterity owe him a debt of gratitude for presenting Elizabeth, for the first time, in her true aspect. It was always a wonder that such a monster of perfection as she has usually been depicted could have issued from the loins of Henry Eighth. At last we have her in her true colors—despotic, violent, intolerant, false, hypocritical, timid, penurious, credulous, ungrateful, unscrupulous,—the splendor of her reign is not due to any merits of her own, but to the wisdom, foresight, and firmness of her great councillors and soldiers.

We commend this unrivalled group of histories to our profession as among the best studies to which they can resort.

STIMSON'S LAW GLOSSARY.

Glossary of technical terms, phrases and maxims of the Common Law. By Frederic Jessup Stimson. Boston: Little, Brown & Co., 1881. Pp. iv., 305.

This is an addition to the well known and excellent "Students' Series." The compiler states that the book "is the result of an attempt to produce a concise



Law Dictionary, giving in common English an explanation of the words and phrases, English as well as Saxon, Latin or French, which are of common technical use in the law. It is not a compilation of law, like the larger dictionaries, but consists purely of definition." This well describes the book, and within these limits the work seems well done. It will be valuable to the class for which it is intended.

CORRESPONDENCE.

EXPERT TESTIMONY.

Editor of the Albany Law Journal:

The unsatisfactory testimony of "experts," chosen and paid by a party, has been lately commented upon by one of the justices of the First District in this State, and the suggestion made that the expert should not know in whose behalf he is employed to investigate the case. The Whitaker case, now pending, and the conflicting testimony given by experienced experts, *pro* and *con*, revives the recollection of the trial of an indictment for murder, which occurred in this county some thirty years ago. The defense was a plea of insanity arising from *dementia*. In support of this defense, Dr. Butler, superintendent of the asylum for insane, in Connecticut, Dr. Nichols, superintendent of an asylum in New York, and I think, Dr. Brigham, then of the Utica Asylum, and several leading physicians of this county, gave their testimony. Opposed to this evidence were Dr. Spencer (a brother of Joshua Spencer, who was counsel in behalf of the People), and one physician of this county. The defendant was acquitted upon the defense alleged, and consigned to the asylum at Utica. The eminent physicians above named unhesitatingly testified that in their opinion the defendant was insane when he committed the act, and would very soon sink into unconsciousness and die. The judges before whom the case was tried, and I think, all the physicians who testified, except one, and with one exception all the attorneys and counsel employed in the case, are dead, but the defendant still survives, as sound in body and mind as his counsel, the late D. S. Dickenson, was on the day he conducted his masterly defense. W. F. W.

WAVERLY, N. Y., June 4, 1881.

THE SURROGATE'S BANQUET.

Editor of the Albany Law Journal:

Your remarks in the LAW JOURNAL of to-day, condemnatory of the propriety of the recent entertainment tendered by members of the bar to that important judicial officer, the surrogate of the city of New York, will doubtless meet the approval of the majority of your readers. It has been said that all of the surrogate's entertainers were, at the time of their invitation, counsel in controversies actually pending in his court. That some of these gentlemen were such counsel is well known. The ancient eulogist of the English law, Fortesque, states part of the oath of office of a judge of one of the high courts of England, in the writer's time, to have been that he would not "take by himself or by any other, privily ne apart, any gift or reward of gold or of silver, nor of any other thing, the which might turn him to profit, unless it be meat or drink, and that of little value, of any man that shall have any plea or process hanging before him." Fortesque, *De Laudibus*, etc., ch. ii. Coke tells us that "bribery is a great misprision when any man in judicial place takes any fee or pension, robe or livery, gift, reward or brokerage of any person that hath to do before him any way, for doing his office, or by color of his office, but of the king only, unless it be of meat and drink, and that of small value." And he proceeds to derive the word "bribery" from a word

meaning "to eat greedily," and quotes two sentences from the Old Testament, one concerning him who devours the people like a morsel of bread, and the other to the effect that he who in judgment is a recognizer of persons departs from truth for a mouthful of the same article. Coke, 3d Instlt., ch. lxviii.

The place in which the surrogate's banquet was served is one associated in the minds of dwellers in the city of New York with sumptuous fare. There does not appear to have been any statement yet made that the rule generally observed there was departed from on this occasion. Yet some scrupulous persons will perhaps trust that for once the *lex loci* did not prevail; that in honoring their guest the learned practitioners in the surrogate's court did not forget the solemn language of Fortesque and Coke, but remembering it, were careful to present to the surrogate nothing save "meat or drink * * of little value." C. W. S.
New York, May 28, 1881.

NOTES.

THE *New Jersey Law Journal* has discovered a new way to compel a general suspension of business on any particular day. It says: "It is impossible that business should be generally suspended on any day unless it is made a legal holiday, and the way to do this is simply to provide that notes which fall due on that day shall be payable on the day before." This is *apropos* of Good Friday. — Now no practitioner who values his reputation ever goes to the rag-end of a special treatise for the *ipissima verba* of a statute. He would as soon think of going to "Tristram Shandy" for the preparation of an anathema. — *Scottish Journal of Jurisprudence*.

Talking of New York courts and lawyers, a metropolitan contemporary gives some interesting details as to the honorable forbearance of many lawyers to practice before relatives or even intimate friends upon the bench. The late Judge William Kent, it is said, never practiced as a young attorney before his father the chancellor, nor did the present ex-Judge Jones ever practice before his father, who in his turn had refused retainers before his father, the first Judge Samuel Jones, in the last century. The son of the late Judge Samuel Betts accepted the clerkship of his father's court rather than practice before him, but resumed his profession after his father's death. When Judge Rapallo's son has a case in his father's court upon argument, his father always quits the bench. The late James T. Brady would never accept a fee in his brother's court, not even if it was offered for an appearance before one of his brother's colleagues. Mr. William A. Beach pursues the same course in the courts wherein his son presides. Judge Spier's son will not practice before his father. The late John S. Lawrence declined cases before his brother, of the Supreme Court. Some lawyers carry these ideas of professional delicacy so far as to be averse to trying or arguing cases before intimate friends who are judges.

A QUIRRELY NOTION. — "The number eight is the number of Justice, on account of the equality that is found in it." *Mollere*, Vol. 1, p. 5, Putnam's ed. of 1879. 'The *Jealousy of Le Barbouillé*,' scene 2. And it is so, that the number is all equality. When written 8, in its Arabic form, the two parts of it are equal, being two circles; cut it from top to bottom through the middle, the two parts made are equal and alike; cut it in four, up and down, and across, and the four parts are equal and alike. Divide it by what division you please, that will fairly go in it, and you make a result of equal parts, as ones, or twos, or fours."

The Albany Law Journal.

ALBANY, JUNE 25, 1881.

CURRENT TOPICS.

ONE of the most important legal investigations ever made in this State is now going on at our State capitol. Assemblyman Bradley accuses Senator Sessions of trying to bribe him to vote for Mr. Depew for United States Senator, and of giving him \$2,000 to that end; and he produces that sum of money which he swears is what Mr. Sessions gave him. Mr. Sessions denies the attempt and the payment. Two ideas are suggested: *First*, that if this story is true, every effort should be made and encouraged to punish the guilty, and that no political obstacles should be thrown in the way, and no attempts made to prejudice the minds of the Legislature or the public either way. Bribery is a very serious and dangerous crime. It is universally believed to be carried on to a very great extent. We believe so, and we believe that it would be a very wholesome example to send a briber of a legislator or a legislator who accepts a bribe to another State institution, to do the State a different and more useful service. *Second*, the skepticism and the derision with which this charge is received not only by the partisan press, of which nothing better is to be expected, but by a large party of the public, in whose interest this investigation is being prosecuted, is alarming and disheartening. It argues public demoralization and indifference. It is said that a man of Mr. Sessions' conceded reputation and character would not have gone to work in so bungling a way. Well, if Mr. Sessions is conceded to be an acknowledged expert in bribery, why is he a senator, to make our laws? This is a serious inquiry for the consideration of his constituents. But how do the public know that this is a "bungling" operation? Are the ways of bribers so well known as to enable such a decided judgment to be pronounced? If so, somebody ought to be prosecuted for bribery. Here is the choice of two theories offered: either Mr. Sessions corruptly offered the money which Mr. Bradley produces, or Mr. Bradley has entered into a wicked and wanton conspiracy to accuse him of bribery, and has supported it by perjury. It is not for us to pronounce which of these is the more probable. The public should preserve a mind fairly and candidly open to conviction. The partisan press should have decency enough to refrain from pre-judging a case so vital to the interests and prosperity of the State. The *New York Times* can put its funny man to better use than ridiculing Judge Van Alstyne's charge to the grand jury of this county, exhorting them to prosecute this inquiry.

The valuation that some lawyers put on their services is illustrated by a suit tried last week in the city of New York. This was a suit by Mr. Orlando

L. Stewart for services as counsel for the executors of the will of "Madame Restell," the famous abortionist. His services were rendered during a period of four months. He claimed two and a half per cent on \$750,000, the amount of the estate. Granting that he devoted all his time to this service, and that he did not work on Sunday, the amount claimed would be about \$178.50 a day, which may be called liberal. "In making his bill he took into consideration the responsibility attached to the services. There were grades in the profession, and in making a bill the rank and influence of counsel became an element of consideration." Mr. Joseph H. Choate, counsel for defendants, asked, upon cross-examination, how much the witness had charged for his rank and influence, but he could not tell. Several lawyers testified that the charges made were reasonable. Mr. Robert Sewell, who thought the services in reference to the will alone were worth \$15,000, was asked by Mr. Choate whether he did not regard a charge of \$1,250 a day for certain services Mr. Stewart testified he had rendered, as exorbitant. Mr. Sewell replied that he did not believe a lawyer's services could be estimated by a *per diem* charge, like ordinary day's work, but he did know of lawyers, Mr. Joseph H. Choate, for instance, often charging \$10,000 a day. This was certainly a good joke on Mr. Choate, but if the accusation is true he can well afford to stand it. The jury, under the influence of one of Mr. Choate's famous "after-dinner speeches," and probably arguing that in a republican country the "rank" of counsel ought not to count for much, gave a verdict for \$3,000. Mr. Stewart will not starve, even at this reduction. The sum would comfortably support about a dozen Methodist country clergymen, with their "quivers full of arrows," for a year.

Recent events have suggested to us a new mode of treating the insane. Give them somebody to kill. This resource cured Col. Tom Buford, of Kentucky. The colonel was extremely crazy, wandering about the country with a shot gun and manifesting his mental disorder by inviting people to drink. Coming across Judge Elliott, of the Court of Appeals, who had recently written the opinion of that court deciding a case against him, the colonel's malady came upon him so irresistibly that he killed the judge at sight. Hereupon a jury inquired into the matter, and concluded that as the colonel had had so little provocation, he certainly must have been insane, and they accordingly acquitted him of any crime. It was judged best however to subject the colonel to the mild restraints of an insane asylum for a season, and now, after the lapse of a few months, we are gratified to be able to announce that he is discharged cured. The like treatment has been found efficacious, in this State, in the case of an epileptic young gentleman, who killed his father because he wrote unpleasant letters to the young gentleman's mother. The operation in this case proved so salutary that the young gentleman, after a due season of confinement, has been

pronounced fit to be a lawyer. So down in Texas, the sensitive and lion-hearted Mr. Currie, having in his madness killed an actor who was defending a lady against his insane insults, immediately experienced relief, and was pronounced cured without any confinement. The operation seems to be based upon the theory of bleeding, except that the bleeding is practiced upon some other person than the lunatic. Of course, it seems rather hard that innocent persons may be selected as the means of cure, and we would suggest the substitution of criminals condemned to death. This course would cure the ailment and at the same time relieve the State from the expense and annoyance of executions. It is to be remarked, however, that in Kentucky this form of mania does not seem to prevail, nor does this mode of treatment seem to be effectual, in the cases of colored or impecunious lunatics. If a nigger or a low-down white man kills another, he always appears to have his senses, and this is so apparent that the community usually hang him at once to save delay and possible miscarriage of justice. Like the gout, the mania is a gentlemanly affliction, exclusively confined to the upper classes and "blue-grass" circles. We extend our congratulations to Colonel Buford, and hope he will not have a relapse.

It seems that it is not so necessary that ladies should go gaily clad to balls as it is that they and their husbands should pay their debts. Thus, in *Sharpley v. Dautre, et vir*, Montreal Superior Court, May 28, 1881, 4 Leg. News, 185, it was held that a ball dress worth \$80 is not "ordinary and necessary wearing apparel" exempt from attachment. The court said: "The word 'necessary' is commonly defined to mean 'needful,' 'indispensably requisite,' and the word 'ordinary' to mean 'plain, not handsome,' 'customary,' 'of common kind or rank.' Is a ball dress both necessary and ordinary? Is it necessary, for unmarried women, for all married women, rich or poor? It can only be used at balls. We do not ordinarily see persons, married or unmarried, walking about wearing ball dress, or apparelled so. A ball dress (says the creditor here) is an article of luxury and extravagance, not ordinary, not an article of common kind, nor indispensably requisite; if suitable to rich persons it is not to poor ones who can't pay their debts, etc. The ball dress seized in this case is of about \$80 value. That is a large sum. The debtor says that the dress was no more than necessary and suitable to a person in defendant's class in society. I see from this case that the courts may hereafter have to decide with great nicety of what character is clothing seized; ordinary or not? necessary or not? All clothing being, certainly, not free, is a ball dress lying at a dressmaker's free? Would two go free, and would a fancy ball dress go free? Would they, if sworn to be 'no more than necessary and suitable to the defendant,' though not at all rich, but in debt?" In *Atkins v. Curwood*, 7 C. & P. 759, dry goods to the amount of £67, ordered by a wife as outfit for a watering place, whither her husband

had forbidden her going, were held not necessary. Lord Abinger growled: "Let the wedding dresses be struck off." And in *Lane v. Ironmonger*, 13 M. & W. 368, bonnets, laces, feathers, and ribbons, to the amount of £5,287 in part of one year, were pronounced extravagant.

In *State v. Beswick*, ante, 487, the court refer to *Com. v. Williams*, 6 Gray, 1, and *State v. Hurley*, 54 Me. 562, as opposed to their decision. On examination we do not think they can be so regarded. They simply hold that a statute making delivery of intoxicating liquors *prima facie* evidence of a sale, is constitutional. This is a distinguishable holding from that of the *Beswick* case. The distinguishing characteristic is set forth in the following extracts from the prevailing opinion: "The statute only prescribes, to a certain extent, and under particular circumstances, what legal effect shall be given to a particular species of evidence, if it stands entirely alone and is left wholly unexplained." "The only purpose and effect of the particular clause of the statute objected to are, to give a certain degree of artificial force to a designated fact." "It is not denied that the fact of delivery affords some presumption of a sale." "Delivery of property always affords, to a greater or less extent, presumptive evidence of its sale." In the principal case there was no such fact, or proof of acts or dealing, as afforded any basis for the raising of such a presumption. The *Williams* case gives a certain degree of weight to particular evidence; the principal case makes that to be evidence which is not legal evidence under the Constitution. In the *Williams* case, Thomas, J., dissented in a strong opinion. He says: "Yet this statute makes an act, wholly innocent in itself, *prima facie* evidence, that is, if uncontrolled, competent and sufficient evidence of the commission of a crime. Upon the proof of a fact, equally consistent with the innocence as with the guilt of the accused, it infers and presumes his guilt." The case of *State v. Hurley*, 54 Me. 562, cited in the principal case, is founded on the *Williams* case, without much expressed consideration. We are more firmly than ever convinced that *State v. Thomas*, ante, 489, is wrong.

We have received a second communication from Judge Countryman, which is too late and too long for our columns this week. It shall appear next week.

NOTES OF CASES.

IN *Oleson v. State*, Nebraska Supreme Court, May 1 26, 1881, N. W. Rep. 38, it was held that in a prosecution for rape, the prosecutrix may be asked whether she made complaint of the injury; but the particulars, when not a part of the *res gestæ*, are not evidence of the truth of her statements, and cannot be given as evidence in chief. The court said: "The State, over the objections of the accused, was permitted to prove by Mrs. Mulroony and Mrs.

Oriks what the prosecutrix had told them on the day after the commission of the alleged offense in regard to it. Greenleaf thus states the rule in regard to such admissions: 'Though the prosecutrix may be asked whether she made complaint of the injury, and when and to whom, and the person to whom she complained is usually called to prove that fact, yet the particular facts which she stated are not admissible in evidence, except when elicited in cross-examination, or by way of confirming her testimony after it has been impeached. On the direct examination the practice has been merely to ask whether she made complaint that such an outrage had been perpetrated upon her, and to receive only a simple yes or no. Indeed, the complaint constitutes no part of the *res gestæ*; it is only in fact corroborative of the testimony of the complainant; and where she is not a witness in the case is wholly inadmissible.' Greenl. Ev., § 218. The testimony referred to was not competent as evidence in chief to prove the commission of the offense, and the court erred in admitting it for that purpose. The particulars were not a part of the *res gestæ*, are not evidence of the truth of her statement, and cannot be inquired into in her examination in chief, or proved by other testimony except in corroboration. *Johnson v. State*, 17 Ohio, 593; *Baccio v. People*, 41 N. Y. 265; *Lacy v. State*, 43 Ala. 80; *People v. McGee*, 1 Den. 19; *Stephen v. State*, 11 Ga. 235." It was held in *State v. Kinney*, 44 Conn. 153; S. C., 26 Am. Rep. 486, that the particulars of the statement may be given by other witnesses in corroboration.

The case of *State v. Hoyt*, 47 Conn. 318, decides several interesting points in criminal law. First, that the defendant in a criminal case has no right to poll the jury. This is decidedly opposed to the weight of authority. See *James v. State*, 55 Miss. 57; S. C., 30 Am. Rep. 496, and note, 497. Second, that in sentencing for murder it is not necessary to ask the prisoner if he has any thing to say against sentence. The court say: "It would seem a most absurd, frivolous, and idle ceremony for this court to set aside the judgment and remand the case to the Superior Court, to the end that the accused may be asked 'whether he has any thing further to say.' We are happy to observe that some of the courts in the United States are beginning to look upon this ancient requirement as a formality, the omission of which will not always invalidate the judgment." Citing *State v. Johnson*, 67 N. C. 59; *Grady v. State*, 11 Ga. 253; *Sarah v. State*, 23 id. 576; *State v. Ball*, 27 Mo. 324; *Jeffries v. Com.*, 12 Allen, 145. (Of these citations only the first was a capital case, and the rest admit the prevalence of the contrary doctrine in capital cases.) But *contra*, see *Mullen v. State*, 45 Ala. 43; S. C., 6 Am. Rep. 691; *McQue v. Com.*, 78 Penn. St. 185; S. C., 21 Am. Rep. 7, and note, 8. Third, that the restriction of the arguments in a murder case to four hours on each side is valid. To the same effect is *White v. People*, 90 Ill. 117; S. C., 32 Am. Rep. 12, and references.

We take the following from the Vienna *Juristische Blätter*: S. & C., of Heidelberg, Germany, contracted with G., a merchant at Czernowitz, Austria, for the sale of 4,950 bags, at a stipulated price to be paid by G. on delivery of the bags at Czernowitz. The bags were to be obtained from Scotland, and it was agreed that they should be shipped from Dundee on January 18th, at the latest, and sent to G. at Czernowitz free of charges. The bags were ready at Dundee for shipment, on the 16th of January, but it was proven that no vessel was ready to go out on that day, nor any other means of transportation, and they were in fact sent on the 18th January by the first outgoing vessel. The bags arrived at Czernowitz on January 28th. G. refused to accept the bags or pay for them. S. & C. stored them in a warehouse for him, and sued him for the price. The inferior courts decided for the defendant on the ground that Dundee being the place for the fulfillment of the contract, a failure to deliver there within the stipulated time, gave G. a right to rescind it and refuse acceptance thereafter. The Austrian Commercial Code provides that where a delivery is to be made by a fixed, definite time, acceptance thereafter may be refused. The courts held that the inability of the plaintiffs to deliver caused by circumstances not within their control made no difference. The plaintiffs appealed, and argued that Czernowitz was the place where the contract was to be fulfilled, and no definite time being fixed for delivery there, the defendant could not refuse acceptance, when the goods were tendered to him. The Imperial Supreme Appellate Court reversed the decisions below and gave judgment for the plaintiffs. They hold that Czernowitz was the place where the contract was to be fulfilled, as the price for the bags was to be paid there on delivery there. Delivery on board the vessel at Dundee on the day stipulated was unessential; if it had been made according to the contract, *non constat* that the bags would have arrived at Czernowitz any sooner. The plaintiffs had a right to select the means of transportation, and they might have selected slower ones than they did employ; dangers of the sea might have delayed the transportation; considering the distance between the places, the delivery as made must be deemed expeditious. No special reason was assigned by the defendant why the two days' delay in the shipment should avoid the contract. The day for delivery at Czernowitz was not fixed, and there was no such delay as would justify the purchaser in refusing acceptance.

M. S. was prosecuted for participation in the crime of forgery of papers of credit (which includes the uttering and passing of such papers). On the trial he was convicted of an attempt. The proof showed that S. had entered into an arrangement with professional forgers at London to obtain of them imitations of papers of credit and public securities generally; that he had so obtained a number of counterfeit Russian government bills of twenty-five rubles each; that before he had uttered any of them

they, with other articles of his property, had been levied upon under an attachment issued against him at the suit of a creditor, when the forgery was discovered, and he arrested in consequence. He appealed from the judgment of conviction, but the Appellate Court affirmed the conviction, saying: * * * "It is argued that the essence of the crime (of participation in the forgery of papers of public credit) is uttering the counterfeit papers in concert with the counterfeiters, accomplices, and participants, and as M. S. is only charged with an attempt to commit this crime, it is necessary to prove an act leading to actual execution, *i. e.*, utterance; that therefore it must be established that he attempted to pass the papers of credit to others, that he presented them to be changed, or that he asked another person to pass them or have them changed. Such an act leading to actual execution has not been proved, and therefore the conviction is erroneous. But there is no error in the conviction; for to constitute a criminal attempt a real act of execution or the beginning of actual execution is not always necessary; an unlawful act, which is directed toward realizing the intent that lies at the bottom of the crime, is sufficient. The purchase of false papers of credit upon an understanding with the counterfeiters, accomplices, or participants, however, is such an act, for in such a purchase any other purpose than utterance cannot possibly be thought of. The verdict of the jury proves that S. bought the counterfeit papers with a purpose to utter them, but that he was prevented from utterance by the attachment. All the ingredients of the crime are made out."

RUNNING AT LARGE.

THE Vermont statute permits any one to kill a dog "running at large off the premises of the owner or keeper," without a collar with the owner's name on it. In *Wright v. Clark*, 50 Vt. 180; S. C., 28 Am. Rep. 496, a fox hound, kept for the chase, and chained when not in pursuit of game, was chasing a fox with his owner and one Stone, and while at some distance from his owner, but near and in full view of Stone, was killed by defendant in shooting at the fox. It was held that the shooting was wrongful, although, as claimed by the defendant, accidental, and that the defendant was liable for the value of the dog. The court spoke thus in praise of dogs: "The dog is the most tractable of animals, and yields most readily to restraint other than physical. The voice and look of his master are often more potent to restrain him than cord or chain. He is often trained so that at his master's command he will remain by and guard his property for a whole day in the absence of his master, or go out of sight and miles away and gather in his flocks and herds. Different species have special instincts which render them particularly susceptible to training and restraint in certain directions. The trained hound, when pursuing the fox or deer with or at his master's bidding, is no more 'stroll-

rambling at will,' than a boy while going on an errand at his master's command. Either, when out of sight and hearing of the master, have it in their power to 'stroll without restraint,' or rove at will; but neither do so, so long as they continuously and vigorously pursue the thing commanded. Hence the fact that the dog when shot was out of sight and hearing of his master, is not determinative of whether he was 'running at large.' If the plaintiff's testimony gained credit, when shot the dog was in hot pursuit of the fox in obedience to the command of the plaintiff, with all his instincts urging him thereto, as each bound brought him nearer and nearer the coveted prize. We do not think such a dog, thus running, is, within the meaning of the statute, running at large."

In *Jennings v. Wayne*, 63 Me. 468, the plaintiff, the owner of a mare and colt, turned them out to water, one Sabbath afternoon, upon the highway in the defendant town. The colt started into a trot and ran away, when the plaintiff caught the mare, took a "turn in the halter around her nose," mounted upon her back and started in pursuit. While so driving and riding her, the mare broke through a culvert, causing the injuries for which suit was brought to recover damages. The question was whether the animals were "at large without a keeper." The court said: "The law does not require the owner of animals, in all cases, to take the precaution to lead them to water in order to make him their keeper. The phrase 'at large without a keeper' must have a reasonable interpretation applicable to the subject-matter. 'A keeper,' says Worcester, 'is one who has something in charge.' To be 'without a keeper,' in the purview of the statute is to be without the charge of any one having the right of control, or 'not under the care of a keeper,' as the statute of Massachusetts expresses it. Such charge or care does not, in all cases, imply direct physical power to control the actions of the animals; in some cases moral means would be sufficient for this purpose, such as the proximity of the owner to the animals, the human voice, gestures, and like means. Whether in a given case, physical or moral power over the animals is necessary, depends upon their nature, age, character, habits, discipline, and business or use at the time, and whatever other circumstances have a bearing upon the subject. What would constitute a person a keeper of one animal would not make him keeper of another under different circumstances. It is sufficient to constitute the owner of animals their keeper, in a given case, if it appears that he possessed the means upon which a person in the exercise of ordinary care, judgment and intelligence upon these matters, would rely to control their actions."

A similar holding was made in *Russell v. Cone*, 46 Vt. 600. The court said: "Running at large is used in the statute in the sense of strolling without restraint or confinement; as wandering, roving, or rambling at will, unrestrained. Perhaps no precise abstract rule under the statute can be laid down, applicable to every case, as to the nature, character,

and amount of restraint necessary to be exercised over a domestic animal, when suffered, as in this case, to be on the highway incident to its use. But the restraint need not be entirely physical; it may depend much upon training, habits and instincts of the animal in the particular case; and the sufficiency of the restraint is to be determined more from its effect upon and controlling and restraining influence over the animal, than from the nature or kind. Suppose a span of horses be so accustomed to be kept and driven together, that while the owner is driving one, the other will voluntarily follow as closely almost as if led by a halter; the owner while taking them along the highway in this manner, could not be said to suffer the horse, so voluntarily following its mate, to run at large in violation of the statute. The same may be said of a young sucking colt upon the highway, with no other restraint than instinct to follow its dam, which is being driven in a carriage on the highway." In this case the owner of a horse was accustomed to ride it to a distance of a mile and a half from home, and then turn the horse loose to return home, which it was trained and accustomed to do without loitering, being so checked that it could not feed upon the way, and persons being in waiting to receive it upon its arrival. The horse was held not to be "running at large."

Animals escaping from the owner's premises cannot be said to be "running at large." *Coles v. Burns*, 21 Hun, 249. The court said: "The phrase 'running at large' implies permission or assent, or, at least, some fault on the part of the owner." "Animals may be running at large, although when seized they were walking or lying down. A horse that has thrown its rider in the highway and escaped, a cow turned out of pasture at evening and going home, droves of sheep, hogs, or other cattle being driven to market, though for the moment unattended by the drover, can hardly be said to be running at large, within the meaning of the statute."

But the contrary was held in *Welsh v. C. R. & Q. R. Co.*, 53 Iowa, 632. The court said: "The evidence shows that when the horse was injured he had on a bridle with the rein over his head, and a halter rope, which was untied and dragging. It is urged that the animal was not running at large within the meaning of the statute. The court instructed the jury as follows: 'The words 'running at large,' as used in the statute, import that the stock are not under the control of the owners; that they are not confined by inclosures to a certain field or place, nor under the immediate care of a shepherd or herdsman; that they are left to roam wherever they may go. But where an animal escapes from the control of the owner, and cannot be caught by the owner, then such animal would be running at large within the meaning of the statute.' This instruction was sustained, and the bridle and halter made no difference. "It does not appear that he was within the personal or physical control of any one."

In *Thompson v. Corpstein*, 52 Cal. 653, it was held

that cattle driven along a road in charge of a herder, and which in passing casually eat of the grass growing on the roadside, are not "estrays" or "running at large," within the meaning of an act forbidding the pasturing of cattle on public highways, and providing for the impounding of estray cattle or cattle running at large on public highways; and the fact that the herder accidentally fell asleep while attending to the cattle, and that the cattle cropped tares while the husbandman slept, did not render the cattle "estrays" or "running at large." The court say: "Had he" (the herder) "fallen down in a fit, or been disabled by a sudden attack of disease, the same consequence might and probably would have ensued, but we do not think that in the one case more than in the other the cattle would be subject to proceedings under the act."

MUNICIPAL BONDS—VALIDITY OF STATUTE CURING IRREGULARITIES IN ISSUE—WHEN DECISION OF STATE COURT NOT BINDING ON FEDERAL COURT.

UNITED STATES SUPREME COURT, MAY 2, 1881.

TOWN OF THOMPSON V. PERRINE.

The town of Thompson, in New York, was authorized by statute to issue bonds in aid of a specified railroad. The statute directed that commissioners should be appointed, who should execute the bonds under their hands and seals; that such bonds should not be binding upon the town without the consent of a specified proportion of the tax payers, which consent was to be proved by the affidavit of the town clerk; that the bonds should not be sold for less than par, and that the money received for their sale should be invested in the stock of the railroad company. The bonds were issued by commissioners appointed in pursuance of the statute. They were not sold as the statute required, but were exchanged directly with the railroad company for its stock, which fact was recited in the bond. It was claimed that they were defective in other particulars, and that there was not a compliance with the statute requiring consent of tax payers, etc. The railroad for the aid of which the bonds were issued was built. Thereafter the Legislature of New York, by an act passed in 1871, ratified the acts of the commissioners in issuing and exchanging the bonds, and declared that such bonds should not be void or voidable in the hands of bona fide holders for value, by reason of any defect or omission in the consents, but should be valid against the town of Thompson. At the time this act was passed it was the established doctrine of the highest court in New York that the Legislature had authority to pass such an act. Subsequent to this plaintiff purchased, in good faith, for value and without notice, except the recital in the bonds, of any defect, certain of the bonds. In an action against the town on such bonds, Held, (1) that the bonds were enforceable against the town; (2) that a decision of the New York court of last resort, in a suit commenced after plaintiff had brought his action (*Horton v. Town of Thompson*, 71 N. Y. 520), that the act in question, of 1871, was not constitutional, was not binding upon this court to prejudice the rights of plaintiff. Held, also, that a judgment in an action to which plaintiff was not a party and of which he had no notice, declaring the bonds void, did not bind plaintiff.

IN error to the Circuit Court of the United States for the Southern District of New York, to review a judgment in favor of Orlando Perrine, the plaintiff below.

This action, commenced on the first day of May, 1876, in the Circuit Court of the United States for the Southern District of New York, involves the liability of the town of Thompson, a municipal corporation Sullivan county, New York, for the amount of coup

attached to certain bonds, signed by G. M. Benedict, N. S. Hamilton and W. H. Cady, county commissioners, and issued by them in the name of the town under date of May 1, 1869. Each bond recites that it "is a valid security, being issued by virtue of an act entitled 'An act to authorize certain towns in the counties of Sullivan and Orange to issue bonds and take stock in any company now organized, or that may hereafter be organized within three years after the passage of this act, for the purpose of building a railroad from the village of Monticello, in the county of Sullivan, through the towns of Thompson and Forestburgh, in said county, and the town of Deerpark, in the county of Orange, to Port Jervis, Orange county,' passed May 4, 1868, and of the act amendatory thereof, passed April 1, 1869." The bonds are negotiable in form, and state that the promise to pay the sum therein specified is "by virtue and in pursuance of the acts above entitled and referred to, and for value received in the stock of the Monticello & Port Jervis Railway Company."

Those acts authorized the commissioners who might be appointed, in the mode therein prescribed, on behalf of any town, along the route of the proposed road from Monticello to Port Jervis, to borrow, on its credit, such sums of money, not exceeding thirty-three per cent of the valuation of the town, to be ascertained by its assessment-rolls for 1867, for a term not exceeding thirty years, at not exceeding seven per cent interest per annum, and "to execute bonds therefor under their hands and seals"—such debt not however to be contracted, and such bonds not to be issued until there was obtained the written consent of the majority of the tax payers, appearing upon the last assessment-roll, as shall represent a majority of the taxable property, not including lands owned by non-residents; nor until a certain amount of the capital stock of the company had been subscribed in good faith, and paid, by individuals or corporations. The statute required the fact that the persons so consenting represented the proper number of tax payers should be supported by the affidavit of one of the town assessors or the town clerk—the consent and the affidavit to be filed in the offices of the county and town clerks respectively, a certified copy whereof "shall be evidence of the facts therein contained and certified in any court of this [that] State, and before any judge or justice thereof."

The third section of the original act provided that the commissioners thereby authorized "may, in their discretion, dispose of such bonds, or any part thereof, to such persons or corporations, and upon such terms, as they shall deem most advantageous for their said town, but not for less than par, and the money that shall be received by any loan or sale of such bonds shall be invested in the stock of such company, now organized, or that may hereafter be organized, within two years after the passage of this act, for the purpose of building or aiding in the building of a railroad," from Monticello to Port Jervis.

The entire issue of bonds under the acts referred to was \$148,000, of which \$15,000 were delivered to the company on the 4th of May, 1869, and \$133,000 on the 12th of May, 1869.

Prior to the delivery of the bonds to the railroad company it had made a construction contract with Crowley and Colts, by which the latter were to be paid partly in bonds of towns along the line of the road. In September, 1869, Gulick and Van Kleeck purchased eight of the bonds from the National Bank of Port Jervis, at ninety cents on the dollar, for cash. In November of the same year, the Atlantic Savings Bank of the city of New York (subsequently known as the Bond Street Savings Bank) purchased \$50,000 of the bonds at eighty-two and one-half cents on the dollar and accrued interest, for cash. The town, by means of taxation in conformity with the provisions of the

original and amendatory acts, met the installments of interest due March 1, 1870, and September 1, 1870. And in January, 1871, the road was completed, and has been in operation ever since. Plaintiff below acquired the bonds in suit in 1875.

Such was the condition of the enterprise, and such the relations which the town held to the holders of its bonds, when on the 28th April, 1871, the Legislature of New York passed an act entitled "An act to legalize and confirm the acts of the commissioners of the towns of Thompson and Forestburgh, in the county of Sullivan, and of Deerpark, in the county of Orange, in issuing and disposing of the bonds of their respective towns, to build a railroad from the village of Monticello, in the county of Sullivan, to the village of Port Jervis, in the county of Orange, under chapter five hundred and fifty-three of the Laws of eighteen hundred and sixty-eight, and to legalize and confirm all bonds heretofore issued by such commissioners under said chapter of laws, now held by or owned by bona fide purchasers."

Since the present case largely depends upon the construction and effect of that act, it is here given in full:

"SECTION 1. The acts of Nathan S. Hamilton, Giles M. Benedict, and William H. Cady, commissioners on the part of the town of Thompson, and Silas T. L. Norris, Edwin Hartwell, and James Ketcham, commissioners of the town of Forestburgh, in the county of Sullivan, and of Orville J. Brown, Samuel O. Dimmick, and Augustus B. Goodale, commissioners of the town of Deerpark, in the county of Orange, appointed in pursuance of an act entitled 'An act to authorize certain towns in the counties of Sullivan and Orange to issue bonds and take stock in any company now organized or that may hereafter be organized, within three years after the passage of this act, for the purpose of building a railroad from the village of Monticello, in the county of Sullivan, through the towns of Thompson and Forestburgh, in said county of Sullivan, and the town of Deerpark, in the county of Orange, to Port Jervis,' passed May fourth, eighteen hundred and sixty-eight, in issuing bonds upon the faith and credit of their respective towns, and in exchanging them for the stock of the company, organized for the purpose of constructing the railroad contemplated by said act, are hereby ratified and confirmed.

"§ 2. No bond or bonds issued or purporting to have been issued under the said act, and now held, owned or possessed by any person or persons, guardian, trustee or corporation, in good faith or for a valuable consideration, shall be void or voidable by reason of any defect or omission in the consents in writing, of the tax payers of the said towns of Thompson, Forestburgh and Deerpark, upon which such bonds were or purport to have been issued in or by reason of said consent, not stating the name of the railroad company in which the tax payers so signing such consents desired the bonds or the money arising from the sale thereof to be invested. But that the said bonds shall be as valid and effectual for every purpose, as if such defect or omission had not occurred, provided, that such or any exchange of bonds by said commissioners for the stock of said company was made at the par value of the said bonds; and provided, further, that the respective issues of the said bonds by their commissioners do not exceed the amount authorized by said act.

"§ 3. No action or proceeding at law, commenced or pending, at the time of the passage of this act, shall abate or be discontinued, or be in any way affected by reason thereof; but the same may be prosecuted or defended, and judgment entered therein, and all proceedings taken to enforce the same, in the same manner as now provided by law, and with the like effect as if this act had not been passed.

"§ 4. This act shall take effect immediately."

HARLAN, J. Although the act of 1868 required all bonds issued under its authority to be disposed of for not less than par, and their proceeds invested in the stock of the company, the commissioners exchanged those issued by the town of Thompson directly with the railroad company for an equal amount of the latter's stock. This was in violation of the statute as construed by the Court of Appeals of New York in several cases to which we had occasion to refer in *Scipio v. Wright*, 101 U. S. 676. We there held—following the decisions of the State court, some of which were made long prior to the passage of the particular enactment now under examination—that a purchaser of town bonds, having notice that they were exchanged for stock in a railroad company, in violation of a statute similar to that of 1863, was not a *bona fide* holder, and could not enforce payment against the town. We perceive no reason to qualify our ruling in that case and therefore proceed to the consideration of other questions not embraced by that decision.

It is apparent, upon the face of the act of 1871, that the Legislature was advised of the fact that the commissioners had departed from the statute of 1868, in exchanging the bonds for stock in the railroad company. And its manifest intention was not only to ratify and confirm such exchange, but to protect any holder of the bonds, who became such in good faith, for a valuable consideration, against any defense arising out of defects or omissions in the consents of tax payers, provided the exchange was at the par value of the bonds and the issue did not exceed the amount authorized by law.

The main argument of counsel for the town is embraced by the following propositions: *First*. That the consents of tax payers were not such as the acts of 1868 and 1869 required. *Second*. That the bonds were exchanged for stock, in violation of the statute; and since they recite, upon their face, that they were issued "for value received in the stock of the Monticello & Port Jervis Railway Company," there could be no *bona fide* holders thereof in the commercial sense. *Third*. That they were not issued under the seals of the commissioners, as required by the statute. *Fourth*. It was beyond the power of the Legislature, by subsequent enactment, to make them valid obligations against the town, without its assent given in proper form. *Fifth*. That no such assent was given.

If it be conceded that the consents were insufficient; that a seal was necessary as evidence of the official authority of the commissioners; that the recitals on the bonds, reasonably construed, gave notice to purchasers that they were illegally exchanged for stock, when they should have been disposed of or sold, at not less than their par value, and their proceeds invested in the stock of the company, the town is, nevertheless, liable, if the curative act of April 23, 1871, was within the constitutional power of the Legislature to pass. While this question, in some of its aspects, may be one of general jurisprudence—involving a consideration of the limits which, under our forms of government, are placed upon legislative and judicial power—it is proper to inquire as to the course of decisions in the highest court of New York upon the authority of the Legislature to pass such an act as that of April 23, 1871. This becomes necessary in view of the fact that the Court of Appeals of New York have adjudged that statute, in its main features, to be unconstitutional. That adjudication, it is contended, is conclusive of the rights of parties in this case. As we are unable to give our assent to this view, it is due to that learned tribunal that we should state, with some fullness, the reasons for the conclusions we have reached.

Prior to the year 1858 the question arose in several cases pending in different inferior courts of New York as to the constitutional power of the Legislature to authorize or require municipal corporations to sub-

scribe for stock in railroad companies, or to issue bonds therefor. The decisions in those cases disclosed a conflict of opinion among judges of recognized ability. The question finally came before the Court of Appeals of the State, in the year 1858, in *Bank of Rome v. Village of Rome*, 18 N. Y. 38. It was there ruled that the State Constitution did not, in terms, or by necessary intendment, restrain the Legislature from conferring upon municipal authorities the power to subscribe to the stock of a railroad corporation, and by taxation to raise the necessary funds for the payment thereof. That decision was approved in 19 N. Y. 20. In the subsequent case of *People v. Mitchell*, 35 id. 552, decided in 1866, the court quote with approval our decision in *Thomson v. Lee County*, 3 Wall. 330, where, speaking by Mr. Justice Davis, we said that although a county or other municipal corporation had no inherent right of legislation, and could exercise no power not conferred upon it, in express terms, or by fair implication, the Legislature, "unless restrained by the organic law, has the right to authorize a municipal corporation to take stock in a railroad or other work of internal improvement, to borrow money to pay for it, and to levy a tax to repay the loan," and that such authority "can be conferred in such a manner that the objects can be attained, either with or without the sanction of the people."

The decision in 35 N. Y. is important in other aspects of the present case. The main question before the court there was as to the validity of a confirmatory statute, the object of which was to cure the defects in certain affidavits which had been filed in proof of the consent of tax payers to a proposed municipal subscription of stock in a railroad company. The statute declared that the affidavits should be valid and conclusive proof in all courts and for all purposes, to authorize and uphold the respective subscriptions of the stock and the issue of bonds to the amount specified therein, and that the bonds should be valid and binding on the municipality issuing them, without reference to the form or sufficiency of the affidavits. The court, referring to the confirmatory statute, said that "it was within the scope of legislative authority to modify the limitations and restrictions in the antecedent acts on this subject, to dispense with prior conditions, and to charge the commissioners with defined and imperative duties." And it quotes with approval our language in *Thompson v. Lee County*, where, referring to a curative statute passed by the Iowa Legislature, we further remarked that "if the Legislature possessed the power to authorize an act to be done, it can, by a retrospective act, cure the evils which existed, because the power thus conferred has been irregularly executed."

Thus stood the doctrines of the State court upon the question of municipal subscriptions, and as to the power of the Legislature, by retrospective enactment, to cure defects in the exercise of powers granted to municipal corporations, when the act of April 23, 1871, was passed. But in 1873, the Court of Appeals decided *People v. Batchelor*, 53 N. Y. 131. That was a case of municipal subscription to a railroad corporation under an act passed in 1867, similar in its main features to the one passed in 1868 in reference to the Monticello and Port Jervis Railroad Company. It was claimed that the statute had not been complied with in obtaining consents from tax payers. A subsequent act of the Legislature required the subscription to be made upon the consents which were filed, and which the court found were not such as were prescribed by the statute under which the consents had been obtained from tax payers. Without any subscription having been made, or bonds issued, a mandamus was sued out to compel the town to become a stockholder in the railroad company, and to issue its bonds in payment of the subscription price of the stock. The court held that the

consent of the tax payers did not embrace such an issue of bonds as were required by the subsequent act; and that the Legislature could not compel a municipal corporation to subscribe stock or issue bonds in aid of the construction of a railroad, which, although public as to its franchise, was private as to the ownership of its property, and its relations to its stockholders. The opinion was concurred in by four of the judges, one concurred in the result, one dissented, and one did not vote.

In *Town of Duanesburg v. Jenkins*, 57 N. Y. 188, decided in 1874 by the commission of appeals—of concurrent jurisdiction and equal authority with the Court of Appeals—the court, by Johnson, J., reviewed the prior decisions of the Court of Appeals upon the question discussed in *People v. Batchellor*. In reference to the latter case it was intimated that the language of the court upon some of the questions discussed was not in harmony with its previous decisions, and that the opinion should be limited to the point adjudged upon the facts existing in that case. The conclusions announced in *Town of Duanesburg v. Jenkins*, after a careful analysis of previous decisions in New York, were that the authority of the Legislature to enable towns and other civil divisions of the State to subscribe for stock and issue bonds in aid of a railroad company, was established by numerous decisions of the highest court of the State; that there was no distinction in principle between a law authorizing a town, upon a popular vote, to subscribe for such stock and issue bonds therefor, and a law directing the same thing to be done; that when the authority to subscribe was made to depend upon the consent of the town, it was in the discretion of the Legislature to prescribe how such consent shall be given; and that if it originally rested with the Legislature to fix the terms on which the towns might act, the same power could remit a part of the conditions imposed, or heal any defects which may have occurred in the performance by the town of those conditions. Much of the language in that case is strikingly applicable to the one in hand. Said the court: "In this case a commissioner has been regularly appointed under the statute, by whom bonds were to be issued and stock subscribed for, provided certain consents were obtained and proofs filed according to the requirements of the several acts upon the subject. Consents were obtained, and proofs were made and filed, which are now on the one side claimed to be, and on the other are denied to be, in conformity to the law. The commissioner meanwhile executed the bonds, subscribed for stock, and delivered the bonds to the company in payment of the subscription; complying with the requirements of the statute in all respects, if the requisite consents had been given and proof made. The only officer of the town who had any duty in the premises acted by signing the bonds; and the Legislature, seeing the whole matter, released the conditions which it had imposed, and declared his assent binding upon the town, if the bonds had been issued and the road had been built, and the bonds in that case obligatory. As it might have authorized action in this way and on these conditions by the town originally, I see no objections to giving effect to its ratification of the action of the town, and holding its consent thus expressed effectual." Again, said the court: "In this case the proper officer of the town has acted, the bonds have been issued, and the stock subscribed for. The objection is that the proof of preliminary consents by tax payers is defective. The action of the Legislature is, in my judgment, sufficient to heal this defect and to sanction the action of the town commissioner in binding the town, the whole consideration to the town having been received in the completion of the road and the issuing of the stock for its benefit."

In the subsequent case of *Williams v. Town of Du-*

anesburg, 66 N. Y. 129, decided in May, 1876, the Court of Appeals of New York recognizes the correctness of the principles announced in *People v. Mitchell*, and in *Town of Duanesburg v. Jenkins*, citing, among other authorities, *Gelpcke v. Dubuque*, 1 Wall. 253; *Thompson v. Lee County*, 3 id. 377; *Beloit v. Morgan*, 7 id. 619, and *St. Joseph Township v. Rogers*, 16 id. 668. Alluding to the statutes for bonding towns in aid of railroads, the court, in *Williams v. Town of Duanesburg*, said that the Legislature could overlook the defective execution of the power conferred, and by retroactive legislation cure defects in the action of municipalities under those statutes. The Legislature may, said the court, "by subsequent legislation, when there has been a failure to perform conditions precedent, and the bonds have been issued, dispense with such conditions, and ratify and confirm, and make valid and obligatory upon the municipality, bonds issued without such performance—at least it may do so in cases where the municipality has, through the construction of the road, or by the receipt of the stock of the company in exchange for the bonds, received the benefit which the statute contemplated as the equivalent for the liability it was authorized to incur. The officers authorized under these statutes to issue the bonds are public agents, and the Legislature, looking over the whole matter, may, when in its judgment justice requires it, ratify and confirm their acts; which otherwise would be valid. In this case the Legislature could originally have authorized the bonds of the town of Duanesburg to be issued under the precise circumstances existing when they were issued, and if the acts of the commissioner have, by subsequent legislation, been ratified, it is equivalent authority to do what has been done." It is worthy of remark, in this connection, that Allen, J., had held in *Clark v. City of Rochester*, 13 How. Pr. 204, decided in 1856, that the Legislature had no power under the Constitution to delegate to, or confer upon, municipal corporations, authority to subscribe for or to hold stock in railroad corporations, and to issue bonds in payment therefor. Nevertheless, in *Williams v. Town of Duanesburg* (Church, C. J., concurring with him), he recognized *The Town of Duanesburg v. Jenkins* as authority, and as declaratory of the law.

But it is contended that the Court of Appeals of New York, in the later case of *Horton v. Town of Thompson*, 71 N. Y. 520, has decided the identical statute under examination, to be unconstitutional, and that this court is bound to accept the decision as conclusive of the present case. That action was commenced about the time the Circuit Court of the United States for the Southern District of New York sustained the validity of the confirmatory act of April 28, 1871, and gave judgment against the town of Thompson for the amount of some of the bonds embraced in the issue of \$148,000. *Cooper v. Town of Thompson*, 13 Blach. 434. *Horton v. Town of Thompson* was decided in the Supreme Court of the State after the present action was instituted. It was a suit upon two interest-coupons of \$35 each, belonging to the same issue of bonds. It was finally determined in the Court of Appeals shortly before the trial of this case in the court below. The questions raised in the case were whether the consent of the tax payers was defective in not naming the railroad to the construction of which the fund should be applied; and whether the validating act of April 28, 1871, in so far as it declared the exchange of bonds for stock to be legal, was not unconstitutional. Upon the first question the court said, that as the consent was sufficiently comprehensive in its terms to embrace the road in question, and inasmuch as the Legislature might legally have authorized it to be in the form in which it was actually given, the act of 1871 "probably cured the defect in its form." But the court, passing that question as one that need not be finally determined,

held, upon the authority of *People v. Batchellor*, that the Legislature had no power to authorize or direct the commissioners originally to contract the debt without any consent or action upon the part of the town; and that since the consent of the taxpayers was not given for an issue of bonds to be exchanged for stock, the Legislature could not validate the bonds and make them binding obligations upon the town, in the hands at least of those who were informed, by their recitals, that in violation of the statute, they were exchanged for stock in the railroad company. Four of the judges concurred in the opinion, and three dissented.

It is to be observed that the court does not refer to or overrule *Bank of Rome v. Village of Rome*, *People v. Mitchell*, *Town of Duaneburg v. Jenkins*, nor *Williams v. Town of Duaneburg*, *supra*.

We are unable to reconcile *Horton v. Town of Thompson*, upon the points now raised, with the doctrines of those cases or of others decided in the Court of Appeals prior to *People v. Batchellor*. It certainly cannot be said that there is such an established, fixed construction by that court, of statutes similar to those of 1868 and 1869, or to the confirmatory act of 1871, as obliges us to follow *Horton v. Township*, or that will justify any one in saying that the present question is finally at rest in the courts of that State. But independent of any such consideration, there are conclusive reasons why we cannot, in opposition to our own views of the law, as expressed in numerous cases, accept the principles of that case as decisive of the rights of the present parties. When the act of April 28, 1871, was passed, it was the established doctrine of the highest court of New York, as it was of this court, that the Legislature, unless restrained by the organic law of the State, could authorize or require a municipal corporation, with or without the consent of the people, by a subscription of capital stock, to aid in the construction of a railroad, having connection with the public interests of the people within the limits of such municipality, and to provide for payment by an issue of bonds or by taxation; that defects or omissions, upon the part of such municipal corporation or its officers, in the execution of the power conferred, or in the performance of the duty imposed, could be cured by subsequent legislation—certainly, where the corporation had received the benefits which the original subscription was designed to secure. As therefore the Legislature might, in the original act under which these bonds were issued, have authorized or required the bonds to be exchanged directly with the railroad company for capital stock, it could ratify and confirm such exchange, even where originally illegal, so as to make the bonds binding obligations upon the town in favor of all who then held them, or might thereafter acquire them, in good faith or for a valuable consideration. It is therefore an immaterial circumstance that the recitals in the bonds may have furnished notice that they were issued originally in violation of the statute. That was the very difficulty which the act of 1871 was designed to remove, and as matter of law, it was removed, if regard be had to the settled doctrines of this court, or to the decisions of the highest court of the State rendered previous to, and which were unmodified at, the passage of that act. It results that from that moment the bonds, by whomsoever held, whether by the railroad company or by others, became binding obligations upon the town, as much so as if the bonds had originally been sold and their proceeds invested in the stock of the railroad company, as required by the acts of 1868 and 1869. If the rights of those holding the bonds were in any degree affected by the subsequent decision in *People v. Batchellor*, the later decision in *Town of Duaneburg v. Jenkins* restored the law, so far as the courts of New York were concerned, as it undoubtedly was declared to be at the time of the act of 1871 was passed. The defendant

in error acquired the bonds in suit in 1875, before the decision in *Horton v. Town of Thompson*, and when, according to the principles announced in *Town of Duaneburg v. Jenkins* and many prior cases in the Court of Appeals, the act of 1871 must have been sustained as a valid exercise of legislative power. He purchased them for value at public auction in the city of New York, without notice of any defense thereto, or of the pendency of any suit involving their validity. If the recitals in the bonds gave notice that the acts of 1868 and 1869 forbade their exchange for stock, and required them to be sold and their proceeds invested in such stock, the purchaser is also presumed to have known, not only that such exchange had been legalized by the act of 1871, but that the authority of the Legislature to pass that act was sustained by the decisions of the highest court of the State rendered prior to its passage. His rights therefore should not be affected by a decision rendered after they accrued, which decision is in conflict with the law, as declared not only by this court in numerous cases, but by the highest court of the State, at and before the time he purchased the bonds.

The assignments of error present another question which it is our duty to notice. The town pleaded in bar of the action a judgment of the Supreme Court of the State in an action commenced in June, 1869, by the attorney-general of the State, on the relation of Charles Kilbourne and others, taxpayers, against the commissioners of the town of Thompson, F. C. Crowley, C. L. Colt, Wm. D. Colt, the Monticello & Port Jervis Railway Company, and the Town of Thompson. A temporary injunction was obtained on 24th June, 1869, restraining the respondents and each of them from using, loaning, or selling the bonds and from executing any other bonds based upon the consents given by the tax-payers. But that injunction was vacated and set aside on 27th July, 1869. A final decree was rendered in 1872 by which the bonds were declared to be null and void, and they as well as the certificates of stock exchanged therefor directed to be delivered up, by the respective parties, and cancelled. The general ground upon which the decree rested was that the provisions of the act under which they were issued were not complied with. From that judgment no writ of error or appeal seems to have been prosecuted. We have already seen that the entire issue of bonds was delivered to the railroad before the commencement of that action, that is, in May, 1869; and that after the dissolution of the injunction, to wit, in September and November, 1869, a large portion of the bonds had found their way into the hands of others who purchased them for value and without any notice of the pendency of the suit in the Supreme Court.

There is an insuperable difficulty in the way of plaintiff in error using the judgment in that case to defeat the present action. The bonds were negotiable securities, which had passed from the town before the action in the Supreme Court of the State was commenced. Those who purchased them in the market pending that litigation, or after it terminated, without notice of the suit, and in good faith, for value, could not be affected by the final decree. Had the complainants caused them to be surrendered to the custody of the court pending the suit, they could have been cancelled in pursuance of the directions contained in the final decree. But the actual custody of the railroad company was never disturbed, nor sought to be disturbed. The knowledge by its officers of the objects of the action, or of the terms of the final decree, could not affect a bona fide purchaser for value who had no such knowledge. Our decision in *County of Warren v. Marcy*, 97 U. S. 105, which is partly based upon adjudications in the courts of New York (*Murray v. Liburn*, 2 Johns. Ch. 441, and *Letch v. Wells*, 48 N. Y. 585), is conclusive upon this branch of the case.

It is scarcely necessary to say that the decrees of the Supreme Court of the State can derive no special force, as against the defendant in error, by reason of the third section of the act of April 28, 1871. That section only protected, from the operation of the act, any action or proceeding at law, commenced or pending at the time of its passage. That provision furnishes, perhaps, an explanation of the failure of the Supreme Court, in its opinion, to refer to the act of 1871, which had passed before its final decree was entered. The purpose of the third section was only to require existing actions or proceedings at law to be determined without reference to that act, and does not affect the rights of a *bona fide* purchaser who was not a party to the suit, and was without notice of its pendency.

We perceive no error in the record, and the judgment is affirmed.

SERVICE ON NON-RESIDENT INFANT.

NEW YORK COURT OF APPEALS, MARCH 25, 1881.

INGERSOLL V. MANGAM.

In an action of foreclosure the statutory provisions as to service must be followed to give jurisdiction of a non-resident infant under fourteen years of age. Personal service in the State upon his only parent, who appears and procures the appointment of a guardian and the appearance of the guardian in the action are not enough.

ACTION to foreclose a mortgage. The purchaser at the sale refused to complete his purchase, on the ground that the title was defective. From an order requiring him to take title he appealed to the General Term, which reversed the order. From the order of the General Term plaintiff appealed.

John Bradner Perry, for appellant.

S. M. & D. E. Meeker, for respondent.

ANDREWS, J. The purchaser objected to the title on the ground that the summons was not served on the infant, William Mangam. The action was for the foreclosure of a mortgage executed by the father of the infant, who died prior to the commencement of the action. The infant is under fourteen years of age, and had an interest in the mortgaged premises by descent, as heir of his father, and resided, when the action was commenced, with his mother in New Jersey. The summons was personally served on the mother in this State, and after such service, upon her application, Simon Dunne, a counsellor at law of the city of Brooklyn, was by an order of the court appointed guardian *ad litem* of the infant defendant, and appeared and put in a general answer as such guardian. The summons was not served on the infant, either personally or by publication, and if such service was necessary to give the court jurisdiction to render judgment foreclosing and barring the infant's interest in the premises, the title is defective and the purchaser should not be compelled to complete his purchase.

The Code enacts that a civil action is commenced by the service of a summons (§ 416). Where the defendant is an infant under fourteen years of age, it is declared that personal service must be made by delivering a copy of the summons within this State to the infant, and also to his father, mother or guardian, or if there is none within the State, to a person having the care or control of him, or with whom he resides, or in whose service he is employed (§ 426).

Service on the infant alone, or on the father, mother, guardian or other person mentioned alone, does not constitute a personal service within the statute. Service on both must concur to answer its requirement. There was therefore no personal service of the sum-

mons in this case, and there was no attempt to serve by publication.

The Code also provides that a voluntary general appearance of the defendant is equivalent to personal service of the summons upon him (§ 424). It is claimed that the appearance by the guardian *ad litem* was a voluntary appearance by the infant within this section. An infant must appear by guardian (§ 471); but a guardian can only be regularly appointed for an infant defendant after service of the summons personally or by the substituted mode (in certain specified cases) as prescribed. This is clearly implied by the language of the section last cited. It provides that the guardian is to be appointed upon the application of the infant, if he is of the age of fourteen years and upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, if made in the other mode prescribed; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. The application in both cases is to be made after the personal or substituted service has been made and completed.

The order for the appointment of the guardian *ad litem* in this case authorized the guardian appointed to appear and defend the action in behalf of the infant; but the difficulty is that the order was unauthorized, because the court had no jurisdiction over the infant or to appoint a guardian *ad litem* when this order was made, by reason of the fact that the infant had not been brought in and the action had not been commenced against him by the service of the summons, which is the statutory mode by which the court acquires jurisdiction of the person or property of an infant. The appearance by the guardian was not therefore an appearance by the infant, and was not within section 424. The infant was incapable of consenting to such appearance, and the guardian could not consent to the exercise of jurisdiction over him by an appearance not preceded by the service of process.

The question in this case was raised in *Bosworth v. Vandewalker*, 53 N. Y. 597, but was not decided, the court in that case holding that it did not appear that the infants had not been served, and in the absence of such proof that it would be presumed that the court which rendered the judgment had jurisdiction. It was held by the chancellor in *Grant v. Vanschoonhoven*, 9 Pal. 255, that to authorize the appointment of a guardian *ad litem* of infant defendants under the 146th rule in Chancery, the petition must distinctly show that the infant had been served with process, or that he had been proceeded against as an absentee, and an order obtained for his appearance, under the statute. Infants are deemed to be wards of the court, and when brought in by service of process the court will look after and protect their interests. But the court must first acquire jurisdiction before they are bound by its judgment.

There is no invariable rule defining what legal proceedings constitute due process of law conferring jurisdiction to deal with and bind the property of infants, by judicial proceedings. Notice in some form, either actual or constructive, is essential, but the Legislature may prescribe that such notice shall be given to the parent or guardian or other person, as representing the infant, and proceedings in conformity with the statute in such cases will be valid and the infant will be bound.

Under the Revised Statutes, in proceedings for partition of lands by petition, jurisdiction over the person and property of infants was acquired by the appointment of a guardian; in the first instance, upon notice to such infants, or to their general guardian. Service of notice upon the infants was not indispensable to the exercise of the jurisdiction. 2 R. S. 317, § 2; *Croghan v. Livingston*, 17 N. Y. 218.

The provisions of the Revised Statutes relating to the partition of lands were, by section 448 of the Code of Procedure, made applicable to actions for partition so far as the same could be applied to the substance and subject-matter of the action, without regard to form; and in *Gotendorf v. Goldschmidt*, Mss. opin. 1880, it was held that under the provisions of the Revised Statutes and of the Code in force when that action was commenced, personal service of the summons upon an infant defendant, in an action of partition, was not essential to give the court jurisdiction. But this is an action for foreclosure, and is governed by the general rules applicable to other actions.

The Legislature has seen fit to prescribe that the summons shall be served on infant defendants. This was the mode defined by the statute for acquiring jurisdiction over their persons and property.

It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service if made; or that it would have been competent for the Legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observance.

The order should be affirmed.

All concur, except Rapallo, J., absent.

LIEN UPON CHATTELS TO BE ACQUIRED.

MISSOURI SUPREME COURT, OCTOBER TERM, 1880.

WRIGHT V. BIRCHER'S EXECUTOR.*

One who has in contemplation the purchase of personal property may, by contract, impose a lien which will be valid and take effect when the property is acquired.

The proprietors of a hotel took a lease for a term of years upon an unfinished building to be used, when completed, as part of their hotel. The rent was payable monthly. The lease was to commence, or take effect on the first of the month after the completion of the building. It contained a stipulation that all fixtures, furniture and other improvements should be bound for the rent. When the lease was signed, the house was unfurnished, but before it took effect certain furniture and fixtures had been placed in the house. Held, that the stipulation created a lien, valid at least in equity: that this lien was for the full amount of the rent reserved, and not simply for any portion that might from time to time become delinquent, and that it had priority of a mortgage given after the lease took effect but before any rent became delinquent, to a person having knowledge of the existence of the stipulation.

APPPEAL by plaintiff from the St. Louis Court of Appeals. Sufficient facts appear in the opinion.

M. L. Gray and J. M. Holmes, for appellant.

Chas. B. B. Houvy, W. L. Scott and W. H. H. Russell, for respondent.

HENRY, J. This cause was submitted to the Circuit Court on the 6th day of March, 1877, upon an agreed statement of facts, in substance the following: Bircher was the owner of a six story building in St. Louis, on the south-east corner of Sixth and Chestnut streets, adjoining the Laclede hotel, and on the 7th day of February, 1873, while work was in progress upon it to convert it into a hotel building, leased it to John W. and Walter Mallin, to be used by them, when completed, as a hotel. The date of the lease was February 7, 1873. It was signed in duplicate, each of the two parties receiving one. At that date there were no fixtures or furniture in the building, it being then unfinished, but they were afterward to be placed in the building by the Mallins, and were so placed in the month

of July, 1863. The term for which the premises were leased was ten years, to commence on the — day of —, 187—, and the lessees agreed to pay an annual rent of \$32,000, in monthly payments of \$2,666.66, to be made on the last day of each month; and it was stipulated in the lease that all fixtures, furniture and other improvements should be bound for the rent and fulfillment of other covenants therein contained, on the part of the lessees, and any forfeiture for non-fulfillment of conditions therein, might be enforced at any day, or time however distant, after such failure or default should happen. The building and premises to be kept free from nuisances, and not to be underlet, except the basement, without the lessor's consent, under a penalty of forfeiture. The concluding stipulation of the lease was as follows: "This lease shall commence on the first of the month after the completion of said building, and the within blanks shall be filled that day. It is further agreed that connection can be made with the Laclede hotel."

The Mallins were proprietors of the Laclede, which was furnished for hotel purposes; and after the completion of the Bircher building they used the two buildings in connection, and they were called and known as the Laclede-Bircher hotel. The Bircher building was completed about the 1st day of August, 1873, by which time the furniture and fixtures in controversy in this suit were placed therein by the lessees, and the blanks in the lease, specifying the date of the commencement of the lease, were then filled, and the instrument duly recorded. On the 9th day of February, 1874, John and Walter Mallin, the lessees, borrowed of Nannie M. Wright \$25,000, and to secure their note given for the amount, executed a deed of trust conveying all of the personal property in the two buildings to M. L. Gray, as trustee, said Nannie M. Wright then having actual notice of the provision of the lease stipulating for a lien by Bircher on the property in the Bircher building. Afterward, on the 26th day of May, 1875, they borrowed of said Nannie M. Wright an additional sum of \$10,000, and to secure their note for that amount executed another deed of trust conveying to said Gray the same property. Bircher entered and took possession of the property in the Bircher building, and claiming a lien upon the goods for rent in arrear, and this is a controversy between him and Nannie M. Wright, who insists that Bircher's lease failed to create a lien, either in law or equity, upon the property in dispute. The judgment of the Circuit Court was in favor of Bircher, and on appeal, was affirmed by the Court of Appeals, and is here an appeal from that judgment.

One of the principal questions discussed by counsel relates to the validity of a sale, or mortgage of goods and chattels not *in esse* at the date of the mortgage or sale. One might write a volume, if inclined, to review all of the adjudged cases on the subject. We are not so inclined, and deem it necessary only to state what we regard as the conclusion reached by the best considered cases. It has been frequently and ably discussed, both in the English and American courts, and highly respectable authorities might be cited in support of either of the opposite views urged by the respective counsel here. The earlier English and American authorities, we think, sanction the doctrine contended for by the counsel of Nannie M. Wright. *Jones v. Richardson*, 10 Met. 488; *Moody v. Wright*, 13 id. 17; *Gardner v. McEwen*, 19 N. Y. 125; *Head v. Goodwin*, 37 Me. 187; *Barnard v. Eaton*, 2 Cush. 294; *Winslow v. Merchants Insurance Co.*, 4 Met. 306; *Codman v. Freeman*, 3 Cush. 306; *Otis v. Still*, 10 Barb. 108; *Lunn v. Thornton*, 1 Man., Gran. & S. (C. B.) 379. The doctrine maintained in the most of these cases was clearly stated in *Otis v. Still*, and was substantially "that a grant of goods, not in existence, or which do not belong to the grantor at the time of the execution of the

* To appear in 73 Missouri Reports.

deed, is void, unless the grantor ratify the grant by some act done by him with that view, after he has acquired the goods; that an assignment of property to be acquired in future, if valid in equity, is only valid as a contract to assign when the property shall be acquired, and is not an assignment of a present interest in the property, and if enforced in equity, can only be enforced as a right under the contract, and not a trust attached to the property as against the creditors of the assignor or mortgagor; that the mortgage of such subsequently acquired property can only be regarded as a mere contract to give further mortgage on such property, binding on the mortgagor personally, and the only remedy of the mortgagee on such contract is as a general creditor."

The broadest contrary doctrine was announced by Mr. Justice Story in *Mitchell v. Winslow*, 2 Story, 639, in the following language: "It seems to me the clear result of all the authorities, that whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto under him, either voluntary or with notice, or in bankruptcy." This has been followed by this court in the case of *Page v. Gardner*, 20 Mo. 508; in New York, in the case of *Seymour v. C. & N. F. R. R. Co.*, 25 Barb. 205, in which *Otis v. Still*, *supra*, was cited and distinctly disapproved; also in *Sillers v. Lenter*, 48 Miss. 528; *Benjamin v. Elmira R. R. Co.*, 49 Barb. 441; *Brett v. Carter* (U. S. Dist., Mass.), 3 Cent. L. J. 286; *Morrill v. Noyes*, 56 Me. 458, and in England, in *Langton v. Horton*, 1 Han. 549; *Holroyd v. Marshall*, 9 Jur. (N. S.) 213; *Whitworth v. Gangain*, 3 Han. 416; *Douglas v. Russell*, 3 Jur. 512; S. C., 1 My. & K. 488. The opinion of the courts in *Morrill v. Noyes*, delivered by Davis, J., is an able review of the authorities, and states the doctrine more clearly and precisely than any other case to which our attention has been called. It does not recognize the validity of mortgages of mere contingencies, or sales on mortgages of property which "the mortgagors might purchase, if they should purchase any," but the sale or mortgage must relate to property then in the contemplation of the parties to be purchased or acquired by the vendor or mortgagor.

Hale v. Webb, 28 Mo. 408, cited by appellant as establishing the proposition that the lien declared in the lease in question is void in equity, does not create a trust affecting the property. This is a misconception of the case. But one question was discussed in that opinion, and that was the effect of a clause in the mortgage which authorized the mortgagor to remain in possession of the mortgaged property, a stock of hardware, and continue his business as a hardware merchant, selling the goods, etc. This clause was held to invalidate the mortgage, and while the mortgage included the property then in store, as well as such as should at any time during the existence of the trust belong to the mortgagor, either in said store or any other store or place, there was no discussion as to the effect of that provision. Napton, J., did observe that: "The case of *Mitchell v. Winslow*, 2 Story, 639, referred to in the opinion of this court in *Page v. Gardner*, 20 Mo. 507, cannot be reconciled in all respects with the decisions of this court in *Brooks v. Wimer*, 20 id. 508, and several subsequent cases reiterating the same doctrine. So far as the case (*Mitchell v. Winslow*) goes to sustain the judgment in *Page v. Gardner*, no exception is designed to be taken to it, as the opinion and judgment in that case is not supposed to conflict with the views expressed in *Brooks v. Wimer*. Now, the only question in *Brooks v. Wimer* was, as to the effect of a clause in the mortgage permitting the mortgagor to retain possession of the mortgaged goods and "dispose of them

without any accountability to any one for the proceeds of the sale." This court held the mortgage fraudulent upon its face, while in *Mitchell v. Winslow* the contrary was maintained, and it is that portion of the opinion of Judge Story which Judge Napton declared in conflict with *Brooks v. Wimer*. In *Page v. Gardner*, the other question discussed by Mr. Justice Story in *Mitchell v. Winslow* was one of the questions under consideration (while the point upon which *Brooks v. Wimer* was decided was not before the court), and the views of Judge Story were fully approved, and in *Hale v. Webb* Judge Napton expressly states "that no exception is designed to be taken to it," evidently referring to that portion of the opinion of Story, J., which related to the mortgage property to be acquired subsequently to the execution of the mortgage. We may therefore with confidence assert that the doctrine of this court on the subject is in perfect harmony with that announced in *Mitchell v. Winslow*, and we see no reason to depart from it.

It may also be observed that by the last stipulation of the lease it was to commence on the first of the month after the completion of the building, and blanks left in the lease for that day were to be filled when the lease commenced and this was accordingly done. When the lease took effect the property was all in the building, and sufficiently described in the lease to make the lien reserved effective in equity if not in law.

In any view, however, that may be taken of the case, Bircher had a lien upon the property for the rent to become due by its terms. If a lien at law, then good against Mrs. Wright without regard to any notice to her other than that imported by the record of the lease. If in equity only, then equally good against her, because she had notice of the stipulation in the lease when she accepted her mortgages.

The position that the lien was only for rent that might at any time be in arrear, and there being none in arrear when the mortgages of Nannie M. Wright were executed, there was no lien in favor of Bircher at that time, cannot be maintained. By a fair construction of the lease the lien reserved was for the full amount of the rents, which by its provisions would accrue within the term for which the house was let. It was not to secure the first installment of rent which the lessees might fail to meet, only, as counsel contend, but each installment, and it created a lien as well for the last as for any preceding installment. The Court of Appeals, in its opinion in the case, fully and satisfactorily disposed of that question, and therefore it is only necessary to state our conclusion on the subject. All concurring, the judgment is affirmed.

NEW YORK COURT OF APPEALS ABSTRACT.

ESTOPPEL—CERTIFICATE OF NO DEFENSE, ACCOMPANYING MORTGAGE, PRECLUDES DEFENSE OF USURY AGAINST INNOCENT HOLDER FOR VALUE.—B. executed a bond and mortgage to F., conditioned to secure \$4,000. At the same time he made a certificate in writing, bearing even date with the mortgage, which he signed and verified as true of his own knowledge, whereby he declared "that the said mortgage is a valid lien upon the premises therein described to the full amount of \$4,000 of principal;" that it is justly owing and unpaid thereon, and that said mortgage will be a good and valid lien upon the premises therein described, in the hands of an assignee thereof, to the full amount of said principal and interest; that he had no defense to the mortgage or bond either in law or equity, or any part thereof. The certificate also stated, "and I do further certify that I have received notice of the intended assignment of said bond and mortgage by said F. to S. and G., and that such assignment will be taken on the faith and credit that all the

matters herein stated are true." The bond and mortgage were, a few days after their execution, assigned by F. to S. and G., and by S. and G., about a year thereafter, assigned to plaintiff, who relying upon the representations contained in the certificate, purchased and paid for said bond and mortgage \$4,000. *Held*, in an action to foreclose the mortgage, that B. was estopped by the certificate from setting up the defense of usury in the inception of the mortgage against plaintiff. It is well settled that where an assignee takes a chose in action by assignment, with the debtor's assent, although he merely stands by in silence, the debtor is estopped to impeach it. *Wilson's Executor v. McLaren*, 19 Wend. 562. Much more should he be estopped as against the assignee for value, by the explicit written declaration that he has no defense or set-off to the debt assigned, and the principle on which the doctrine stands extends even to the defense of usury. *Smyth v. Munroe*, *post*; *Payne v. Burnham*, 62 N. Y. 69. The person by whom the doctrine is invoked must not, however, be a stranger to the transaction. In this case the certificate is to be taken as if directed to whom it might concern, and plaintiff is entitled to the benefit of it. There is authority for this result. See *Howe v. Cole*, 51 N. H. 287; *Holbrook v. N. J. Zinc Co.*, 57 N. Y. 616; *Ashton's Appeal*, 73 Penn. St. 153; 2 White & Tud. Lead. Cas. Eq. 1673. The certificate is not by its terms limited to S. and G., but is addressed to any person who thereafter occupies to the mortgage the relation of assignee. Even though the certificate would not avail S. and G. by reason of their knowledge of its falsity, plaintiff may avail himself of it. He is protected by the same principle which a *bona fide* purchaser for value and without notice necessarily invokes, although the title comes to him from a person in whose hands it is affected with notice (*Story's Eq. Jur.*, §§ 409, 410) and through which one who buys a negotiable chose in action is protected against the claim of the true owner, when the latter has, by his affirmative act, conferred apparent title upon another. *Moore v. Metropolitan Nat. Bk.*, 55 N. Y. 41; *McNeil v. Tenth Nat. Bk.*, 46 id. 325. The certificate, though bearing the same date, has a greater effect than if the same language was embraced in the mortgage, no fraud being practiced in obtaining it. If the statement was in the mortgage it would fall with the contract, because of the statute which would annul the instrument. Otherwise where it is separate. See *Clark v. Sisson*, 22 N. Y. 312; *Mechanics' Bank v. Townsend*, 29 Barb. 569. In *Wilcox v. Howell*, 44 N. Y. 398, the defense was not usury but fraud, and both mortgage and certificate were obtained by it. Judgment reversed. *Weyh v. Boylan*. Opinion by Danforth, J. [Decided May 31, 1881.]

— CERTIFICATE OF NO DEFENSE, ACCOMPANYING MORTGAGE ASSIGNED TO SUPERINTENDENT OF INSURANCE DEPARTMENT — USURY — MARRIED WOMAN. — In this case M. and his wife executed a bond and mortgage, and concurrent therewith, an instrument consenting to the assignment of the same to the superintendent of the insurance department of this State. They also executed a certificate to the effect that to the bond and mortgage there was no legal or equitable defense. This bond and mortgage was assigned and received in the ordinary routine of business of the insurance department, and it was the practice then to require a certificate of the same tenor and effect in all transactions of the same character. This bond and mortgage were taken by the department for the protection of the policy-holders of an insurance company, under the provisions of the statute. *Held*, that the superintendent of the insurance department was entitled to avail himself of the benefit of the certificate to estop M. and his wife from setting up the defense of

usury, upon a foreclosure of the mortgage. See *L'Amoureux v. Vischer*, 2 N. Y. 278; *Mason v. Anthony*, 3 Keyes, 609; *Payne v. Burnham*, 62 N. Y. 69. See, also, *Malloney v. Horan*, 49 id. 111; *Wilcox v. Howell*, 44 id. 399. The wife of M. could not set up that she had no knowledge of the purpose of the certificate. It would not be safe or in accordance with any sound principle to hold that a married woman is exonerated from the statements she has made, by reason of her ignorance. The superintendent, as trustee for the benefit of the policy-holders in the insurance company, may avail himself of the estoppel. It is his duty to convert the securities into money and distribute them to the *cestui que trust*. *Ruggles v. Chapman*, 59 N. Y. 163; *S. C.*, 64 id. 557; *In re Att'y-Gen. v. M. L. Ins. Co.*, 13 Hun, 115; *S. C.*, 74 N. Y. 617. Judgment affirmed. *Smyth v. Munroe*. Opinion by Miller, J. [Decided March 1, 1881.]

EVIDENCE — IMPEACHING WITNESS — INQUIRY AS TO REPUTATION FOR TRUTH NOT CONFINED TO TIME AT WHICH WITNESS GIVES TESTIMONY. — A witness called to impeach E., a witness for the opposing side, whose testimony had been taken upon a commission, testified that he had known E. intimately fifteen or eighteen years, and was then asked what his reputation was for truth and veracity. This question was objected to on the ground that it was directed to the reputation of E. at the time of the trial, and not to his reputation at the time the commission was executed, about eighteen months before. *Held*, that the objection was not tenable, general reputation is not usually the growth of a day or month but results in most cases from a course of conduct for a period of time. Proof that the reputation of a witness is now bad might justify the jury, in the absence of contradicting evidence, in inferring, within reasonable limits as to time, that it was bad before the day of the trial. The trial judge may control the range of inquiry, and it is for the jury to determine the weight of the evidence. Judgment affirmed. *Dolner v. Ward*. Opinion by Andrews, J. [Decided March 22, 1881.]

PRACTICE — WHAT AFFIDAVIT TO PROCURE ORDER OF PUBLICATION MUST SHOW — OLD CODE, § 135. — An affidavit upon which an order of publication under section 135 of the Code of Procedure was granted, stated that "the defendant has not resided within the State of New York since March, 1877, and deponent is informed and believes that defendant is now a resident of San Francisco, California." There was no other allegation to show that defendant could not be found in the State. *Held*, that the affidavit was insufficient in not showing that the defendant could not, after due diligence, be found within the State. If evidence upon which, in such a case, an order of publication is granted, has a legal tendency to show that diligence has been employed and that defendant could not be found, the jurisdiction will be sustained, though such evidence is slight. *Staples v. Fairchild*, 3 N. Y. 46. But an affidavit merely showing non-residence, without proof as to where defendant actually was at the time, is not enough. In *Belmont v. Cornen*, 82 N. Y. 256, the affidavit contained allegations tending to show that an effort had been made to find defendant in the State, and that he was not there, hence it confers jurisdiction to pass upon the proof. In *Howe Machine Co. v. Pettibone*, a certificate of the sheriff set forth that he had used due diligence to find defendant, but from the best information he could obtain he learned that he had left the State. The precise point considered has never been presented to this court, and the authorities on this subject in the Supreme Court, which are numerous, are quite conflicting. Order reversed. *Carleton v. Carleton*. Opinion by Miller, J. [Decided May 13, 1881.]

STATUTE OF LIMITATION — IN ACTION FOR FALSE IMPRISONMENT — IMPRISONMENT UNDER WARRANT SET ASIDE — ORDER SETTING ASIDE REVERSED — NEW WARRANT ORDERED BUT NOT ACTED ON. — In an action for false imprisonment it appeared that plaintiff D. was arrested under the Stillwell act, in proceedings instituted by defendant, by a warrant from the Superior Court of New York, on the 15th of November, 1876, and detained subject thereto until Feb. 3, 1877, when the Superior Court dismissed and vacated the warrant, exonerated D.'s bail, and discharged from custody and set him at liberty. Thereafter defendant, by *certiorari* removed the proceedings into the Supreme Court, and at a General Term on October 15, 1877, the determination of the Superior Court was reversed and an order entered to that effect. This order was, Jan. 7, 1878, made the order of the Superior Court, which court directed that D. be "required to appear under the original warrant and proceedings," and that his bail produce him Jan. 15, for further proceedings according to law. At that date defendant appeared voluntarily in the Superior Court. That court made an order directing "that a commitment be issued to the sheriff directing that he rearrest D.," etc. D. was not rearrested. The order of the court was affirmed at its General Term, and upon appeal by D. to the Court of Appeals reversed. *Held*, that the right of action for false imprisonment accrued Feb. 3, 1877, and the statute began to run at that time. The continuance of the proceedings did not continue the arrest, and the order of the Superior Court directing a rearrest not acted upon did not operate to revive the former warrant, as the order was contrary to law and invalid. The bonds did not remain for they had been discharged and were void. Authorities cited: *Caldwell v. Colgate*, 7 Barb. 253; *Homan v. Brinkerhoff*, 1 Den. 184; *Coleman v. Bean*, 3 Keyes, 97; *Dusenbury v. Kelley*, 57 How. 274; *Wood v. Dwight*, 7 Johns. Ch. 295; *People v. Bowe*, 81 N. Y. 45; *Wamo v. Constant*, 4 Johns. 32; *Doyle v. Russell*, 30 Barb. 305. Judgment affirmed. *Dusenbury v. Kelley*. Opinion by Finch, J. [Decided May 31, 1881.]

UNITED STATES SUPREME COURT ABSTRACT.

CONFLICT OF LAW — GRANT BY CONGRESS OF LAND TO STATE IN TRUST — LIMIT OF POWER OF STATE LEGISLATURE. — In 1864 the United States granted to the State of California the Yosemite Valley and the Mariposa Big Tree Grove, "with the stipulation, nevertheless, that the State shall accept this grant upon the express condition that the premises shall be held for public use, resort, and recreation, and shall be inalienable for all time; the premises to be managed by the governor of the State and eight other commissioners, to be appointed by the executive of California, who shall receive no compensation for their services." 13 Stat. 325, chap. 184. In 1866 the State of California, by an act of the Legislature, accepted this grant "upon the conditions, reservations and stipulations contained in the act of Congress." *Held*, that while the State of California could not commit the management of the property granted to any other board than the one provided in the act of Congress, or control the executive in the exercise of his authority, a State statute providing that the term of office of a commissioner should be four years would be valid. So would one providing a corporate name in which the commissioners might sue and be sued; that they might make rules not inconsistent with the Constitution of the United States or of California, or of the act making the grant, or any law of Congress or the Legislature; that they should hold their first meeting at such time and place as should be designated by the governor; that a majority should

constitute a quorum for the transaction of business; that they should appoint a president and secretary as well as a guardian of the property, and that they should report through the governor to the Legislature at every regular session. Judgment of California Supreme Court affirmed. *Ashburner v. People of California*. Opinion by Waite, C. J. [Decided March 7, 1881.]

EQUITABLE ACTION — TO CHARGE CORPORATION WITH LIEN FOR PROPERTY OF INFANTS INVESTED THEREIN BY GUARDIAN — WHEN SUCH LIEN NOT ALLOWABLE — PARTNERSHIP — INFANT'S ESTATE IN FIRM — CONSTITUTIONAL LAW — VALIDITY OF SPECIAL ACT BY STATE LEGISLATURE AFFECTING NON-RESIDENT INFANT'S ESTATE — INFANTS — ACT OF GUARDIAN — RATIFICATION. — Previous to 1843 A. and B., brothers, carried on, under the firm name of A. & B., manufacturing business in Rhode Island. That year A. died, leaving a widow, C. and D., his two sons, and two daughters. The partnership property was then estimated worth \$100,000. B. continued to carry on the business in the same name for the benefit of himself and his brother's estate, the widow, who had taken letters of administration on that estate, allowing the estate to remain in the firm. About 1856 B. took into partnership with him his son E. and his nephews C. and D., and during that year died, leaving a widow, his son and four grandchildren, F., G., and two others, all infants under fourteen years of age, children of a deceased daughter, who lived in New York with their father. At the death of B. the business of the firm was largely extended, and its property was estimated worth \$3,000,000. C. D. & E. continued to carry on the business under the old firm name, the estate of B. remaining in the business. To this the father of the infants who carried on business in New York in connection with that of the firm, consented, as did also their property guardian in Rhode Island, the widow of B. and the administratrix of his estate. At that time the business was highly prosperous. No change in the business took place until 1865, except that E. sold his interest to C. & D. In 1865 it was proposed to transfer the business to a corporation organized under a charter previously granted by the Legislature of Rhode Island, and upon the joint petition of the father of the infants and their property guardian the Legislature passed a resolution authorizing the guardian to convey the minors' interest in the business to the corporation and receive in return stock in the corporation of a value equal to such interest, which was done. From the appraisement made of the property of the business at that time it appeared to have been largely increased in value since 1856. After this transfer the guardian presented her accounts to the probate court as administratrix and guardian, and the account was passed and she discharged and a new guardian appointed for the infants. The infant F., a daughter, became of age in 1866, and G. in 1868. F. married in 1869. G. acquiesced in the conduct of the business, drew money from the profits, asked for information as to his rights, which was furnished him up to 1873, when the corporation became insolvent and made an assignment for creditors. Annual accounts were rendered to F. until 1873. At the time of the transfer to the corporation the business was profitable, and continued for some years to be so. In 1875 F. and G. brought action to establish a lien on the property of the corporation assigned for creditors to the extent of their original interest in the firm. The bill charged fraud and concealment on the part of those managing plaintiffs' interests in the transformations through which they went. This was denied, and the laches and acquiescence of plaintiffs set up. There was no evidence to sustain the charge of fraud. *Held*, that the action could not be maintained. (1) The parties beneficially

interested in this case were formerly the personal representatives of A. and B., namely, the two widows of said A. and B., the administratrixes respectively of their estates. The ultimate beneficiaries could only reach the property through them. If they abused their trust they would be liable to their respective *cestui que trusts*. They had the power, if they saw fit, unless restrained by their beneficiaries, to allow the estates of their deceased intestates to be continued in the business of the partnership; and if it was continued by their allowance and consent, the property became liable to the partnership debts subsequently incurred as well as to prior debts; but with this qualification, that the property which remained unchanged was still subject to the partnership lien in preference to after-incurred debts; whilst new property which, in the course of business, took the place of the old, was not subject to said lien in preference to such debts. This seems to be the result of the cases, though they are apparently somewhat in conflict. A cursory reading of the opinion in *Skipp v. Harwood* (1747), 2 Swanst. 537, and Lord Hardwicke's opinion in the same case on appeal; *West v. Skipp*, 1 Ves., Sr., 239, and the opinions in *Stocken v. Dawson*, 9 Beavan, 239, and same case on appeal, 17 L. J. (Ch.) 282, would lead to the conclusion that the executor's lien in such cases attaches to the whole property, as well that newly acquired as that which remains of what was in existence at the testator's or intestate's decease. But this is inconsistent with the decisions in *Nerot v. Burnand*, 4 Russ. 247, and *Payne v. Hornby*, 25 Beavan, 280; S. C., 4 Jur. (N. S.) 446, which hold that where the business is carried on with the consent of the out-going partner or the representative of the deceased partner, debts incurred during that period have a preference over the partnership lien upon all newly-acquired property. A comparison of the cases will show that the rule laid down by Lords Hardwicke and Cottenham in *West v. Skipp* and *Stocken v. Dawson*, was applied by them to cases in which the property of the retiring or deceased partner was used in the business against the will, or without the consent of the persons entitled thereto. The law is laid down with much accuracy in the last edition of Lindley on Partnership, 700-702, where it is said: "Whilst the partnership lasts, the lien attaches to everything that can be considered partnership property, and is not therefore lost by the substitution of new stock for old. Further, on the death or bankruptcy of a partner, his lien continues in favor of his representatives or assignees, and does not terminate until his share has been ascertained and provided for by the other partners. But after the partnership is dissolved, the lien is confined to what was partnership property at the time of the dissolution, and does not extend to what may have been subsequently acquired by the persons who continue to carry on the business." Sir John Romilly, in giving judgment in *Payne v. Hornby*, cited above, after admitting that by a mortgage of his stock in trade a man might bind after-acquired property (as to which see *Holroyd v. Marshall*, 10 H. L. Cas. 191), said: "But on the death of a partner the case is altogether different. There is, as Lord Eldon very accurately expresses it, 'a quasi lien'; there is, in point of fact, only a right to the specific property. The executors of the deceased partner are joint tenants with the surviving partners, and accordingly they are entitled to require the surviving partners to do one of two things—either to wind up the partnership business at once, or to fix the value of the testator's property and secure payment of the amount. * * * If the executors do not apply for a receiver, but simply file a bill for the winding up of the partnership, I apprehend that the new stock which has been acquired during the time that the business has been carried on by the surviving partner belongs, in the first place, to the creditors who have been created by such subse-

quent dealings, and not to the creditors of the old partnership; and that it is the duty of the executors, if they wish to prevent any dealings with the stock, to come at once to this court for the appointment of a receiver; otherwise they in fact sanction the commission of a fraud, by leading the subsequent creditors to believe that they are dealing with a person who is liable out of his stock in trade to discharge their debts." 4 Jurist (N. S.), 446. These remarks of the Master of the Rolls have respect to the rights of creditors. As between the surviving partners themselves and the representatives of the deceased partner, the lien of the latter will extend to after-acquired property resulting from the employment of the partnership stock, so as to entitle them, at their option, either to demand a share of the profits, or interest on the value of the decedent's share at the time of his death; unless the transactions between them have been such as to indicate a sale of the deceased partner's share to the survivors. A sale, however, can hardly be inferred where no steps have been taken to ascertain the value of the share. (2) The authority given by the Legislature to the guardian of the infants to transfer their property to the corporation was a complete justification of her acts on that behalf. With regard to the general legislative power of a State to act upon persons and property within the limits of its own territory there can be no doubt. Mr. Justice Story lays down three fundamental rules on the subject of private international law; the first of which is, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." And he adds, "The direct consequence of this rule is, that the laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural-born subjects or aliens, and also all contracts made and acts done within it." The second rule declares that no State or nation can, by its laws, directly affect or bind property out of its own territory, or persons not resident therein. The third is, that whatever force and obligation the laws of one country have in another depend solely upon the laws of the latter, that is, upon the comity exercised by it. Story's Conf. L., §§ 18-23. One of the ordinary rules of comity exercised by some European States is, to acknowledge the authority and power of foreign guardians, that is, guardians of minors and others appointed under the laws of their domicile in other States. But this rule of comity does not prevail to the same extent in England and the United States. In regard to real estate it is entirely disallowed; and is rarely admitted in regard to personal property. Justice Story, speaking of a decision which favored the ex-territorial power of a guardian in reference to personal property, says: "It has certainly not received any sanction in America in the States acting under the jurisprudence of the common law. The rights and powers of guardians are considered as strictly local; and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators." Story's Conf. L., §§ 499, 504, 504 a.; and see Whart. Conf. L., §§ 259-268, 2d ed.; 3 Burge's Colon. and For. L., 1,011. And some of those foreign jurists who contend most strongly for the general application of the ward's *lex domicilii*, admit that when it comes to the alienation of foreign assets, an exception is to be made in favor of the jurisdiction within which the property is situate, for the reason that this concerns the ward's property, and not his person. Whart., § 267, 268. But whilst the English and American law require a guardianship where the property is situated, it is conceded that in the due exercise of comity preference would ordinarily be given to the

person already clothed with the authority of guardian in the minor's own country. Phillimore, vol. IV, 381; Whart., § 268. In this case it does not appear that the minors had any other guardian in New York than their natural guardian, who applied for the appointment of the widow of B. as guardian of their estate in Rhode Island. As the question is one of power and not of comity, there can be no doubt that the Legislature of Rhode Island, where the property was situate, had power, first, to pass laws for the appointment of guardians of the property of non-resident infants situate in that State; and secondly, it had power to prescribe the manner in which such guardians shall perform their duties as regards the care, management, investment and disposal of such property; and that this power is as full and complete as where the minors are domiciled in the State. The question of the power of a Legislature, when not restrained by a specific constitutional provision, to pass special laws, has been much mooted in the courts of this country. Laws of this character, for the purpose of healing defects, giving relief, aid, and authority in cases beyond the force of existing law, have been frequently passed in almost every State in the Union, and have received the sanction not only of this court but of other courts of high authority. The exercise of this power has been most conspicuous in that class of cases in which the Legislature has been called upon to act as *parens patriæ* on behalf of lunatics, minors, and other incapacitated persons. Laws authorizing the sale of the estates of such persons have frequently been passed, and have been upheld as fairly within the legislative power. The passage of such laws is not the exercise of judicial power, although by general laws the discretion to pass upon such cases might be confided to the courts. But when it is not confided to the courts, the power exercised is of a legislative character, the Legislature making a law for the particular case. In some modern Constitutions the exercise of this power has been prohibited to the legislative department. But where not so prohibited, and where it has never been authoritatively condemned in the jurisprudence of the State, the right to exercise it in those cases in which it has been accustomed to be exercised cannot be denied to the Legislature, amongst which the present case may be fairly reckoned. Such laws are not judgments upon any person's rights, but they confer powers upon the exercise of which judgment may afterward be given. The only cases in Rhode Island decided since the adoption of the Constitution of 1843, which have been cited as having a bearing on the subject are *Taylor v. Place*, 4 R. I. 324, and *Thurston v. Thurston*, 6 id. 296. The general conclusion to be derived from these cases is favorable to the view taken. In the first of these cases, the Legislature having passed a vote for opening a judgment, allowing new affidavits to be filed on the ground of accident and mistake, setting aside a verdict and granting a new trial, the court very properly held this to be an exercise of judicial power, and declared the vote to be void. But they distinguished the case from those laws passed to confer special powers upon executors, etc.; as in *Watkins v. Holman*, 16 Pet. 60, where an act authorizing an administratrix residing in another State to sell land in Alabama for the purpose of paying debts was held by this court to be within the legislative power and valid. In the other case cited (*Thurston v. Thurston*), the court held that it was beyond the power of the Court of Chancery in that particular case to decree a sale of infants' lands; that the power, if possessed by any court, was vested by statute in the probate court; but added: "If such a case should arise within the spirit, though not within the letter of such or a similar statute, a special authority to a trustee to convert the real estate of his infant, lunatic, or otherwise incapable *cestui*, would seem to partake, as intimated by this court in *Taylor*

v. Place, more of a legislative than of a judicial character, and would be, having been long exercised and not prohibited by the Constitution, within the constitutional competence of the general assembly." *Watkins v. Holman*, 16 Pet. 25; *Davis v. Johannot*, 7 Metc. 388; *Snowhill v. Snowhill*, 2 Green's Ch. 20; *Norris v. Clymer*, 2 Barr, 277; *Spotswood v. Pendleton*, 4 Call, 514; *Dorly v. Gilbert*, 11 Gill & Johns. 87." This is certainly a very clear intimation of the constitutionality of the class of laws to which that now under consideration belongs. (3) The acquiescence of plaintiffs after they become of age precludes them from obtaining relief. Decree of U. S. Circ. Ct., Rhode Island, affirmed. *Hoyt v. Sprague*. Opinion by Bradley, J. [Decided May 9, 1881.]

UNITED STATES CIRCUIT DISTRICT COURT ABSTRACT.*

EQUITABLE ACTION—CONFLICT OF LAW—RIGHTS OF RECEIVER UNDER STATE COURT AS AGAINST FEDERAL COURT.—In suit by the first mortgage bondholders of the Vermont Central Railroad against the mortgage trustees, for holding said trustees accountable for moneys alleged to have been taken by them from the trust funds in their hands in violation of their trust, the defendants pleaded that during the period of the accounting called for they had been in possession of the railroad as receivers or officers of the Court of Chancery of Franklin county, Vermont, and as such receivers, had already rendered an account to said Court of Chancery for the sums claimed in this suit, and so they could not be held chargeable therefor in any proceeding for that purpose in this court; or that if they were otherwise so chargeable, yet as the same subject-matter was previously before the State Court for adjudication, this court should dismiss the plaintiffs' bill, out of comity toward the State court. The defendants also contended that if they had ceased to be receivers of the State court prior to the origin of the demand in suit, yet no order for discharging them as receivers had ever been entered in the State court, and that this court should still regard them as official receivers of the State court. *Held*, that the receivership formerly existing in the State court had practically ceased prior to the period covered by the accounting claimed in this case, and that the State court had so determined, and that as the parties themselves had brought the receivership to a close by their own acts, no formal entry in court of such discharge was necessary, and that as the parties to the proceeding in the State court were not the same as the parties in this case, the pendency of such proceedings would be no bar to this suit. Also, *held*, that the rule of comity toward the State court could not operate to deprive this court of its own rightful jurisdiction. Cases referred to: *Stanton v. Embrey*, 93 U. S. 548; *Cook v. Burnley*, 11 Wall. 608; *Slocum v. Mayberry*, 2 Wheat. 1; *Harris v. Denuie*, 3 Pet. 292; *Hagan v. Lucas*, 9 id. 400; *Wiswall v. Sampson*, 14 How. 52; *Buck v. Colbath*, 3 Wall. 334; *Anonymous*, 6 Ves. 287; *Angi v. Smith*, 9 id. 335; *Booth v. Clark*, 17 How. 322; *Park v. Jenness*, 7 id. 612; *Vermont & Can. R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500; *Mallett v. Dexter*, 1 Curt. 178; *Erwin v. Lowery*, 7 How. 172; *Suydam v. Broadnax*, 14 Pet. 67; *Union Bank v. Jolly*, 18 How. 503; *Shelby v. Bacon*, 10 id. 56; *Green v. Creighton*, 3 id. 90; *Davis v. Duke of Marlborough*, 2 Swanst. 12; *Railroad Co. v. Soutter*, 2 Wall. 510; *Windsor v. McVeigh*, 93 U. S. 274; *Payne v. Hook*, 7 Wall. 425; U. S. Circ. Ct. Vermont, Feb. 22, 1881. *Andrews v. Smith*. Opinion by Wheeler, D. J.

NEGLIGENCE—UNDER COMMON LAW OR CIVIL LAW—NO LIABILITY FOR NEGLECT DEATH—BUT UNDER

*Appearing in 5 Federal Reporter.

ADMIRALTY LAW THERE IS.—(1) Although by the common law (*Baker v. Bolton*, 1 Camp. 493; *Insurance Co. v. Brame*, 36 U. S. 754), and apparently also by the civil law (though the Code Napoleon allows it, *Hugh v. New Orleans*, etc., R. Co., 6 La. Ann. 496; *Herman v. Carrolton*, R. Co., 11 id. 5), it seems that in admiralty a libel by a father, to recover for the loss of the services of his minor son, killed in a collision, will be sustained. *Plummer v. Webb*, 1 Hare, 75; *Cutting v. Seabury*, 1 Sprague, 522; *The Sea Gull*, Chiss. Dic. 143; *The Highland Light*, id. 150; *Holmes v. Oregon & Col. R. Co.*, 6 Fed. Rep. 75. (2) Where a statute confers upon an administrator the right to recover for a loss of life occasioned by the wrongful act, neglect or default of another, if such loss of life is occasioned by a collision upon navigable waters, the administrator may proceed by a libel *in rem* against the offending vessel. Cases referred to, *Steamboat Co. v. Chase*, 16 Wall. 532; *Ex parte McNiel*, 13 id. 236; *The Guildfall L. R.*, 2 Adm. 825; *The Explorer*, L. R., 3 id. 359; *The Beta L. R.*, 2 P. C. 447; *The Franconia*, 3 Asp. Marit. Cases, 415; *Smith v. Brown*, L. R., 6 Q. B. 730; U. S. Dist. Ct. E. D. Michigan, Feb. 21, 1881. *The Garland*. Opinion by Brown, D. J.

OFFICER—DE FACTO, ACTS OF, ARE BINDING—OFFICER APPOINTED UNDER UNCONSTITUTIONAL STATUTE.—A person in office by color of right is an officer *de facto*, and his acts as such are valid and binding as to third persons; and an unconstitutional act is sufficient to give such color to an appointment to office thereunder. The constitution of Oregon authorizes the Legislature, when the population of the State equals 200,000, to provide by election for separate judges of the Supreme and Circuit Courts. On October 17, 1880, the Legislature passed an act providing for the election of such judges at the general election in June, 1880, and also that the governor should appoint such judges in the meantime, which was done. *Held*, that admitting such act was unconstitutional, because the population of the State was less than 200,000, and that the appointments by the governor were therefore invalid, and also because the Constitution only authorized the selection of such judges by election, still the persons so appointed under the act, and performing the duties of the judges of said courts, were judges *de facto*, and a person imprisoned under a judgment given in one of them, convicting him of a crime, is not thereby deprived of his liberty without due process of law, contrary to the fourteenth amendment. Authorities referred to, 1 Kent's Com. 612; *Kenard v. Louisiana*, 92 U. S. 481; *Pennoy v. Neff*, 95 id. 723; *People v. Kelsey*, 34 Cal. 475; *People v. Albertson*, 8 How. Pr. 363; *Brown v. Blake*, 49 Barb. 9; *King v. Corporation of Bedford*, 6 East, 356; *Wilcox v. Smith*, 5 Wend. 232; *People v. White*, 24 id. 539; *People v. Collins*, 7 Johns. 549; *Molnary v. Tanner*, 9 id. 135; *Mallitt v. Uncle Lane*, 1 Nev. 188; *Fowler v. Bebee*, 9 Mass. 231; *Commonwealth v. Fowler*, 10 id. 200; *Brown v. O'Connell*, 86 Conn. 451; *Brown v. Lunt*, 37 Me. 428; *Ex parte Strang*, 21 Ohio St. 610; *Taylor v. Skrine*, 3 Brevard, 516; *State v. Messmore*, 14 Wis. 164; *State v. Bloom*, 17 id. 521; *Stark v. Starr*, 1 Sawy. 20; U. S. Dist. Ct. Oregon, April 19, 1881. *In re AA Lee*. Opinion by Deady, D. J.

PROCESS—LEVY UNDER ATTACHMENT OF PERSONAL PROPERTY—CONFLICT OF LAW—PROCESS FROM FEDERAL AND STATE COURTS.—(1) To constitute and preserve an attachment of personal property capable of manual delivery, the officer must take the property into custody and continue in the actual possession of it, by himself or by an agent appointed by him for that purpose. *Hollister v. Goodale*, 8 Conn. 332; *Chadburne v. Sumner*, 16 N. H. 129; *Mills v. Camp*, 14 Conn. 219; *Glover v. Stevens*, 19 Me. 92; *Lane v. Jackson*, 5 Mass. 257; *Gale v. Ward*, 14 id. 366; *Odlorne v. Colley*, 2 N.

H. 66; *Huntington v. Blaisdell*, id. 817; *Butterfield v. Clemence*, 10 Cush. 209; *Crawford v. Newell*, 23 Iowa, 453. (2) Where writs of attachment issue from a Federal and State court against the same defendant, the one under which the property is first actually taken into custody has priority, without regard to the date of the respective writs, and a United States marshal and sheriff cannot make a joint or partnership levy, nor can one of these officers make a levy subject to the prior levy of the other. *Hagan v. Lucas*, 10 Pet. 400; *Brown v. Clarke*, 4 How. 4; *Pulliam v. Osborne*, 17 How. 471; *Taylor v. Caryl*, 20 id. 583; *Fox v. Hempfield R. Co.*, 2 Abb. (U. S.) 151; *Johnson v. Bishop*, 1 Woolw. 224; U. S. Cir. Ct. E. D. Arkansas, Jan., 1881. *Adler v. Roth*. Opinion by Caldwell, D. J.

MARYLAND COURT OF APPEALS ABSTRACT.*

MALICIOUS PROSECUTION—WHAT NECESSARY TO SUSTAIN ACTION—PROBABLE CAUSE.—In order to maintain the action for malicious prosecution, it is incumbent on the plaintiff to show that he had been prosecuted by or at the instigation of the defendant, and that such prosecution was instituted maliciously and without probable cause. These ingredients are essential to the right of action, and if they are not found to co-exist, the action is not maintainable. While the malice necessary to the right of recovery may not be deduced as a necessary legal conclusion from a mere act, irrespective of the motive with which the act was done, yet any motive other than that of instituting the prosecution for the purpose of bringing the party to justice is a malicious motive on the part of the person who acts under the influence of it. *Mitchell v. Jenkins*, 5 B. & Ad. 594; *Add. on Torts*, 594, 613; 2 Greenl. on Ev., § 453; *Boyd v. Cross*, 35 Md. 194; *Cooper v. Utterbach*, 37 id. 283; *Stansbury v. Fogle*, id. 386; 1 Tayl. on Ev. 40. Probable cause is made to depend upon knowledge of facts and circumstances which were sufficient to induce the defendant or any reasonable person to believe the truth of the accusation made against the plaintiff, and that such knowledge and belief existed in the mind of the defendant at the time the charge was made or being prosecuted, and were in good faith the reason and inducement for his putting the law in motion. Mere belief that cause existed, however sincere that belief may have been, is not sufficient. *Delegat v. Highley*, 3 Bing. N. C. 950; *McWilliams v. Hoban*, 42 Md. 57; 2 Greenl. on Ev., § 455; *Perryman v. Lister*, L. R., 3 Exch. 197; 8 C. L. R., 4 H. L. 521; *Merriam v. Mitchell*, 13 Me. 439. *Johns v. Marsh*. Opinion by Alvey, J.

NEGLIGENCE—INJURY TO PERSON STOPPING UPON STREET FROM FALL OF DEFECTIVE WALL.—A person lawfully passing along a street, who stops on the door sill of a house fronting on the street, for the purpose of adjusting his shoe, and while thus occupied, his head being within the lines of the street, without any negligence on his part is injured by a brick falling on his head, in consequence of the dilapidated condition of the wall of the house, has a right of action against the owner of the house for the injury inflicted. *Deford v. State*, 30 Md. 205; *Irwin v. Sprigg*, 6 Gill, 200; *Copeland v. Hardengham*, 3 Campb. 848; *Mænner v. Carroll*, 46 Md. 212; *Butterfield v. Forrester*, 11 East, 60; *Bridge v. G. J. R. Co.*, 3 M. & W. 244; *Angell on Highw.* 347. Travellers on a street have not only the right to pass but to stop and rest on necessary and reasonable occasions, so that they do not obstruct the street, or doorways, or wantonly injure them. *Douglas*, 745; 3 Steph. N. P. 2768; 2 Bl. Com., note 26, by Christ.; *Adams v. Rivers*, 11 Barb. 390. A ruined or dilapi-

* Appearing in 56 Maryland Reports.

dated wall is as much a nuisance, if it imperils the safety of passengers or travellers on a public highway, as a ditch, or a pit-fall dug by its side. *Murray v. McShane*. Opinion by Bowie, J.

STATUTE OF LIMITATIONS — RESIDENCE IN STATE ON LANDS CEDED TO UNITED STATES NOT ABSENCE FROM STATE. — In an action of assumpsit in which the statute of limitations was pleaded, the plaintiff replied: That at the time of the cause of action aforesaid accruing to him against said defendant, the said defendant was absent out of the State, to wit: within the territory ceded to the United States by the State of Maryland, under the act of assembly of said State of 1847, chapter 158. *Held*, that the power reserved to the State by the act of 1847, chapter 158, to have its process served in the territory by that not ceded to the United States for the Naval Academy, is valid and operative. That as process from the Circuit Court for Anne Arundel county could reach the defendant while residing there, he could not *pro tanto* be considered "out of the State" within the meaning of the act of limitations. 2 Greenl. on Ev., § 437; *Sleight v. Kane*, 1 Johns. Cas. 70; *Mitchell v. Tibbetts*, 17 Pick. 208; *Sluhs v. Reese*, 19 Ohio, 306. *Maurice v. Worden*. Opinion by Brent, J.

RHODE ISLAND SUPREME COURT ABSTRACT.*

CONFLICT OF LAW — PRIORITY BETWEEN CREDITORS OF DIFFERENT JURISDICTIONS — BANKRUPTCY ATTACHMENT — ASSIGNMENT FOR CREDITORS. — G., in Boston, dealing with J., in Naples, arranged to make payments as follows: G. procured two letters of credit on B. of London, one in favor of J. and the other in favor of himself, but assigned to J. J. was to send goods to G., was to draw on B. for payment, and with the drafts was to forward bills of lading drawn to B.'s order. B. was to accept the drafts and forward the bills of lading to L., his agent in Boston, who, on receiving from G. funds to meet the drafts and commissions, was to deliver the bills of lading to G., properly indorsed to him, G. agreeing, immediately on receipt of the goods, "to provide funds to meet the corresponding acceptances, commissions," etc. In the course of business, and pursuant to this arrangement between G., J. and B., J. had drawn on B., and B. had accepted drafts to the amount of £3,900, when B., June 15, 1875, became bankrupt. These drafts were then held by purchasers for value, and were taken up by J. B. was discharged in bankruptcy as of September 8, 1875. G. had paid to L. the sum of \$22,314 to meet B.'s acceptances, and this sum had been, by L. and B., mingled with their other moneys. G. paid the account of J. for goods purchased. L. had drawn on B. at times as B.'s agent and at times in his own name. L. became bankrupt in November, 1875, and his assignee was appointed in the district of Massachusetts under the United States bankrupt act. July 27, 1876, G. brought an action against B. to recover the amount paid to L., and attached certain moneys on deposit in Rhode Island. These moneys were collected on a judgment recovered July 8, 1876, in favor of a former agent of B. who had, in November, 1874, agreed in writing that the moneys belonged to B., and had given L. an irrevocable power of attorney to collect them. In equitable proceedings to determine the right to these moneys, which were claimed by the English assignee in bankruptcy of B., by the American assignee in bankruptcy of L., in virtue of an alleged equitable assignment of these moneys by B. to L., to cover L.'s liability for drafts drawn in his own name on B., and by G., in virtue of his attachment, *held*, that on the evidence adduced the moneys had not been equitably assigned

by B. to L. That the transactions between G., B. and J. were essentially a remittance by G. of funds to B., to be forwarded by him to J. *Held*, further, that the funds not having been so forwarded by B. to J., B. was liable to G. for them. That B.'s liability to G. was a debt payable in Boston. That this debt was not discharged by the bankruptcy proceedings in England. That the transfer of B.'s estate to his assignee in bankruptcy in England could not affect G.'s attachment in Rhode Island. That G. was entitled to recover his claim against B. out of the attached moneys, but that all dividends paid by B.'s estate, on J.'s drafts, should first be deducted from G.'s claim. Authorities cited, *Rodick v. Gandell*, 4 De G. M. & G. 763; *Casey v. Cavaroe*, 6 Otto, 467; *Carnegie v. Morrison*, 2 Mete. 381; *Russell v. Wiggin*, 2 Story, 213; *Vaughan v. Halliday*, L. R., 9 Ch. App. 461; *Re Gottenburg Co.*, 28 Week. Rep. 456; *Ex parte Gomez*, 23 id. 789; *Johnson v. Roberts*, 33 id. 703; *Re Hallett's Estate*, L. R. 13 Ch. Div. 300; *Guthrie's Savigny*, 163, 175; *Whart. Conflict L.*, § 359, 401 a., 101 u.; 4 *Phill. Ins. Law*, §§ 467, 474, 544, 566, 759; *Henry For. Law*, 11; *Odwin v. Forbes's Buck Bank's Cas.*, 57 Dwarries Stat. 650; *Story Confli. L.* §§ 261, 395, 399; *Story Bill Ex.*, § 158; *Atwood v. Protect. Ins. Co.*, 14 Conn. 556; *Clark v. Connecticut Pest Co.*, 35 Conn. 303; *Goodwin v. Holbrook*, 4 Wend. 37; *Braynard v. Marshall*, 8 Pick. 104; *Towne v. Smith*; 1 Woodb. & M. 115; *Poa Garn. of Lientard v. Duck*, 6 Md. 15; *Smith v. Smith*, 2 Johns. 235; 2 *Para. on Cont.*, 585, 587; *Blanchard v. Russell*, 13 Mass. 1; *Speed v. May*, 17 Penn. St. 91; *Kirtland v. Hotchkiss*, 10 Otto, 491; *Lewis v. Owen*, 4 B. & A. 634; *Ogden v. Saunders*, 12 Wheat. 213; *Betton v. Valentine*, 1 Curt. 168; *Upton v. Hubbard*, 28 Conn. 274; *Taylor v. Geary*, Kirby, 313; *Hoyt v. Thompson*, 5 N. Y. 320; *Abraham v. Plestoro*, 3 Wend. 538; *Estate of Merrick*, 2 Achm. 485; *Johnson v. Hunt*, 23 Wend. 87; *Mitchel v. Winslow*, 2 Story, 630; *Robinson v. Crowder*, 4 McCord. 519; *Holmes v. Remsen*, 20 Johns. 229; 2 *Kent Com.*, 497; *Moray v. De Rottenham*, 6 Johns. Ch. 52; *Harrison v. Sterry*, 5 Cranch, 289; *Blake v. Williams*, 6 Pick. 286; *Baldwin v. Hale*, 1 Wm. 223; *Banks v. Greenleaf*, 6 Cal. 271; *Saunders v. Williams*, 5 N. H. 213; *Royal Bank of Scotland v. Cuthbert*, 1 Ross, 462; *Milne v. Mouton*, 6 Barney, 353; *Ellis v. McFenny*, L. R., 6 C. P. 228; *Gill v. L. R.*, 2 P. C. 157; *Tappan v. Poor*, 15 Mass. 419; *Blanchard v. Russell*, 13 id. 1; *May v. Breed*, 7 Cusb. 15; *Oskey v. Bennett*, 11 How. 33; *Booth v. Clark*, 17 id. 322; *Topham's Assig. v. Chapman*, 1 Mills (S. C.), 283; *Armand v. Castrique*, 13 M. & W. 443; *Munroe v. Guilleaume*, 3 Keyes, 30; *Banks v. Tappan*, 99 Mass. 376; *Leighton v. Kelsey*, 57 Maine, 85; *Kittredge v. Emerson*, 15 N. H. 227; *Peck v. Jeune*, 7 How. (U. S.) 612, 623; *Davenport v. Tilton*, 19 Mete. 320; *Ives v. Sturgis*, 12 id. 463; *Lefeuve v. Sullivan*, 10 Moore P. C. 1. *Goodsell v. Benson*. Opinion by Potter, J.

[Decided Feb. 12, 1881.]

CORPORATION — ACTS ULTRA VIRES — RIGHTS OF STOCKHOLDERS. — The H. Railroad Co., a Rhode Island corporation, executed, in 1863, an agreement and lease to the B. Railroad Co., a Connecticut corporation, whereby all the property and business of the former was transferred, *in perpetuum*, to the latter, the stockholders of the former to be remunerated by receiving stock in the latter or by receiving a fixed price per share, in money. This transfer was ratified by the Legislature of Rhode Island in 1866. In 1866 the B. Co. mortgaged its road. It subsequently became bankrupt, and was dissolved by a decree in Connecticut in 1873. The mortgagees foreclosed by equity proceedings in Rhode Island in 1875, and formed the N. Railroad Co. into whose possession the road passed by deeds from the mortgage trustees and from the assignees of the B. Co. In December, 1875, certain stock-

*To appear in 18 Rhode Island Reports.

holders of the H. Co. filed in Rhode Island a bill in equity to set aside the agreement and lease to the B. Co., and to redeem the H. railroad from the mortgages executed by the B. Co., alleging that the agreement and lease were *ultra vires*, that they were obtained by fraud, and that they were subject to certain conditions precedent, which had not been fulfilled. *Held*, (1) that the agreement and lease were *ultra vires* and violated the rights of the dissenting minority of the stockholders of the H. Co. (2) That on the evidence produced, the fraudulent representations charged against the B. Co. in the matter of the agreement and lease were not satisfactorily proven. (3) That certain provisions in the agreement relative to the cost of purchasing and completing another road, to the stock subscriptions of the B. Co., and to the issue and transfer of stock to trustees, could not be considered conditions precedent to the transfer. (4) That the complainants, by their delay in beginning legal proceedings, and by allowing the intervention of other equities, were precluded from relief. (5) That the N. Co. derived its title from the mortgage, not from the deed given by the mortgage trustees, and was not affected by a clause in the decree of foreclosure reserving the "rights of any person or corporation claiming to hold stock, whether common or preferred, in the H. Co., or of any person or corporation not a party to this suit," and (6) That the bill must be dismissed. Authorities referred to, *Caldwell v. City of Alton*, 83 Ill. 416; *Thomas v. Railroad Co.*, 11 Otto, 71; *Keen v. Johnson*, 9 N. J. Eq. 413; *State v. Boston, C. & M. R. Co.*, 25 Vt. 433; *Matter of Townsend*, 39 N. Y. 171; *Stewart v. Lehigh Valley R. Co.*, 38 N. J. Law, 505; *Thompson v. Waters*, 25 Mich. 214; *Hall et al. v. Sullivan R. Co.*, 2 Redf. Am. R. Cas. 621; *Chicago & R. I. R. Co. v. Lake Shore & M. S. R. Co.*, 11 Reporter, 323; *Lauman v. Lebanon Val. R. Co.*, 80 Penn. St. 42; *Wilson v. Proprietors Cent. Bridge*, 9 R. I. 590; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Peabody v. Flint*, 6 Allen, 62; *Royal Bank v. Grand Junction R. Co.*, 125 Mass. 490; *In re Pinto Mining Co.*, L. R., 8 Ch. Div. 273. *Boston & Providence Railroad Co. v. New York & New England Railroad Co.* Opinion by Stinson, J. [Decided March 12, 1881.]

DEFINITIONS — BEER — LAGER BEER — CHILDREN. — There is no presumption that a liquor described simply as "beer" is a malt liquor. *State of Rhode Island v. Brewster*. Opinion by Durfee, C. J. [Decided Feb. 6, 1881.]

Lager beer being a malt liquor, is an intoxicating liquor, under a statute entitled "An act to regulate and restrain the sale of intoxicating liquors," which forbids the sale of "ale, wine, rum, or other strong or malt liquors." *State of Rhode Island v. Rush*. Opinion by Matteson, J. [Decided Jan. 31, 1881.]

The by-laws of a benevolent association provided that on the death of a member a sum of money should be paid "to the widow of such member if there be one; if he leaves no widow, then to the child or children or their lawful guardian for them, share and share alike. Should the deceased member leave no widow, child, or children the money shall be paid to such person as he may have designated in writing." *Held*, that the words "child or children" must be taken in their primary meaning, and could not be extended to include grand-children. *Winsor v. Odd Fellows Beneficial Association*. Opinion by Durfee, C. J. [Decided Dec. 31, 1881.]

MARRIED WOMEN — ESTOPPEL. It is only when the ground of the estoppel is a mere tort that the estoppel will avail against a married woman. No estoppel will avail against her to give effect to a contract or deed which she is incapable of making. *Bigelow on Estop.*

443-6; *Lowell v. Daniels*, 2 Gray, 161; *Liverpool Adelpi Loan Association v. Fairhurst*, 9 Exch. Rep. 422; *Cannam v. Farmer*, 8 Id. 608; *Keen v. Coleman*, 39 Penn. St. 239; *Keen v. Hartman*, 48 Id. 497. *Mason v. Jordan*. Opinion by Durfee, C. J. [Decided Jan. 29, 1881.]

NEW BOOKS AND NEW EDITIONS.

MOAK'S UNDERHILL ON TORTS.

Principles of the Law of Torts; or Wrongs Independent of Contract. First American, from the second English edition; by Arthur Underhill, M. A., of Lincoln's Inn, Barrister-at-Law; assisted by Claude C. M. Plumptre, of the Middle Temple, Barrister-at-Law. With American Cases, by Nathaniel C. Moak, Counsellor-at-Law, Albany, N. Y.: William Gould & Son, 1881. Pp. viii, 864.

THE original of this work was a duodecimo of 266 pages. It was written on the plan of Wigram on Wills, in our judgment the best planned law book ever written, and which was followed to some extent by Brice in his *Ultra Vires*. The original work has been expanded, as we see, by notes by Mr. Moak, who is one of the few American lawyers who has an equal rank as an advocate and as an editor and reporter. Mr. Moak says in his preface; "One class of lawyers insists, in an elementary work, upon brief, technical statements of the rules of law sustained by a few leading cases; another class, that every case cited should be so distinctively given that the reader may determine, from the work itself, just what *that* case decides." "This work is intended to occupy a position between the views of the two classes referred to, and to sufficiently give the law of each State to be of service in all, in cases falling under the propositions treated, where the practitioner has not time, in the bustle of practice and the courts, carefully to examine." This accurately describes the scope of the work. It therefore answers very much the same purpose in this field as Abbott's *Trial Evidence* in the matter of evidence. The practitioner may depend on Mr. Moak's well known and inexhaustible research and his unusual facilities, and implicitly believe that nothing has escaped him. Everything is arranged with rare discrimination. Everything is expressed with remarkable clearness and conciseness. Although the practitioner possesses Judge Cooley's unrivalled work on Torts, he still needs and must have this handy-book, which in its way is just as good and just as important. The book has an excellent index of over 100 pages, but it has no table of cases. It is elegantly printed.

STEWART'S NEW JERSEY EQUITY REPORTS.

The present volume of this most admirable series is as interesting as any of its predecessors. Particular attention is called to the following cases: *National Trust Co. v. Miller*, p. 156. — As a matter of courtesy this court will extend its aid to a foreign receiver in enabling him to recover property. *Delaware, etc., R. Co. v. Oxford Iron Co.*, p. 192. — Persons holding unpaid claims for labor against an insolvent corporation, but no longer in its employ, not entitled to preference under the statute giving preference to "laborers in the employ thereof;" with note by the reporter. *Ellison v. Lindsey*, p. 258. — A valuable note on service of notice by mail. *Citizens' Coach Co. v. Camden Horse R. Co.*, p. 206. — A decision of the Court of Errors and Appeals, affirming the chancellor's decision in 4 Stew. Eq. 525, that a horse railway company may restrain a coach company from the habitual use of its rails laid in a public street. *Pillsbury v. Kington*, p. 287. — An assignee for benefit of creditors may set aside a fraudulent conveyance by his assignor, overruling *Van Keuren v. McLaughlin*, 6 G. E. Green, 163; with note by the reporter. The volume contains many other valuable notes by the reporter.

NEW YORK COURT OF APPEALS DECISIONS.

THE following decisions were handed down, Tuesday, June 21, 1881:

Motion granted without costs—*Dodge v. Mann.*—Motion denied with \$10 costs—*The Susquehanna Valley Bank v. Loomis.*—Motion denied, if appellant, in twenty days from entry of order, in pursuance of section 1326 of Code, files and serves an undertaking and pays respondent ten dollars costs of motion; otherwise granted with costs—*The Architectural Iron Works v. The City of Brooklyn.*—Motion denied, without costs—*The Glens Falls Paper Co. v. White.*—Motion granted with costs—*The People ex rel. Coppers v. The Trustees of St. Patrick's Cathedral.*—Judgment reversed and new trial granted, costs to abide event—*Beach v. Coiles.*—Judgment affirmed with costs—*Timeyer v. Turnquist.*—Order affirmed with costs—*Fogelsonger v. Forson, Shaefer v. Soule; DeRitas v. DeHerques; The People ex rel. Vandervoort v. Grace, mayor, etc. (2 cases); In re Raymond; In re Newton, In re Loew; In re Wheeler; The Pacific Mail Steamship Co. v. Toel; Goddard v. Trenbath.*—Order modified; reversed so far as it allows costs to plaintiff, and affirmed so far as it denies costs to defendant; no costs in this court—*Baine v. The City of Rochester.*—Appeal dismissed with costs—*Brownell v. Ruckman; Johnson v. Cameron Coal Co., respondent, Elias appellant; Stilwell v. Prust.*—Order modified so as to reduce assessment in accordance with *In re Merriam*, and allowing interest from date of ascertainment of amount thereby, no costs in this court—*In re Pelton.*

CORRESPONDENCE.

A QUESTION OF ETHICS.

Editor of the Albany Law Journal:

Now that you are discussing the propriety of lawyers' taking cases on "spec," suppose you give us your ideas of the morality of this transaction: A firm of lawyers had been entrusted with a mortgage to foreclose. They wrote the mortgagor informing him of the fact, giving him the option of paying without suit. In a few days a member of another firm appears to them, conveys the idea that one of his clients desires to take an assignment of the mortgage as an investment, obtains an assignment to such person. Within a few days the firm which has obtained the assignment commences a foreclosure, and will thereby obtain a considerable bill of costs. This exact case has very recently occurred.

Yours,

LEX.

ETHICS OF PROFESSIONAL COMPENSATION.

Editor of the Albany Law Journal:

In your excellent article in the last number of the JOURNAL, you refer to the case of *Voorhees v. McCartney*, and quote from the opinion of the court sustaining your views of the morality of contracts by attorneys for contingent fees. If you desire to add to the opinions of eminent lawyers cited by you, you will find the opinion of the late John H. Reynolds in his points in the case above referred to. He was counsel for Dorr in that case, and sought to reverse the order compelling Dorr to pay McCartney's costs, solely on the ground that the contract to carry on the suit at his own expense, for half the recovery in addition to costs, was not illegal. After arguing this point with much ability, he could not refrain from expressing to the court his personal views of the practice you so earnestly deprecate, by characterizing it as "reprehensible, immoral, and disgusting, as well as debasing to the profession of the law," but added a quotation from Portia's judgment in the Merchant of Venice, apparently by way of apology for advocating an unrighteous cause: "The law allows it and the court

awards it." The opinion of so eminent and honorable a counsellor is certainly entitled to great weight in relation to the honor and morale of the profession.

June 19, 1881.

V.

REDFIELD'S SURROGATE LAW.

Editor of the Albany Law Journal:

Vol. 23, No. 24, A. L. J., p. 478, contains a notice of Redfield's L. & P. Surrogate's Courts, ed. 1881. Some years ago I purchased the first edition (1875). Shortly afterward I cited this work, p. 106, in Kings Co. Sur. Ct. "The party propounding the will has the affirmative, and the burden of proof rests upon him to show to the satisfaction of the court that the instrument was duly executed by a testator of sound mind and lawful age, etc. *Delafield v. Parish*, 25 N. Y. 2, 87, affg N. Y. Surr., 1 Redf. 130." The surrogate informed me that the decision in *Delafield v. Parish* was directly the contrary, and upon examination of the reported case I concluded that the surrogate was correct. Upon examination of the ed. of 1881 I find the text of the ed. of 1875 reiterated, as to the decision in *Delafield v. Parish*. If there are many errors in the work such as this, it seems to me it cannot be very valuable.

Yours, very truly,

D. B. THOMPSON.

BROOKLYN, June 14, 1881.

NOTES.

THE 6th volume of the *Federal Reporter* contains 1 decisions from March to May, 1881. We find it of great interest, and the series must be indispensable to practitioners in the Federal courts.—The New York Evening Post says the new statue in London, of Mr. Gladstone, represents the statesman "in the act of addressing a vast assemblage." We do not understand that the assemblage is represented, and are curious to know how the imagined size of the audience is denoted in the statue.

Were the verdict to stand which was given the other day at the Guildhall in the case of *Bartlett v. Eyre*, the legal obligations of the fashionable world of London would be very largely increased. A roll of carpet, such as is in universal use for such purposes, had been laid down from the door of the defendant's house to the door of his carriage. The plaintiff, in passing along the street, caught his foot in the carpet and fell, sustaining severe injuries. There was no suggestion, apparently, on the part of the plaintiff that there was any negligence on the part of the defendant or his servants in the way in which the carpet was laid down. The place where the accident occurred was lighted in the ordinary way, and the only complaint was that no one was stationed by the carpet to warn passers-by of its presence. We venture to think that the case was lost because no witnesses were called for the defense to prove that the carpet was laid in the ordinary way and without negligence.—*London Law Times*.

The heirs of the Anneke Jans-Webber estate in Holland held a meeting in Detroit, Mich., last week. There were about 100 persons present. A letter was read from the Hon. James G. Birney, United States minister at the Hague, in which he said that the whole litigation was a wild goose chase.—The members of the Dutchess county bar were astonished over the recent action of Judge Gilbert at Poughkeepsie. He arrived in court at 11 o'clock A. M., charged the grand jury, called the petit jury, and then promptly called the calendar. No cases being ready, he discharged the petit jury, adjourned the court, and left on the 1:35 o'clock P. M. train for New York. It is alleged that eleven cases were ready for Tuesday and Wednesday.

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